DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 08-1448	
Title:	Arnold Schwarzenegger, Governor of California, et al., Petitioners v. Entertainment Merchants Association, et al.
Docketed:	May 21, 2009
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(07-16620)
Decision Date:	February 20, 2009
Questions Presented	

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 19 2009	Petition for a writ of certiorari filed. (Response due June 22, 2009)
Jun 2 2009	Order extending time to file response to petition to and including July 22, 2009, for all respondents.
Jun 22 2009	Brief amicus curiae of Eagle Forum Education and Legal Defense filed.
Jul 22 2009	Brief of respondents Entertainment Merchants Association, et al. in opposition filed.
Jul 22 2009	Motion for leave to file amici brief by California State Senator Leland Y. Yee, et al. out of time filed.
Aug 5 2009	DISTRIBUTED for Conference of September 29, 2009.
Apr 20 2010	DISTRIBUTED for Conference of April 23, 2010.
Apr 26 2010	Motion for leave to file amici brief filed by California State Senator Leland Y. Yee, et al. out of time DENIED.
Apr 26 2010	Petition GRANTED.
May 10 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioners.
May 11 2010	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including July 12, 2010.
May 27 2010	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.
May 28 2010	The time within which to file respondents' brief on the merits is extended to and including September 10, 2010.
Jul 12 2010	Brief of petitioners Arnold Schwarzenegger, Governor of California, et al. filed.
Jul 12 2010	Joint appendix filed (4 volumes). (Statement of costs filed)
Jul 15 2010	Copies of trial exhibit "Video Game Violence Sampler" received from counsel for the petitioners.
Jul 19 2010	Brief amici curiae of Louisiana, et al. filed.
Jul 19 2010	Brief amicus curiae of Eagle Forum Education and Legal Defense filed.
Jul 19 2010	Brief amicus curiae of Common Sense Media filed.
Jul 19 2010	Brief amici curiae of California State Senator Leland Y. Yee, et al. filed.
Aug 24 2010	SET FOR ARGUMENT ON Tuesday, November 2, 2010.
Sep 2 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 10 2010	Brief of respondents Entertainment Merchants Association, et al. filed.

Sep 13 2010	Brief amici curiae of Marion B. Brechner First Amendment Project, et al. filed. (Distributed)
Sep 14 2010	CIRCULATED.
Sep 15 2010	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Sep 15 2010	Record for U.S.D.C. for Northern District of California is electronic.
Sep 16 2010	Brief amicus curiae of First Amendment Coalition filed. (Distributed)
Sep 16 2010	Brief amici curiae of American Booksellers Foundation for Free Expression, et al. filed. (Distributed)
Sep 17 2010	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed. (Distributed)
Sep 17 2010	Brief amici curiae of International Game Developers Association, et al. filed. (Distributed)
Sep 17 2010	Brief amici curiae of Computer & Communications Industry Association, et al. filed. (Distributed)
Sep 17 2010	Brief amicus curiae of National Association of Broadcasters filed. (Distributed)
Sep 17 2010	Brief amici curiae of First Amendment Scholars filed. (Distributed)
Sep 17 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Sep 17 2010	Brief amicus curiae of Microsoft Corporation filed. (Distributed)
Sep 17 2010	Brief amici curiae of Rhode Island, et al. filed. (Distributed)
Sep 17 2010	Brief amici curiae of Social Scientists, Medical Scientists, and Media Effects Scholars filed. (Distributed)
Sep 17 2010	Brief amicus curiae of Thomas Jefferson Center for Protection of Free Expression, et al. filed. (Distributed)
Sep 17 2010	Brief amici curiae of The Future of Music Coalition, et al. filed. (Distributed)
Sep 17 2010	Brief amicus curiae of Cato Institute filed. (Distributed)
Sep 17 2010	Brief amici curiae of Motion Picture Association of America, Inc., et al. filed. (Distributed)
Sep 17 2010	Brief amicus curiae of First Amendment Lawyers Association filed. (Distributed)
Sep 17 2010	Brief amici curiae of Consumer Electronic Retailers Coalition, et al. filed. (Distributed)
Sep 17 2010	Brief amici curiae of Progress and Freedoom Foundation, and the Electronic Frontier Foundation filed. (Distributed)
Sep 17 2010	Brief amicus curiae of Vindicia, Inc. filed. (Distributed)
Sep 17 2010	Brief amicus curiae of Activision Blizzard, Inc. filed. (Distributed)
Sep 17 2010	Brief amicus curiae of ID Software LLC filed. (Distributed)
Sep 17 2010	Brief amicus curiae of Comic Book Legal Defense Fund filed. (Distributed)
Sep 17 2010	Brief amicus curiae of National Cable & Telecommunications Association filed. (Distributed)
Sep 17 2010	Brief amici curiae of Entertainment Consumers Association, et al. filed. (Distributed)
Sep 17 2010	Brief amicus curiae of The Rutherford Institute filed. (Distributed)
Oct 8 2010	Reply of petitioners Arnold Schwarzenegger, Governor of California, et al. filed. (Distributed)
Nov 2 2010	Argued. For petitioners: Zackery P. Morazzini, Supervising Deputy Attorney General, Sacramento, Cal. For respondents: Paul M. Smith, Washington, D. C.

PETITION
FOR
WRIT OF
CERTIORARI

Supreme Court, U.S.
FILED

No. 08 1448 MAY 19 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In the Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN Jr., in his official capacity as Attorney General of the State of California, Petitioners

v.

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

LIST OF PARTIES

Petitioners are Arnold Schwarzenegger, in his official capacity as the Governor of the State of California, and Edmund G. Brown Jr., in his official capacity as the Attorney General of the State of California.

Respondents are the Video Software Dealers Association and the Entertainment Software Association.

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PETITION FOR A WRIT OF CERTIORARI

Arnold Schwarzenegger, in his official capacity as the Governor of the State of California, and Edmund G. Brown Jr., in his official capacity as the Attorney General of the State of California, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 556 F.3d 950 (9th Cir. 2009). The decision of the district court granting respondents' motion for summary judgment (App., *infra*, 40a-65a) is unreported. The decision of the district court granting respondents' motion for a preliminary injunction (App., *infra*, 66a-92a) is reported at 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." This provision applies to the states through the due process clause of the Fourteenth Amendment. *Gitlow v. People of the State of New York*, 268 U.S. 652, 666 (1925). California Civil Code sections 1746-

1746.5, prohibiting the sale of violent video games to minors, as defined, are reproduced in the Appendix to this petition. App., *infra*, 93a-100a.

STATEMENT

1. California Civil Code sections 1746-1746.5 (the Act) prohibit the sale or rental of "violent video games" to minors under 18. The Act defines a "violent video game" as one that depicts "killing, maiming, dismembering, or sexually assaulting an image of a human being" in a manner that meets all of the following descriptions: (1) A reasonable person, considering the game as a whole, would find that it appeals to a deviant or morbid interest of minors; (2) it is patently offensive to prevailing standards in the community as to what is suitable for minors, and; (3) it causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. The Act does not prohibit a minor's parent or guardian from purchasing or renting such games for the minor. App., *infra*, 96a.

In passing the Act, the California Legislature considered numerous studies, peer-reviewed articles, and reports from social scientists and medical associations that establish a correlation between violent video game play and increased automatic aggressiveness, aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in minors and adults. App., *infra*, 27a-31a. The Legislature also considered the Federal Trade Commission's report that the video game industry specifically marketed M-rated (Mature) video games to minors, that 69% of 13 to 16-year-old children were able to purchase M-rated games, and that only

24% of cashiers asked the minor's age. App., *infra,* 103a.

The record contains examples of the violent content of various video games that may be covered by the Act. For example, as the district court described one of the games depicted in the record:

> The game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. The player's character makes sardonic comments during all this; for example, urinating on someone elicits the comment "Now the flowers will grow."

App., *infra,* p. 78a (internal citation omitted).

2. Respondents, representing the video game and software industries, brought a facial challenge to the Act. On respondents' motion for a preliminary injunction and the parties' cross-motions for summary judgment, the United States District Court for the Northern District of California ruled that, absent sexual content, violence alone cannot be considered unprotected speech under the First Amendment. App., *infra,* 53a-58a, 86a-89a. Therefore, the district court held that, as a content-based regulation of protected speech, the Act was subject to review under strict scrutiny. Applying strict scrutiny, the district court held that, although protecting the physical and psychological well-being of minors is a compelling governmental interest, the State failed to demonstrate a sufficient causal

connection between minors playing the covered games and the harm sought to be avoided by the Act. App., *infra,* 58a-60a. The district court also held that the Act was not the least restrictive means of achieving the compelling interest in that the State did not demonstrate that parental controls available on some new versions of gaming consoles would be less effective. App., *infra,* 60a-62a. The district court therefore held that the Act was facially unconstitutional under the First Amendment and permanently enjoined its enforcement. App., *infra,* 39a.

3. The Court of Appeals for the Ninth Circuit affirmed. The court rejected the State's argument that the Act only covers speech that should not be entitled to First Amendment protection and should therefore be reviewed under the same flexible standard that is applied to restrictions on the sale of sexual material to minors under *Ginsberg v. State of New York*, 390 U.S. 629 (1968). App., *infra,* 15a-23a. Under *Ginsberg,* the Act would be upheld so long as it was not irrational for the Legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641. The court of appeals instead reviewed the Act under strict scrutiny and affirmed the district court's finding that the State's evidence failed to establish a sufficient direct causal connection between violent video game play and the physical and psychological harm to minors sought to be prevented. App., *infra,* 27a-32a. The court of appeals also affirmed the district court's finding that, even assuming a direct causal connection had been shown, the Act was not the least restrictive means of preventing the identified harm to minors. App., *infra,* 32a-34a.

REASONS FOR GRANTING THE PETITION

This Court should grant review for three reasons. First, the extremely violent video games that would fall within the State's statutes should be subject to *Ginsberg's* variable standard for the same reasons that this Court applied the standard to sexual materials sold to minors: provided it was rational for the State to conclude that the material is harmful to minors, the restriction is justified by the State's strong interest in assisting parents in protecting the well-being of children. Second, this is an important issue with national implications, particularly in light of the growing evidence that these games harm minors and that industry self-regulation through the existing rating system has proven ineffective. Third, even assuming that strict scrutiny applies, the Ninth Circuit's decision conflicts with and narrows this Court's decision in *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). When the government defends a regulation on speech as a means of preventing anticipated harms, *Turner* requires courts to uphold legislators' predictive judgments of harm when they have "drawn reasonable inferences based on substantial evidence." *Id.*, at 666. The court below required a far more stringent standard that will affect future cases on a broad variety of subjects.

Despite the lack of a split among the circuit courts,[1] this is an issue of national importance. To date, at least nine other states and local governments have enacted similar prohibitions.[2] Each has suffered the same fate, as no court has been willing to extend *Ginsberg*, notwithstanding the fact that violent video games can be just as harmful to minors as sexual material and should receive no greater protection under the First Amendment. After 40 years, this Court should consider extending *Ginsberg* to help states meet a new, modern threat to children.

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[1] *See Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (8th Cir., 2003); *Entertainment Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir., 2008); *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir., 2001).

I. THE *GINSBERG* STANDARD SHOULD APPLY TO EXTREMELY VIOLENT MATERIAL THAT IS SOLD TO MINORS, JUST AS IT DOES TO SEXUAL MATERIAL

In the limited context of distribution to minors, expressive material can be so excessively violent that, just like sexual material, it deserves no First Amendment protection. Accordingly, this Court should consider whether extremely violent material can be obscene as to minors even without a sexual element, and whether *Ginsberg* should thus be extended to apply to such material.

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[2] *See* note 3, *supra*; see also *Entertainment Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. 2007) (enjoining 21 Okla. Stat. §§ 1040.76-.77); *Entertainment Software Ass'n v. Granholm*, 426 F.Supp.2d 646 (E.D. Mich. 2006) (enjoining 2005 Mich. Public Act 108); *Entertainment Software Ass'n v. Foti*, 451 F.Supp.2d 823 (M.D. La. 2006) (enjoining La. R.S. 14:91.14); *Entertainment Software Ass'n v. Hatch*, 443 F.Supp.2d 1065, 1069 (D. Minn. 2006) (enjoining Minn. Stat. § 325I.06).; *Entertainment Software Association v. Blagojevich*, 404 F.Supp.2d 1051 (N.D. Ill. 2005) (enjoining Ill. Crim. Stats. 5/12A-5(a), 5/12A-10(e), 5/12B-15); *Video Software Dealers Association v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash. 2004) (enjoining Rev. Code Wash. 9.91.180).

A. Application of the *Ginsberg* Standard to Extremely Violent Material Would Carry On This Court's Longstanding Tradition of Upholding Special Protections For Children

Like other forms of unprotected speech recognized to date, the extremely violent video games at issue here serve "no essential part of any exposition of ideas, and are of such slight social value as a step to the truth" that the government must be allowed to regulate their dissemination to minors based upon content, without running afoul of the First Amendment. See *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-572 (1942). By definition, the Act covers only a well-defined, limited class of speech -- patently offensive violence that appeals to a deviant or morbid interest and has no socially redeeming value for minors. App., *infra,* 93a-94a. Such material is properly subject to review under the variable obscenity standard set forth in *Ginsberg v. State of New York,* 390 U.S. 629 (1968).

In *Ginsberg,* this Court held for the first time that material protected by the First Amendment (material that is not obscene) can lose its protected status when distributed to minors. *Id.,* at 639-646. At the outset, the Court accepted that the material at issue in *Ginsberg* -- "girlie" magazines -- was not obscene as to adults. *Id.,* at 634. But the Court recognized that a variable standard must be applied when states legislate to protect the well-being of their youth. *Id.,* at 638-639. The *Ginsberg* standard allows a state to define obscenity (material receiving no First Amendment protection) in a variable manner: using one definition applicable to adults and a broader definition applicable only to minors.

The Court set forth the standard of review as follows: "To sustain state power to exclude material defined as obscene by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S. at 641. In broad language, the Court explained that "material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined." *Id.*, at 363.

Minors, of course, enjoy the protection of the First Amendment. But as this Court has repeatedly recognized, the First Amendment rights of minors are not coextensive with those of adults. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, n. 11 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring). *Ginsberg*'s reasoning is grounded on this principle. Therefore, "[E]ven where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'" *Ginsberg, supra,* 390 U.S. at 638 (quoting *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 170 (1944)).

As Justice Frankfurter recognized over fifty-five years ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

"Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Belloti v. Baird*, 443 U.S. 622, 638-39 (1979).

More recently, in *Roper v. Simmons*, 543 U.S. 551 (2005), this Court recognized the constitutionally significant, fundamental differences between adults and minors – differences the State contends mandate that minors be subject to greater regulation to ensure parents are given every opportunity to involve themselves in decisions that are important to a minor's healthy development into an adult. In *Roper*, this Court found that there is a "lack of maturity and an underdeveloped sense of responsibility" in those under 18 which "often result in impetuous and ill-considered actions and decisions." *Id.*, at 569 (internal quotation omitted). According to this Court, those under 18 "are more vulnerable or susceptible to negative influences and outside pressures" and "have less control, or less experience with control, over their own environment." *Id.*

Therefore, in the limited context of selling violent video games to minors, this Court should consider extending *Ginsberg* to permit states to treat extremely violent material the same as sexually explicit material. Doing so would allow states like California to give parents, rather than store clerks and industry groups, control over the decision to allow children to purchase extremely violent video games. Reviewing the Act under the variable obscenity standard set forth by this Court in *Ginsberg v. State of New York, supra*, instead of strict scrutiny, will allow the State to fulfill its duty to assist parents in protecting the well-being of their children.

B. With Respect To Its Distribution To Minors, Excessively Violent Material Is No More Worthy Of First Amendment Protection Than Sexual Material

Violence already plays a major role in existing obscenity jurisprudence across the country in that sexually explicit material can qualify as obscenity based upon the violent nature of its depiction. Images of extreme sexual torture, for example, can be considered obscene by the prevailing standards of any given community. *See, e.g., State v. Reece*, 110 Wash.2d 766 (1988) (upholding store manager's conviction for selling obscene magazines, defined to include depictions of "violent or destructive sexual acts"). In many cases, but for the violent content, the sexual nature of the material would not be legally obscene. The presence of violence can be the determining factor in finding otherwise protected sexual material deviant, prurient, shameful, or morbid, and can cause protected material to become patently offensive when it otherwise would not be. Violence can remove all redeeming social value from otherwise protected material. *Id.*; *see also* La. Rev. Stats. § 14:106(a)(6) (defining obscenity in part as "sexually violent material" including "whippings, beatings, torture, and mutilation of the human body"); Ga. Code. Ann. § 16-12-80(b)(3)(E) (defining obscenity as "[s]exual acts of flagellation, torture, or other violence"); Oh. Rev. Code § 2907.01(F)(3) (defining "harmful to juveniles" as including depictions of "bizarre violence, cruelty, or brutality" that tends to arouse minors).

Admittedly, these existing obscenity laws link violence with sexual material. But the State's point is that, logically, if violence can cause otherwise protected material to lose its constitutional protection, then violent images alone can lose their protection, at least with respect to their sale to minors.

The Act reaches only expressive material that this Court should recognize lies outside the circle of constitutional protection. The only games covered by the Act are those with violent content that is patently offensive, appeals to a deviant or morbid interest, and taken as a whole, causes the game to lack any redeeming social value for minors. App., *infra*, 93a-94a. The State asks this Court to consider whether games meeting this definition are worthy of any First Amendment protection with regard to their distribution to minors.

II. STRICT SCRUTINY SHOULD NOT BE APPLIED IN A MANNER THAT REQUIRES THE STATE TO DEMONSTRATE DIRECT CAUSATION BETWEEN VIOLENT VIDEO GAME PLAY AND THE RESULTING HARM TO MINORS

Even assuming the variable obscenity standard does not apply to the Act, the Court should accept this case, at a minimum, to clarify the quantum of evidence necessary to support a state's restriction on violent material sold to minors when such restrictions are reviewed under strict scrutiny.

The State argues that strict scrutiny should not be applied to require empirical evidence of a direct causal link between violent video game play and the harm to minors sought to be avoided. In *Turner Broadcasting System, Inc.*, *supra*, 512 U.S. at 666, this Court upheld federal must-carry broadcast provisions requiring cable television systems to dedicate a portion of their channels to the transmission of local broadcast stations. In defending the regulation, the government relied upon Congress' legislative finding that, absent mandatory carriage rules, "the continued viability of local broadcast television would be 'seriously jeopardized.'" *Id.*, at 665. The Court accepted the government's justification for the regulation, recognizing that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Id.*

In reviewing government regulations on speech, a court "must accord substantial deference to the predictive judgments" of the legislative body. *Id.* A state's predictive judgments, therefore, must be upheld so long as the court finds that "in formulating its judgments, [the state] has drawn reasonable inferences based on substantial evidence." *Id.*

Although the court of appeals purported to apply the standard set forth in *Turner*, in reviewing the Act (App., *infra*, 25a-32a), it held that the State failed to prove the existence of a compelling governmental interest because "the evidence presented by the State does not support the Legislature's purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of causation. . . . None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm." App. *infra*, 31a-32a. The court of appeals found the State's evidence fatal to its case because only a correlation, not direct causation, was established. In the absence of direct causation, the court of appeals held that the State failed to demonstrate the existence of a compelling interest. App., *infra*, 31a.

By requiring proof of a direct causal link, the court of appeals effectively narrowed the *Turner* standard. Indeed, the deference that *Turner* gives to states, as modified by the decision below, may now be an insurmountable hurdle in cases such as this. Under existing, responsible social science, such empirical evidence may prove unobtainable. Of course, the evidence considered by the California Legislature did not contain studies wherein children were insulated from all other forms of violent media and exposed only to violent video games. But the Legislature did consider substantial evidence that tends to establish a correlation between playing violent video games and increased automatic aggressiveness, aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in minors and adults. App., *infra*, 27a-31a. Such evidence should be legally sufficient under *Turner Broadcasting System, Inc., supra,* when the State legislates to assist parents in protecting the well-being of their children.

Notably, this Court recently opined that the government cannot be expected to obtain the unobtainable when it acts to protect children from the harmful effects of indecent broadcast media. In *F.C.C. v. Fox Television Stations, Inc.*, __ U.S.__ [129

S.Ct. 1800] (2009), this Court held that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency." *Id.*, at *1813. Importantly, the Court noted that "[i]t is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable." *Id.* Therefore, this Court held that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity." *Id.*

Those same evidentiary concerns are equally relevant not only here, but in other contexts as well. The court of appeals' narrow application of *Turner* could arguably be applied to invalidate other legislatively imposed restrictions based upon the predictive judgments of legislative bodies. Restrictions on a minor's ability to legally marry could face an uphill battle under the court of appeals' narrow standard. It is unlikely that a state could produce empirical proof that minors under the age of 18 or 16 are harmed by marrying. But under the court of appeals modification of *Turner*, such proof would be required.

The court of appeals effectively narrowed the rule set forth in *Turner*, and this Court's review is needed to re-establish the proper evidentiary standard applicable when courts engage in their duty to review predictive judgments of legislative bodies.

CONCLUSION

For all of the forgoing reasons, the petition for a writ of certiorari should be granted.

Dated: May 18, 2009

Respectfully submitted

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556 F.3d 950 (2009)

United States Court of Appeals,
Ninth Circuit.

VIDEO SOFTWARE DEALERS ASSOCIATION;
Entertainment Software Association, Plaintiffs-
Appellees,
v.
Arnold SCHWARZENEGGER, in his official capacity
as Governor State of California; Edmund G. Brown,
Jr., in his official capacity as Attorney General, State
of California, Defendants-Appellants,
and
George Kennedy, in his official capacity as Santa
Clara County District Attorney; Richard Doyle, in his
official capacity as City Attorney for the City of San
Jose; Ann Miller Ravel, in her official capacity as
County Counsel for the County of Santa Clara,
Defendants.

No. 07-16620.

Argued and Submitted Oct. 29, 2008.
Filed Feb. 20, 2009.

Background: Associations of companies that create, publish, distribute, sell and/or rent video games brought declaratory judgment against state under the First and Fourteenth Amendments seeking to invalidate newly-enacted law imposing restrictions and labeling requirements on the sale or rental of "violent video games" to minors. The United States District Court for the Northern District of California, Ronald M. Whyte, J., 2007 WL 2261546, granted associations' motion for summary judgment, permanently enjoining enforcement of the law. State appealed.

Holdings: The Court of Appeals, Callahan, Circuit Judge, held that:
(1) state's concession that alternate definition of "violent video game" found in law imposing restrictions and labeling requirements on the sale or rental of "violent video games" to minors was unconstitutionally broad did not render the entire law wholly invalid;
(2) as a matter of first impression, violent video games did not fall within legal definition of "obscenity" under the First Amendment;
(3) state did not have a compelling interest in preventing psychological or neurological harm to minors allegedly caused by violent video games; and
(4) even if state had a compelling interest in preventing psychological or neurological harm allegedly caused to minors by violent video games, law was not narrowly tailored to further that interest.

Affirmed.

Zackery P. Morazzini, Deputy Attorney General for the State of California, on behalf of Defendants-Appellants Arnold Schwarzenegger, in his official capacity as Governor of the State of California, and Edmund G. Brown, in his official capacity as Attorney General of the State of California.

Paul M. Smith, Jenner & Block LLP, on behalf of Plaintiffs-Appellees Video Software Dealers Association and Entertainment Software Association.

Appeal from the United States District Court for the Northern District of California, Ronald M. Whyte, District Judge, Presiding. D.C. No. CV-05-04188-RMW.

Before: ALEX KOZINSKI, Chief Judge, SIDNEY R. THOMAS and CONSUELO M. CALLAHAN, Circuit Judges.

CALLAHAN, Circuit Judge:

Defendants-Appellants California Governor Schwarzenegger and California Attorney General Brown (the "State") appeal the district court's grant of summary judgment in favor of Plaintiffs-Appellees Video Software Dealers Association and Entertainment Software Association ("Plaintiffs"), and the denial of the State's cross-motion for summary judgment.[FN1] Plaintiffs filed suit for declaratory relief seeking to *953 invalidate newly-enacted California Civil Code sections 1746-1746.5 (the "Act"), which impose restrictions and a labeling requirement on the sale or rental of "violent video games" to minors, on the grounds that the Act violates rights guaranteed by the First and Fourteenth Amendments.[FN2]

FN1. Plaintiffs are associations of companies that create, publish, distribute, sell and/or rent video games, including games that would be potentially regulated under the California statutory scheme at issue.

FN2. All references to "Civil Code" or "section 1746" refer to the California Civil Code unless otherwise indicated.

We hold that the Act, as a presumptively invalid content-based restriction on speech, is subject to strict scrutiny and not the "variable obscenity" standard from *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). Applying strict scrutiny, we hold that the Act violates rights protected by the First Amendment because the State has not demonstrated a compelling interest, has not tailored the restriction to its alleged compelling interest, and there exist less-restrictive means that would further the State's expressed interests. Additionally, we hold that the Act's labeling requirement is unconstitutionally compelled speech under the First Amendment because it does not require the disclosure of purely factual information; but compels the carrying of the State's controversial opinion. Accordingly, we affirm the district court's grant of summary judgment to Plaintiffs and its denial of the State's cross-motion. Because we affirm the district court on these grounds, we do not reach two of Plaintiffs' challenges to the Act: first, that the language of the Act is unconstitutionally vague, and, second, that the Act violates Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment.

I.

A.

On October 7, 2005, Governor Schwarzenegger signed into law Assembly Bill 1179 ("AB 1179"), codified at Civil Code §§ 1746-1746.5.[FN3] The Act states that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor." Cal. Civ. Code § 1746.1(a).[FN4] Violators are subject to a civil penalty of up to $1,000. *Id.* at § 1746.3.

> FN3. During the legislative session, A.B. 1179 had been "gutted" and amended; the language in Assembly Bill 450 ("A.B. 450") replaced the original language in A.B. 1179.

> FN4. The parties dispute whether the Act bans purchases or rentals by minors who are accompanied by their parents. The Act does not speak to whether there is an exception for sales to minors accompanied by a parent; it states only that it does not apply "if the violent video game is sold or rented to a minor by the minor's parent, grandparent, aunt, uncle, or legal guardian." Cal. Civ. Code § 1746.1(c).

Central to this appeal, the Act defines a "violent video game" as follows:

(d)(1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

*954 (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

Id. at § 1746(d)(1).[FN5] Borrowing language from federal death penalty jury instructions, the Act also defines the terms "cruel," "depraved," "heinous," and "serious physical abuse," [FN6] and states that "[p]ertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim." [FN7] *Id.* at § 1746(d)(2)-(3).

FN5. The State concedes on appeal, consistent with the district court's conclusion, that the alternate definition of "violent video game" in section 1746(d)(1)(B) is unconstitutional because it "does not provide an exception for material that might have some redeeming value to minors...." The State's contention that this section of the Act is severable based on the severability clause contained in California Civil Code § 1746.5 is subsequently addressed.

FN6. Section 1746(d)(2) includes the following definitions:

(A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by *torture or serious physical* abuse of the victim.

(C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

(E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually

> inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

> FN7. Legislative materials in the record indicate that the Legislature used these terms in the Act because they survived claims of unconstitutional vagueness in *United States v. Jones*, 132 F.3d 232 (5th Cir. 1998).

The Act also imposes a labeling requirement. It requires that each "violent video game" imported into or distributed in California must "be labeled with a solid white '18' outlined in black," which shall appear on the front face of the game's package and be "no less than 2 inches by 2 inches" in size. *Id.* at § 1746.2.

A.B. 1179 states that the State of California has two compelling interests that support the Act: (1) "preventing violent, aggressive, and antisocial behavior"; and (2) "preventing psychological or neurological harm to minors who play violent video games." A.B. 1179 also "finds and declares" that:

(a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.

(b) Even minors who do not commit acts of violence suffer psychological harm *955 from prolonged exposure to violent video games.

The State included in the excerpts of record several hundred pages of material on which the Legislature purportedly relied in passing the Act. While many of the materials are social science studies on the asserted impact of violent video games on children, other documents are varied and include legal analyses, general background papers, position papers, etc. Dr. Craig Anderson, whose work is central to the State's arguments in this case, is listed as an author of roughly half of the works included in the bibliography.

B.

The content of the video games potentially affected by the Act is diverse. Some of the games to which the Act might apply are unquestionably violent by everyday standards, digitally depicting what most people would agree amounts to murder, torture, or mutilation. For example, the State submitted a videotape that contains several vignettes from the games *Grand Theft Auto: Vice City, Postal 2,* and *Duke Nukem 3D,* which demonstrate the myriad ways in which characters can kill or injure victims or adversaries.[FN8] The record also contains descriptions of several games, some of which are based on popular novels or motion pictures, which are potentially covered by the Act. Many of these games have extensive plot lines that involve or parallel historical events, mirror common fictional plots, or place the player in a position to evaluate and make moral choices.

[FN8] We note that the State's videotape contains heavily edited selections of the violence that can be meted out, but does not

> include any context or possible storyline within which the violence occurs.

The video game industry has in place a voluntary rating system to provide consumers and retailers information about video game content. The Entertainment Software Rating Board ("ESRB"), an independent, self-regulated body established by the Entertainment Software Association, rates the content of video games that are voluntarily submitted. ESRB assigns each game one of six age-specific ratings, ranging from "Early Childhood" to "Adults Only." [FN9] It also assigns to each game one of roughly thirty content descriptors, which include "Animated Blood," "Blood and Gore," "Cartoon Violence," "Crude Humor," "Fantasy Violence," "Intense Violence," "Language," "Suggestive Themes," and "Sexual Violence."

> FN9. The age ratings include "EC" (Early Childhood), "E" (Everyone), "E10+" (Everyone Ten and Older), "T" (Teen [13+]), "M" (Mature [17+]), and "AO" (Adults Only [18+]).

C.

On October 17, 2005, before the Act took effect, Plaintiffs filed suit against the Governor, the Attorney General, and three city and county defendants, all in their official capacities, for declaratory relief against the Act on the grounds that it violated 42 U.S.C. § 1983 and the First and Fourteenth Amendments. Plaintiffs argued that the Act unconstitutionally restricted freedom of expression on its face based on content regulation and the labeling requirement, was unconstitutionally vague, and violated equal protection.

The district court granted Plaintiffs' motion for a preliminary injunction. *Video Software Dealers Ass'n v. Schwarzenegger,* 401 F.Supp.2d 1034 (N.D. Cal. 2005). Subsequently, the parties filed cross-motions for summary judgment. The district court granted Plaintiffs' motion and denied the State's cross-motion. *See Video Software Dealers Ass'n v. Schwarzenegger,* No. C-05-04188, 2007 WL 2261546 (N.D. Cal. Aug. 6, 2007). The district court's summary*956 judgment order invalidated the Act under strict scrutiny, and did not reach Plaintiffs' claims regarding vagueness, equal protection, or the Act's labeling requirement. The district court permanently enjoined enforcement of the Act. The State timely appealed.

II.

We review a grant of summary judgment de novo and must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied substantive law." *Ballen v. City of Redmond,* 466 F.3d 736, 741 (9th Cir. 2006) (citation and internal quotation marks omitted). We draw all reasonable inferences supported by the evidence in the nonmoving party's favor. *Id.* We "may affirm summary judgment on any ground supported by the record." *Doran v. 7-Eleven, Inc.,* 524 F.3d 1034, 1039 n. 3 (9th Cir. 2008).

III.

We first address Plaintiffs' argument that the entire Act should be invalidated based on the State's concession on appeal that the alternate definition of "violent video game" found in section 1746(d)(1)(B) is unconstitutionally broad. The State counters that the Act is saved by the severability clause in Civil Code § 1746.5, which states: "The provisions of this title are severable. If any provision of this title or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application." We hold that the Act is not wholly invalid as a result of the State's concession.

We look to state law to determine the effect of the severability clause. *Qwest Commc'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1259 (9th Cir. 2006), *overruled on other grounds*, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc). Under California law, there is a general presumption in favor a statute's constitutionality. *Ex parte Blaney*, 30 Cal.2d 643, 184 P.2d 892, 900 (Cal. 1947) ("[T]he general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of statute unconstitutional in part."). An invalid portion of a statute

> can be severed if, and only if, it is "grammatically, functionally and volitionally separable." It is "grammatically" separable if it is "distinct" and "separate" and, hence, "can be removed as a whole without affecting the wording of any" of the

measure's "other provisions." It is "functionally" separable if it is not necessary to the measure's operation and purpose. And it is "volitionally" separable if it was not of critical importance to the measure's enactment.

Hotel Employees & Rest. Employees Int'l Union v. Davis, 21 Cal.4th 585, 88 Cal.Rptr.2d 56, 981 P.2d 990, 1009 (1999) (citations omitted); *see also Jevne v. Superior Court*, 35 Cal.4th 935, 28 Cal.Rptr.3d 685, 111 P.3d 954, 971 (2005).

Section 1746(d)(1)(B) is grammatically and functionally separable because, as an alternate definition of "violent video game," it can be removed from the Act without affecting the wording or function of the Act's other provisions. Plaintiffs contend, however, that such a deletion does not account for the phrase "does either of the following" in section 1746(d)(1), which is the lead-in language to the alternate definitions of "violent video game," and that retaining this phrase results in a "conundrum and grammatical error." Plaintiffs' concerns are accounted for by the simultaneous deletion of the phrase *957 "does either of the following." Although some California cases speak in general terms of separability "as a whole," *see, e.g., Jevne*, 28 Cal.Rptr.3d 685, 111 P.3d at 972, the California Supreme Court has also evaluated grammatical and functional separability with respect to whether the valid and invalid portions of a statute or initiative can be "separated by paragraph, sentence, clause, phrase, or even single words." *Santa Barbara Sch. Dist. v. Superior Court of Santa Barbara County*, 13 Cal.3d 315, 118 Cal.Rptr. 637, 530 P.2d 605, 617 (1975); *see also Ex parte Blaney*, 184 P.2d at 900;

accord *Schweitzer v. Westminster Invs.*, 157 Cal.App.4th 1195, 69 Cal.Rptr.3d 472, 485 (2007). Here, the phrase "does either of the following" can be cleanly stricken without doing violence to the rest of the Act or impermissibly reading into the statute any exceptions or qualifications. *See* *Fort v. Civ. Serv. Comm'n of Alameda County*, 61 Cal.2d 331, 38 Cal.Rptr. 625, 392 P.2d 385, 390 (1964).[FN10]

> FN10. Although not argued by the parties, we note that deleting Civil Code § 1746(d)(1)(B) also appears to require the deletion of sections 1746(d)(2) and (d)(3)-which define when a violent act is "cruel," "depraved," or "heinous," or involves "serious physical abuse" or "torture"-because these sections only relate to or explain section 1746(d)(1)(B).

Sections 1746(d)(1)(B), (d)(2), and (d)(3) are also volitionally separable. We must ask whether the inclusion of these sections was of critical importance to passage of the Act and whether the Act "would have been adopted by the legislative body had [it] foreseen the partial invalidation of the statute." *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1, 14 (1979) (citation and internal quotation marks omitted). Evidence in the record indicates that the Legislature included sections 1746(d)(1)(B), (d)(2) and (d)(3) in the Act with the express goal of avoiding the constitutional pitfalls identified in *Video Software Dealers Association v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash. 2004). An Assembly Judiciary Committee Mandatory Information Worksheet to A.B. 450 and a Research Summary to A.B. 450 both indicate that these detailed definition sections were included in the Act for the purpose of avoiding the result in *Maleng*, where a Washington district court struck down a 2003 state statute, in part, because it was not narrowly tailored. Further, the Assembly Third Reading to A.B. 450 also discusses the tailoring issues in *Maleng*, and notes that the Act "regulates the sale of only those games that contain the most heinous, cruel or depraved acts of violence." Nonetheless, the record does not persuade us that sections 1746(d)(1)(B), (d)(2) and (d)(3) were "critical" to the passage of the Act. The fact that the Legislature included an alternate definition for "violent video game" designed to help the Act withstand a constitutional challenge does not necessarily indicate that it would not have passed the Act but for the inclusion of these sections. Accordingly, in light of California's presumption in favor of retaining constitutional parts of statutes, we conclude that the Act is not wholly invalid as a result of the State's concession.

IV.

Our next task is to determine what level of scrutiny to apply in reviewing the Act's prohibitions. Existing case law indicates that minors are entitled to a significant measure of First Amendment protections, that content-based regulations are presumptively invalid and subject to strict scrutiny, and that if less restrictive means for achieving a state's compelling interest are available, they must be used. The State's argument on appeal, that we should not apply strict scrutiny and instead *958 should apply a "variable obscenity" standard from *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), raises a question of first impression in this circuit.

The Supreme Court has stated that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212-13, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (citations omitted). The State does not contest that video games are a form of expression protected by the First Amendment.[FN11] *See Interactive Digital Software Ass'n v. St. Louis,* 329 F.3d 954, 956-58 (8th Cir. 2003) (holding that "violent" video games are a protected form of speech); *Maleng,* 325 F.Supp.2d at 1184-85 (same). It is also undisputed that the Act seeks to restrict expression in video games based on its content. *See Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep't,* 533 F.3d 780, 787 (9th Cir. 2008) ("[A] law is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face."(citation and internal quotation marks omitted)); *Interactive Digital Software Ass'n,* 329 F.3d at 958 (holding that an ordinance that applied to graphically violent video games was a content-based restriction).

FN11. The Supreme Court has not specifically commented on whether video games contain expressive content protected under the First Amendment; however, story-laden video games of the type potentially covered under the Act are similar to movies, which the Court has long held are protected expression notwithstanding their ability to entertain as

> well as inform. *See, e.g., Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-02, 72 S.Ct. 777, 96 L.Ed. 1098 (1952).

"Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). We ordinarily review content-based restrictions on protected expression under strict scrutiny, and thus, to survive, the Act "must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.; see also Sable Commc'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) ("The Government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."); *Reno v. ACLU,* 521 U.S. 844, 876-77, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (finding relevant the fact that a reasonably effective method by which parents could prevent children from accessing internet material which parents believed to be inappropriate "will soon be widely available").

The State, however, urges us to depart from this framework because the Act concerns minors. It argues that we should analyze the Act's restrictions under what has been called the "variable obscenity" or "obscenity as to minors" standard first mentioned in *Ginsberg,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195. In essence, the State argues that the Court's reasoning in *Ginsberg* that a state could prohibit the sale of sexually-explicit material to minors that it could not ban from distribution to adults should be extended to materials containing violence. This presents an invitation to re-consider the boundaries of the legal concept of "obscenity" under the First Amendment.

*959 In *Ginsberg*, the Court held that New York State could prohibit the sale of sexually-explicit material to minors that was defined by statute as obscene because of its appeal to minors. *Id.* at 643, 646, 88 S.Ct. 1274. Therefore, the state could prohibit the sale of "girlie magazines" to minors regardless of the fact that the material was not considered obscene for adults. *Id.* at 643, 88 S.Ct. 1274. The Court stated that "[t]o sustain the power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." FN12 *Id.* at 641, 88 S.Ct. 1274. The Court offered two justifications for applying this rational basis standard: (1) that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"; and (2) the state's "independent interest in the well-being of its youth." *Id.* at 639-40, 88 S.Ct. 1274.

FN12. The statute in *Ginsberg* used the defined term "harmful to minors," which prohibited access by minors when it: "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and [¶] (ii) is patently offensive to prevailing

> standards in the adult community as a whole with respect to what is suitable material for minors, and [¶] (iii) is utterly without redeeming social importance for minors." *Id.* at 646, 88 S.Ct. 1274.

The State suggests that the justifications underlying *Ginsberg* should apply to the regulation of violent content as well as sexually explicit material. The assertion, however, fails when we consider the category of material to which the *Ginsberg* decision applies and the First Amendment principles in which that decision was rooted.

Ginsberg is specifically rooted in the Court's First Amendment obscenity jurisprudence, which relates to non-protected sex-based expression-not violent content, which is presumably protected by the First Amendment. *See* 390 U.S. at 640, 88 S.Ct. 1274. *Ginsberg* explicitly states that the New York statute under review "simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests of such minors." *Id.* at 638, 88 S.Ct. 1274 (citation, internal quotation marks, and alterations omitted). The definition of obscenity that *Ginsberg* adjusted was the Court's obscenity test announced in *Roth v. United States*, which dealt with obscene materials defined with reference to sex. 354 U.S. 476, 485-87, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (discussing the nature of obscenity at length and stating, among other things, that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest."). The *Ginsberg* Court applied a rational basis test to the statute at issue because it placed the magazines at issue within a sub-category of obscenity-obscenity as to minors-that had been determined to be not protected by the First Amendment, and it did not create an entirely new category of expression excepted from First Amendment protection. The State, in essence, asks us to create a new category of non-protected material based on its depiction of violence.

The Supreme Court has carefully limited obscenity to sexual content. Although the Court has wrestled with the precise formulation of the legal test by which it classifies obscene material, it has consistently addressed obscenity with reference to sex-based material. Such was the case in *Roth* and *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), which modified *Roth.* And though it post-dates *Ginsberg,* the Court in *960 *Miller v. California* expressly cabined the First Amendment concept of obscenity in terms of sexual material. 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) ("[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct.")

Circuit courts have resisted attempts to broaden obscenity to cover violent material as well as sexually-explicit material. In *American Amusement Machine Association v. Kendrick,* which involved a video game restriction that mixed the regulation of sexual and violent material, the Seventh Circuit discussed why "[v]iolence and obscenity are distinct categories of objectionable depiction," explaining that obscenity is concerned with "offensiveness," whereas ordinances like the one at issue in *Kendrick* (and here) are concerned with conduct or harm. 244 F.3d

572, 574-75 (7th Cir.2001), *cert. denied,* 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001).[FN13] In *Video Software Dealers Association v. Webster*, the Eighth Circuit held that videos "that contain[ ] violence but not depictions or descriptions of sexual conduct cannot be obscene." 968 F.2d 684, 688 (8th Cir. 1992) ("Obscenity ... encompasses only expression that 'depict[s] or describe[s] sexual conduct.' " (citing *Miller*, 413 U.S. at 24, 93 S.Ct. 2607)). Likewise, in *Eclipse Enterprises, Inc. v. Gulotta*, the Second Circuit declined to place trading cards which depicted heinous crime that was allegedly harmful to minors in the category of unprotected obscenity. 134 F.3d 63, 66-68 (2d Cir. 1997). Further, in *James v. Meow Media, Inc.*, the Sixth Circuit, in discussing excessively violent movies and video game material, "decline[d] to extend [its] obscenity jurisprudence to violent, instead of sexually explicit, material." 300 F.3d 683, 698 (6th Cir. 2002).

FN13. Citing one law review article, the State also urges us to redefine the First Amendment meaning of "obscenity"-which involves material related to sex-by substituting an ordinary definition of obscenity based on its Latin root. In *Maleng*, Judge Lasnik rejected the same argument. 325 F.Supp.2d at 1185. He explained that the phrase "obscene material" was not inherently limited to sexually explicit material in the ordinary sense, and that the Latin root "obscaenus" literally means "filth." *Id.* Nonetheless, he held, relying on *Miller*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, that "when used in the context of the First Amendment, the word 'obscenity' means material that deals with

> sex." *Id.* This reasoning, dismissing the linguistic argument, applies equally to the State's argument here.

Finally, we note that the *Ginsberg* Court suggested its intent to place a substantive limit on its holding. It stated:

> We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York ... to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.

Ginsberg, 390 U.S. at 636-37, 88 S.Ct. 1274 (citation omitted). Though not the clearest of disclaimers, this language telegraphs that the Court's concern in *Ginsberg* was with the relationship between the state and minors with respect to a certain subject matter- "sex material" as it relates to the interests of minors.

In light of our reading of *Ginsberg* and the cases from our sister circuits, we decline the State's invitation to apply the *Ginsberg* rationale to materials depicting violence, and hold that strict scrutiny remains the applicable review standard.[FN14] *961 Our decision is consistent with the decisions of several other courts that have addressed and rejected the argument that the *Ginsberg* standard be extended from the field of sex-based content to violence in video games. *See Interactive Digital Software Ass'n*, 329 F.3d at 959; *Kendrick*, 244 F.3d at 576-78; *Entm't Software Ass'n*

v. *Granholm*, 426 F.Supp.2d 646, 652 (E.D. Mich. 2006); *Maleng*, 325 F.Supp.2d at 1185-86. At oral argument, the State confirmed that it is asking us to boldly go where no court has gone before. We decline the State's entreaty to extend the reach of *Ginsberg* and thereby redefine the concept of obscenity under the First Amendment.

> FN14. We also reject the State's more general request that we equate violent content with unprotected "obscenity." As the discussion above indicates, the Court's obscenity jurisprudence limits obscene materials to sex-based materials.

V.

Accordingly, we review the Act's content-based prohibitions under strict scrutiny. As noted above, "[c]ontent-based regulations are presumptively invalid," *R.A.V.*, 505 U.S. at 382, 112 S.Ct. 2538, and to survive the Act "must be narrowly tailored to promote a compelling Government interest." *Playboy Entm't Group, Inc.*, 529 U.S. at 813, 120 S.Ct. 1878. Further, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*

A.

The Legislature stated that it had two compelling interests in passing the Act: (1) "preventing violent, aggressive, and antisocial behavior"; and (2) "preventing psychological or neurological harm to minors who play violent video games." Although there was some early confusion over whether the

State was relying on both of these interests, the State subsequently clarified that "[t]he physical and psychological well-being of children is the concern of the Act," as distinguished from the interest of protecting third parties from violent behavior. The State's focus is on the actual harm to the brain of the child playing the video game. Therefore, we will not assess the Legislature's purported interest in the prevention of "violent, aggressive, and antisocial behavior." FN15

FN15. Throughout this litigation, the parties have disagreed as to what extent *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam), applies to this case. The dispute stems from the fact that one of the compelling interests advanced by the Legislature is the prevention of "violent, aggressive, and antisocial behavior." One of the Legislature's findings was that "[e]xposing minors to depictions of violence in video games ... makes those minors more likely ... to exhibit violent antisocial or aggressive behavior." However, "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.' " *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 253, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (citation omitted). It "may suppress speech for advocating the use of force or a violation of law only if 'such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " *Id.* (citing *Brandenburg,* 395 U.S. at 447, 89 S.Ct. 1827). District courts analyzing the violence

> prevention rationale have rejected it. *See Entertainment Software Association v. Blagojevich*, 404 F.Supp.2d 1051, 1073 (N.D. Ill. 2005); *Granholm*, 426 F.Supp.2d at 652; *Entm't Software Ass'n v. Foti*, 451 F.Supp.2d 823, 831 (M.D. La. 2006); *Maleng*, 325 F.Supp.2d at 1187 n. 3.

The Supreme Court has recognized that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Commc'ns of Cal., Inc.*, 492 U.S. at 126, 109 S.Ct. 2829; *see also Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 771 (8th Cir. 2008); *Interactive Digital Software Ass'n*, 329 F.3d at 958; *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997); *Maleng*, 325 F.Supp.2d at 1186-87. Notwithstanding*962 this abstract compelling interest, when the government seeks to restrict speech "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality op.); *Swanson*, 519 F.3d at 771; *Interactive Digital Software Ass'n*, 329 F.3d at 958-59. Although we must accord deference to the predictive judgments of the legislature, our "obligation is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (citations and quotation marks omitted); *see also Playboy Entm't Group, Inc.*, 529 U.S. at 822, 120 S.Ct. 1878 ("This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved....").

In evaluating the State's asserted interests, we must distinguish the State's interest in protecting minors from actual psychological or neurological harm from the State's interest in controlling minors' thoughts. The latter is not legitimate. The Supreme Court has warned that the

> government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

Ashcroft, 535 U.S. at 253, 122 S.Ct. 1389 (citation and internal quotation marks omitted.) In *Kendrick*, the Seventh Circuit commented on a psychological harm rationale in the violent video game context:

> Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would

> leave them unequipped to cope with the world as we know it.

244 F.3d at 579; *see also Interactive Digital Software Ass'n,* 329 F.3d at 960 ("Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.") (citation and quotation marks omitted). Because the government may not restrict speech in order to control a minor's thoughts, we focus on the State's psychological harm rationale in terms of some actual effect on minors' psychological health.

Whether the State's interest in preventing psychological or neurological harm to minors is legally compelling depends on the evidence the State proffers of the effect of video games on minors. Although the Legislature is entitled to some deference, the courts are required to review whether the Legislature has drawn reasonable inferences from the evidence presented. *See Turner Broad. Sys., Inc.,* 520 U.S. at 195, 117 S.Ct. 1174. Here, the State relies on a number of studies in support of its argument that there is substantial evidence of a causal effect between *963 minors playing violent video games and actual psychological harm.

The State relies heavily on the work of Dr. Craig Anderson, pointing to Dr. Anderson's 2004 updated meta-analysis called *An update on the effects of playing violent video games.*[FN16] Craig A. Anderson, *An update on the effects of playing violent video games,* 27 J. ADOLESCENCE 113 (2004). This article states that it "reveals that exposure to violent video games is significantly linked to increases in aggressive behaviour, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behaviour." Even upon lay review, however, the disclaimers in this article, alone, significantly undermine the inferences drawn by the State in support of its psychological harm rationale.[FN17] First, Dr. Anderson remarks on the relative paucity of the video game literature and concedes that the violent video game literature is not sufficiently large to conduct a detailed meta-analysis of the specific methodological features of other studies, many of which were themselves flawed. Second, he further states that "[t]here is not a large enough body of samples ... for truly sensitive tests of potential age difference in susceptibility to violent video game effects," and jettisons mid-article his exploration of the effect of age differences (i.e., over-eighteen versus under-eighteen). It appears that he abandoned the age aspect of the study, in part, because "there was a hint that the aggressive behaviour results might be slightly larger for the 18 and over group." He concludes the meta-analysis with the admission that there is a "glaring empirical gap" in video game violence research due to "the lack of longitudinal studies."

FN16. Meta-analysis is "a quantitative method for integrating existing studies" where "statistical procedures are used to assess the magnitude of a phenomenon across different studies, independent of the studies' sample sizes." David L. Faigman et al., 2 MOD. SCI. EVIDENCEE § 18:13 (2005-06 Ed.).

FN17. Dr. Anderson's hearing testimony in the

> *Blagojevich* case, which is in the record, contains his assent to the statements that there is probably an "infinite" number of stimuli that could cause aggression or aggressive thoughts in a person (e.g., a picture of a gun), and that his selection of violent video games was "largely a matter of [his] choice."

Thus, Dr. Anderson's research has readily admitted flaws that undermine its support of the State's interest in regulating video games sales and rentals to minors, perhaps most importantly its retreat from the study of the psychological effects of video games as related to the age of the person studied.[FN18] Although not dispositive of this case, we note that other courts have either rejected Dr. Anderson's research or found it insufficient to establish a causal link between violence in video games and psychological harm. *See Kendrick*, 244 F.3d at 578; *Granholm*, 426 F.Supp.2d at 653; *Entm't Software Ass'n v. Hatch*, 443 F.Supp.2d 1065, 1069 & n. 1 (D. Minn. 2006); *Blagojevich*, 404 F.Supp.2d at 1063.

> FN18. The State also relies on a 2003 study on general media violence by Dr. Anderson, which contains a three-page section on violent video games and reflects the conclusions and shortfalls of the 2004 meta-analysis. Craig A. Anderson et al., *The Influence of Media Violence on Youth*, 4 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 81, 90-93 (2003). For example, the study states that "[t]here are no published longitudinal surveys specifically focusing on effects of violent video games on aggression."

The State also relies on a study of the effects of video game violence on adolescents, conducted by Dr. Douglas Gentile, which studied eighth and ninth graders and concluded that "[a]dolescents who expose themselves to greater amounts of video game violence were more hostile" and *964 reported getting into more arguments and fights and performing poorly in school. Douglas A. Gentile et al., *The effects of violent video game habits on adolescent hostility, aggressive behaviors, and school performance*, 27 J. ADOLESCENCE 5 (2004). The extent to which this study supports the State's position is suspect for similar reasons as Dr. Anderson's work. First, this study states that due to its "correlational nature" it could not directly answer the following question: "Are young adolescents more hostile and aggressive because they expose themselves to media violence, or do previously hostile adolescents prefer violent media?" Second, this study largely relates to the player's violent or aggressive behavior toward others-which, as noted above, is not the interest relied on by the State here-rather than the psychological or neurological harm to the player. Moreover, the study glaringly states that "[i]t is important to note ... that this study is limited by its correlational nature. *Inferences about causal direction should be viewed with caution*" (emphasis added). Finally, Dr. Gentile's study suggests that "[a]dditional experimental and longitudinal research is needed."

Additionally, the State relies on a study by Dr. Jeanne Funk for the proposition that video games can lead to desensitization to violence in minors. Jeanne B. Funk et al., *Violence exposure in real-life, video games, television, movies, and the internet: is* *there desensitization?*, 27 J. ADOLESCENCE 23 (2004). Like the others, this study presents only an attenuated path between video game violence and desensitization. It specifically disclaims that it is based on correlation principles and that "causality was not studied."

Finally, the State relies on a two-page press release from Indiana University regarding the purported connection between violent video games and altered brain activity in the frontal lobe. Press Release, Indiana University School of Medicine, Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity (Dec. 2, 2002). The research described, conducted in part by Dr. Kronenberger, has been criticized by courts that have reviewed it in depth. *See Blagojevich*, 404 F.Supp.2d at 1063-65 ("Dr. Kronenberger conceded that his studies only demonstrate a correlative, not a causal, relationship between high media violence exposure and children who experience behavioral disorders [or] decreased brain activity...."); *Granholm*, 426 F.Supp.2d at 653 ("Dr. Kronenberger's research not only fails to provide concrete evidence that there is a connection between violent media and aggressive behavior, it also fails to distinguish between video games and other forms of media.").

In sum, the evidence presented by the State does not support the Legislature's purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution against inferring causation. Although we do not require the State to demonstrate a "scientific certainty," the State must come forward with more than it has. As a result, the State has not met its burden to demonstrate a compelling interest.

B.

Even if we assume that the State demonstrated a compelling interest in preventing psychological or neurological harm, the State still has the burden of *965 demonstrating that the Act is narrowly tailored to further that interest, and that there are no less restrictive alternatives that would further the Act. *Playboy Entm't Group, Inc.*, 529 U.S. at 813, 120 S.Ct. 1878. We hold that the State has not demonstrated that less restrictive alternative means are not available.

Instead of focusing its argument on the possibility of less restrictive means, the State obscures the analysis by focusing on the "most effective" means, which it asserts is the one thousand dollar penalty imposed for each violation. Specifically, the State argues that the ESRB rating system, a voluntary system without the force of law or civil penalty, is not a less-restrictive alternative means of furthering the Legislature's purported compelling interest. Acknowledging that the industry has implemented new enforcement mechanisms, the State nevertheless argues that the ESRB does not adequately prevent minors from purchasing M-rated games. The State also dismisses the notion that parental controls on modern gaming systems could serve the government's purposes, arguing that there is no evidence that this technology existed at the time the Act was passed. *But see* Foti, 451 F.Supp.2d at 833 (suggesting that such controls could be a less-restrictive measure); *cf.* *Reno,* 521 U.S. at 876-77, 117 S.Ct. 2329 (finding relevant the fact that a reasonably effective method by which parents could prevent children from accessing internet material which parents believed to be inappropriate "will soon be widely available").

Further, the State does not acknowledge the possibility that an enhanced education campaign about the ESRB rating system directed at retailers and parents would help achieve government interests. *See also* *Playboy,* 529 U.S. at 816, 120 S.Ct. 1878 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 507-08, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (plurality op.) (striking down ban on advertising alcohol prices because of less restrictive alternatives, such as an educational campaign or counter-speech). The State appears to be singularly focused on the "most effective" way to further its goal, instead of the "least restrictive means," and has not shown why the less-restrictive means would be ineffective.

Even assuming that the State's interests in enacting the Act are sufficient, the State has not demonstrated why less restrictive means would not forward its interests. The Act, therefore, is not narrowly tailored. Based on the foregoing, and in light of the presumptive invalidity of content-based restrictions, we conclude that the Act fails under strict scrutiny review.

VI.

Finally, we evaluate the constitutionality of the Act's labeling provision, which requires that the front side of the package of a "violent video game" be labeled with a four square-inch label that reads "18." Cal. Civ. Code § 1746.2. Plaintiffs argue that section 1746.2 unconstitutionally forces video game retailers to carry the State of California's subjective opinion, a message with which it disagrees. The State counters that the "labeling provision impacts the purely commercial aspect regarding retail sales of the covered video games" and, under the resulting rational basis analysis, the labeling requirement is rationally related to the State's "self-evident purpose of communicating to consumers and store clerks that the video game cannot be legally purchased by anyone under 18 years of age."

*966 Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). Commercial speech, however, is generally accorded less protection than other expression. *See United Foods, Inc.*, 533 U.S. at 409, 121 S.Ct. 2334.

The Court has upheld compelled commercial speech where the state required inclusion of "purely factual and uncontroversial information" in advertising. *See Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (upholding state's requirement that attorney include in his advertisements a disclosure that clients may be responsible for litigation costs); *see also United States v. Schiff,* 379 F.3d 621, 630-31 (9th Cir. 2004) (holding that the government could compel website operator to post factual information about potential criminal liability if patrons used website to evade taxes); *Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 113-15 (2d Cir. 2001) (upholding state labeling law that required manufacturers of mercury-containing products to disclose on packaging factual and uncontroversial information about the disposal of mercury-containing products). Compelled disclosures, justified by the need to "dissipate the possibility of consumer confusion or deception," are permissible if the "disclosure requirements are reasonably related to the State's interest in preventing deception of customers." *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265.[FN19]

> FN19. Heightened scrutiny may apply, however, if the commercial speech is "inextricably intertwined" with otherwise fully-protected speech, e.g., political speech, charitable solicitations. *Riley,* 487 U.S. at 796, 108 S.Ct. 2667; *Cal-Almond, Inc. v. U.S. Dep't of Agric.,* 14 F.3d 429, 436 (9th Cir. 1993).

Ordinarily, we would initially decide whether video game packaging constitutes separable commercial speech or commercial speech that is "inextricably intertwined" with otherwise fully-protected speech. *See Riley,* 487 U.S. at 795-96, 108 S.Ct. 2667 (stating that "[i]t is not clear that ... speech is necessarily commercial whenever it relates to [a] person's financial motivation for speaking"). That analysis would direct what level of scrutiny to apply to the labeling requirement. However, we need not decide that question because the labeling requirement fails even under the factual information and deception prevention standards set forth in *Zauderer.*[FN20] Our holding above, that the Act's sale and rental prohibition is unconstitutional, negates the State's argument that the labeling provision only requires that video game retailers carry "purely factual and uncontroversial information" in advertising. *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265. Unless the Act can clearly and legally characterize a video game as "violent" and not subject to First Amendment *967 protections, the "18" sticker does not convey factual information.

> FN20. We note that on similar facts, the Seventh Circuit, in *Entertainment Software Association v. Blagojevich,* struck down a statute's requirement that video game retailers affix a four square-inch sticker reading "18" on any video game the state defined as "sexually explicit." 469 F.3d 641, 651-52 (7th Cir. 2006). The court applied strict scrutiny because, in its view, the label did not concern the disclosure of "purely factual" information-the label reflected the state's opinion that the product contained material that the state deemed "sexually explicit" and communicated a "subjective and highly controversial message." *Id.* at 652. We do not

> adopt the *Blagojevich* court's approach here because it is not clear what authority supported its application of strict scrutiny, and we conclude that the labeling requirement here is invalid under a less-strict review standard.

Moreover, the labeling requirement fails *Zauderer's* rational relationship test, which asks if the "disclosure requirements are reasonably related to the State's interest in preventing deception of customers." *Id.* at 651, 105 S.Ct. 2265. Our determination that the Act is unconstitutional eliminates the alleged deception that the State's labeling requirement would purportedly prevent: the misleading of consumers and retailers by the ESRB age ratings that already appear on the video games' packaging. Since the Act is invalid and, as a result, there is no state-mandated age threshold for the purchase or rental of video games, there is no chance for deception based on the possibly conflicting ESRB rating labels. In fact, the State's mandated label would arguably now convey a false statement that certain conduct is illegal when it is not, and the State has no legitimate reason to force retailers to affix false information on their products. *See Hatch,* 443 F.Supp.2d at 1072, *aff'd on other grounds, Swanson,* 519 F.3d 768.

VII.

We decline the State's invitation to apply the variable obscenity standard from *Ginsberg* to the Act because we do not read *Ginsberg* as reaching beyond the context of restrictions on sexually-explicit materials or as creating an entirely new category of expression-speech as to minors-excepted from First Amendment protections. As the Act is a content based regulation, it is subject to strict scrutiny and is presumptively invalid. Under strict scrutiny, the State has not produced substantial evidence that supports the Legislature's conclusion that violent video games cause psychological or neurological harm to minors. Even if it did, the Act is not narrowly tailored to prevent that harm and there remain less-restrictive means of forwarding the State's purported interests, such as the improved ESRB rating system, enhanced educational campaigns, and parental controls. Finally, even if the Act's labeling requirement affects only commercial speech in the form of video game packaging, that provision constitutes impermissibly compelled speech because the compelled label would not convey purely factual information. Accordingly, the district court's grant of summary judgment to Plaintiffs and denial of the State's cross-motion for summary judgment is **AFFIRMED**.

E-FILED on: 8/14/07

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

VIDEO SOFTWARE DEALERS ASSOCIATION, and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs v. ARNOLD SCHWARZENEGGER; BILL LOCKYER; GEORGE KENNEDY; RICHARD DOYLE; and ANN MILLER RAVEL; Defendants	No. C-05-04188 RMW JUDGMENT

On August 6, 2007, the court issued its order granting summary judgment in favor of plaintiffs, permanently enjoining defendants from enforcing Cal. Civ. Code §§ 1746-1746.5.

IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs permanently enjoining defendants from enforcing Cal. Civ. Code §§ 1746-1746.5.

DATED: 8/14/07

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

Not Reported in F.Supp.2d, 2007 WL 2261546
(N.D.Cal.)

United States District Court, N.D. California,
San Jose Division.

VIDEO SOFTWARE DEALERS ASSOCIATION,
and Entertainment Software Association, Plaintiffs,
v.
Arnold SCHWARZENEGGER, in his official capacity
as Governor of the State of California; Bill Lockyer,
in his official capacity as Attorney General of the
State of California; George Kennedy, in his official
capacity as Santa Clara County District Attorney;
Richard Doyle, in his official capacity as City
Attorney for the City of San Jose; and Ann Miller
Ravel, in her official capacity as County Counsel for
the County of Santa Clara, Defendants.

No. C-05-04188 RMW.

Aug. 6, 2007.

Matthew Samuel Hellman, Theodore J. Bounteous, Jr., Amy L. Tenner, Ethan D. Dettmer, H. Mark Lyon, Jeffrey A Minnery, Katherine A. Fallow, Paul M. Smith, for Plaintiffs.

Zackery P. Morazzini, Robert R. Fabela, David Michael Rollo, Kathryn J. Zoglin, for Defendants.

Francine T. Radford, Keith E. Johnson, for Amicus Curiae.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

RONALD M. WHYTE, United States District Judge.

*1 Plaintiffs move for summary judgment declaring that California Civil Code §§ 1746-1746.5 ("the Act"), requiring that certain violent video games be labeled and prohibiting the rental or sale of those games to minors, is unconstitutional and that its enforcement be permanently enjoined. Defendants move for summary judgment declaring that the Act is constitutional. For the reasons given below, the court grants the plaintiffs' motion and permanently enjoins enforcement of the Act. Defendants' motion is denied.

I. BACKGROUND

The plaintiffs are the Video Software Dealers Association ("VSDA") and the Entertainment Software Association ("ESA"), two groups who describe themselves as associations of companies in the video game industry. The defendants are California Governor Arnold Schwarzenegger, California Attorney General Bill Lockyer, Santa Clara County District Attorney George Kennedy, Santa Clara County Counsel Ann Ravel, and San Jose City Attorney Richard Doyle. Governor Schwarzenegger and Attorney General Lockyer ("State defendants") are the only defendants to file opposition to plaintiffs' summary judgment motion. Therefore, the other defendants are apparently willing to accept and be bound by the outcome of the motions.

On October 7, 2005, Governor Schwarzenegger signed into law Assembly Bill 1179, which was to take effect on January 1, 2006, as new Cal. Civ. Code

§§ 1746-1746.5. The Act restricts the sale and rental of certain violent video games to minors. *Id.* § 1746.1(a). The Act contains a two-part definition of a "violent video game":

(d) (1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

(2) For purposes of this subdivision, the following definitions apply:

(A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

*2 (C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

(E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

(3) Pertinent factors in determining whether a killing

> depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

Id. § 1746(d).

The court preliminarily enjoined the defendants from enforcing the Act. *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F.Supp.2d 1034 (2005).

In their motion for summary judgment, the plaintiffs claim the Act is unconstitutional and specifically assert that: (1) video games are a form of expression protected by the First Amendment of the U.S. Constitution, even for minors, (2) the Act's definition of "violent video game" is unconstitutionally vague, and (3) the labeling provisions of the Act run afoul of the First Amendment. The defendants counter that the Act is narrowly tailored to further a compelling state interest and that it is neither impermissibly vague nor violative of the First Amendment.

California is not the first state to attempt to limit minors' access to violent video games. While the Ninth Circuit has yet to consider a state legislature's ability to implement such a regulation, the Seventh and Eighth Circuits have found that specific ordinances on the subject unconstitutional in violation of the First Amendment. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.2001); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003). Several district courts have also struck down or preliminarily enjoined enforcement of such ordinances. *See Entertainment Software Ass'n. v. Foti*, 451 F.Supp.2d 823 (M.D. La. 2006); *Entertainment Software Ass'n. v. Hatch*, 443 F.Supp.2d 1065 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F.Supp.2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F.Supp.2d 1051 (E.D. Ill. 2005)[FN1]; and *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash. 2004).

> FN1. The permanent injunction issued by the district court in *Blagojevich* enjoined enforcement of a law criminalizing the sale or rental of sexually explicit video games to minors as well as the enforcement of the statute criminalizing the sale or rental of violent video games to minors. The State only appealed the injunction with respect to the enforcement of the law on sexually explicit videos. The issuance of the injunction was affirmed. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006).

II. MOTION TO STRIKE FILINGS OF AMICUS CURIAE

*3 The court granted Common Sense Media leave to "file an amicus brief in connection with any motion for summary judgment by the plaintiffs." Docket no. 67. This is technically what Common Sense has done. *See* docket no. 78. However, Common Sense's brief is merely a summary of the declarations of six purported experts also submitted by Common Sense. Docket nos. 82-87. Common Sense also filed what it describes as "an updated 10-minute montage of representative scenes from several 'ultra violent' video games." Docket nos. 78 at 2; 79, Ex. A.

Plaintiffs move to strike the filings of Common Sense as improper under the terms on which this court granted Common Sense leave to participate. The parties reported that there were "no material factual disputes" and that "this case may properly be resolved on summary judgment," Joint Case Mgmt. Statement (docket no. 68) ¶ 2, and the action has been structured with this in mind. Common Sense is not a party to this action, and as such, generally lacks the rights of a party. *See MillerWohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As plaintiffs point out, were Common Sense a party, its proffered expert testimony would have been subject to standard discovery procedures, such as Fed. R. Civ. P. 26(a)(2). For these reasons, the court strikes the expert testimony proffered by Common Sense.

III. CONSTITUTIONALITY OF THE ACT

A. Protection of Speech-The First Amendment

Both sides move for summary judgment on the issue of whether the Act's restrictions on minors' access to violent video games covered by the Act are permissible under the First Amendment. The Supreme Court has "long recognized that each medium of expression presents special First Amendment problems." *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).[FN2] The Act regulates video games, which, even though mere entertainment, are nonetheless protected by the First Amendment. *See Interactive Digital*, 329 F.3d at 957-58.

FN2. Several decades ago, the Supreme Court "recognized that some believe motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 690 (1968) (internal quotation marks omitted). Defendants make similar arguments about video games. *See, e.g.,* docket no. 70 at 14-15.

The freedom of speech protected by the First Amendment is "the indispensable condition[ ] of nearly every other form of freedom." *Palko v. Connecticut,* 302 U.S. 319, 327 (1937). Children "are entitled to a significant measure of First Amendment protection." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212 (1975). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Id.* at 213 (footnoted omitted).

However, "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 245-46 (2002). As the Court has noted,

> *4 The First Amendment rights of minors are not co-extensive with those of adults. A State may permissibly determine that, at least in some

> precisely delineated areas, a child-like someone in a captive audience-is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor.

Erznoznik, 422 U.S. at 214 n. 11 (internal quotation marks, citations, and brackets omitted). The question here is whether the Act is directed at expression that falls within an exception to First Amendment protection.

"Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). A state may normally limit expression based on content only (1) "to promote a compelling interest," and (2) if the state "chooses the least restrictive means" (3) "to further the articulated interest." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

B. Protection of Speech Under *Brandenburg*

The plaintiffs argue that the Act should be analyzed under *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*). The defendants disagree and rely on *Ginsburg v. New York*, 390 U.S. 629 (1968).

When passing the Act, the California Legislature made the following findings justifying the need for the Act:

(a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.

(b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

(c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.

2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179) (West) § 1. In *Brandenburg,* the Court held that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. at 447. Neither the legislative findings nor the evidence submitted by defendants suggest that the expression in violent video games is directed to inciting or producing imminent lawless action. This alone means that the Act is unconstitutional if *Brandenburg* sets forth the governing standard. *See* 395 U.S. at 447; *Granholm,* 426 F.Supp.2d at 652; *Blagojevich,* 404 F.Supp.2d at 1073. In addition, neither the legislative findings nor the evidence shows that playing violent video games immediately or necessarily results in real-world violence. *Granholm,* 426 F.Supp.2d at 652; *Blagojevich,* 404 F.Supp.2d at 1073. Defendants argue that there is an increased statistical probability that minors exposed to violent video games will engage in violent behavior. *See, e.g.*, docket no. 70 at 12-13. This is not sufficient under the requirement from *Brandenburg* that the suppressed expression be likely to produce "imminent lawless action." It is immaterial under the *Brandenburg* standard that violent video games may, as defendants assert, promote violence (or "aggressive behavior") in a more indirect way. *See Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1199 (9th Cir. 1989) (declining to create exception to First Amendment protection for non-obscene pornography, even though plaintiffs argued such pornography caused harm). Expression is not outside the protections of the First Amendment "simply because it is base and malignant." *Id.* "[S]peech may not be suppressed simply because it is offensive." *Id.*

C. State's Protection of Minors and Their Free Speech Rights

*5 Defendants submit that *Brandenburg* does not apply to the Act. *See, e.g.*, docket no. 77 at 14-15. In defending the Act, the State relies on the goals of preventing "automatic aggression, increased aggressive behavior, [and] antisocial behavior" by minors. Docket nos. 70 at 5 and 7, 77 at 4, 5 ("automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior"); *see* docket no. 70 at 11 ("automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior"). The defendants argue that neither the Supreme Court nor the Ninth Circuit has ever held or even suggested that the *Brandenburg* standard limits restrictions on speech targeting and affecting only minors.

The Supreme Court has recognized that those still in their formative years must be considered differently under the law. *See Ginsberg v. New York*, 390 U.S. 629, 638-41 (1968); *see also Roper v. Simmons*, 543 U.S. 551, 569-71 (2005). The rationale underlying *Brandenburg* that in a society of free men, men must be free to make even foolish choices-does not apply unequivocally to those still learning how to choose. The defendants submit that the Act implements a compelling state interest, that is to prevent minors from experiencing "feelings of aggression," "a reduction of activity in the frontal lobes of the brain," and "psychological harm." 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179) (West) § 1(a)-(b). The Supreme Court has recognized that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). However, to withstand constitutional scrutiny, any regulation must be narrowly drawn to serve that interest without unnecessarily interfering with First Amendment freedoms. *Id.* "Content-based regulations are presumptively invalid." *R.A.V.*, 505 U.S. at 382.

Plaintiffs claim that *Ginsberg* has only been used by prior courts to analyze restrictions on sexual material and that any regulation of violent videos necessarily interferes with First Amendment freedoms. The Supreme Court has never expressly considered whether obscenity is a unique category of expression and therefore the only subject matter that justifies limitation of the First Amendment rights of minors, or whether-as California seeks to do here-*Ginsberg* may serve as a template for other limitations on minors' access to other categories of expression, such as violent videos.

Media violence was at issue in *Winters v. New York*, 333 U.S. 507 (1948). In the decision below, the New York Court of Appeals reasoned—as California does here—that violence can be "indecent or obscene" in much the same way as sexual material can and, therefore, upheld the defendant's conviction under a statute that prohibited distribution of publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," *People v. Winters*, 294 N.Y. 545, 549-550, 553 (1945). The statute forbade all such publications, not just the distribution of them to minors. *Id.* at 549. The Supreme Court, although "recogniz[ing] the importance of the exercise of a state's police power to minimize all incentive to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency," struck the statute down as unconstitutionally vague. *Id.* at 518. The Court, however, made clear that it was holding neither that a state "may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment" nor that states are "prevented by the requirements of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise." 333 U.S. at 510, 520. *Winters* thus does not foreclose a state from regulating violent expression such as the violent videos described in the Act and could be construed to imply that a narrowly-drawn regulation could do so.

*6 The desire to regulate the exposure of minors to senseless violent acts is understandable and, perhaps, more important than regulating exposure to obscenity. Many parents presumably hope that their children, upon reaching an appropriate age, will enjoy healthy sexual relationships. Only certain narrow categories of sexual activity, such as rape and incest, are illegal. Violence, on the other hand, is generally illegal, and is allowed only in certain narrow circumstances, such as self-defense and proper law enforcement activity. Most parents hope that their children will grow up to be non-violent. If exposing minors to depictions of violence in video games makes them experience feelings of aggression and exhibit violent antisocial or aggressive behavior, the state could have a compelling interest in restricting minors' access to such material.

Nevertheless, cases subsequent to *Winters* have, without exception, held that the First Amendment precludes restrictions on minors' access to violent videos, either on the theory that *Ginsburg* rationale cannot be expanded beyond the subject matter of obscenity or that the nexus between exposure to violent videos and feelings of aggression or antisocial behavior has not been adequately shown.

In *Kendrick*, the Seventh Circuit reversed a district court's denial of a preliminary injunction against enforcement of a city ordinance that required parents to accompany minors who wished to play video games containing "graphic violence" predominately appealing to minors' morbid interest in violence and lacking serious literary, artistic, political or scientific value. 244 F.3d at 573. Judge Richard Posner, writing for the panel, explained that video games depicting violence could not be categorized as obscene. *Id.* at 574-76. The city's grounds for promulgating the ordinance had to "be compelling and not merely plausible" and not a pretext for regulation in violation of a minors' First Amendment rights. Id. at 576. Judge Posner expressed doubt that a government could have a compelling interest in preventing minors from playing violent video games and that the City had little data to compel a conclusion that the games covered by the ordinance increased aggressive behavior in minors. Id. at 578-79. Among the evidence was some of the work of Craig Anderson, Ph.D., a psychologist who has published on the effect of violent videos on minors and on whose opinions the California legislature significantly relied in passing the Act. Id. at 578. A preliminary injunction was issued because the ordinance's "conjectural" benefits were outweighed by the risk of infringing on First Amendment rights. Id. at 580. The court did note, however, that "[i]f the games used actors and simulated real death and mutilation convincingly, or if the games lacked any story line and were merely animated shooting galleries ..., a more narrowly drawn ordinance might survive a constitutional challenge." Id. at 579-80.

*7 In *Interactive Digital,* the Eighth Circuit reversed a district court and ordered a permanent injunction against enforcement of a county ordinance that made it unlawful to "sell, rent, or make available graphically violent video games to minors." 329 F.3d at 956. The court expressly held that the ordinance should be analyzed using strict scrutiny, rejecting the County's suggestion to treat the games as obscene and use the less stringent standard from *Ginsberg*. Id. at 958-60. The County presented a psychologist who claimed that playing violent video games increased aggressive thoughts and behavior, but the court found this testimony fell short of the required "substantial supporting evidence" necessary to justify the ordinance. *Id.* at 958-59.

The court for the District of Minnesota in *Hatch* permanently enjoined enforcement of a Minnesota statute that subjected a person under seventeen years of age to a civil penalty for knowingly renting or selling a video game rated AO (adults only) or M (mature) by the Entertainment Software Rating Board. 443 F. Supp. 2d at 1068. The court found that the statute did not pass strict scrutiny and that the data offered to support the statute was insufficient to demonstrate a causal link between the playing of violent video games and some deleterious effect on minors. *Id.* at 1069-1070. The court also found that even assuming a causal link, the statute was not narrowly tailored. There was no showing that restricting video games alone would alleviate the state's concern about minors, nor that video games, in the absence of other violent media, would cause injury to children. *Id.* at 1070.

In *Foti,* a district court in the Middle District of Louisiana granted a preliminary injunction barring enforcement of a statute criminalizing distribution of video and computer games that appeal to minors' morbid interest in violence. 451 F.Supp.2d at 837. The court found that the targeted expression was protected under *Brandenburg* and that "the Statute cannot be defended on the grounds that it is designed to protect minors from some form of 'psychological harm,' as that amounts to nothing more than 'impermissible thought control.'" *Id.* at 831.

In *Granholm,* a district court in the Eastern District of Michigan permanently enjoined enforcement of a statute prohibiting distribution of certain "ultra-violent explicit video games" to minors. 426 F.Supp.2d at 648. The court ruled that the statute under consideration, as a content-based restriction on expression, could not pass strict scrutiny. *Id.* at 651-52. The court also found that the evidence considered by the legislature, including studies by Dr. Anderson, was insufficient to show that playing violent video games causes minors to have aggressive thoughts and behavior. *Id.* at 652-53. The court also found that the statute was not narrowly tailored and was likely to have a chilling effect on adults' free expression because it would cause video game creators to steer clear of the boundaries of the statutory definition. *Id.* at 654-56.

*8 In *Blagojevich*, a district court permanently enjoined enforcement of an Illinois statute criminalizing the sale or rental of certain violent video games to minors. 404 F.Supp.2d. at 1055. The court interpreted *Kendrick* as applying strict scrutiny and found that the statute was "a content-based regulation subject to the strictest scrutiny under the First Amendment." *Id.* at 1072. Among the justifications for the statute were "preventing violent, aggressive, and asocial behavior" and "preventing psychological harm to minors." *Id.* The proffered evidence justifying the statute included fourteen studies by Dr. Anderson. *Id.* at 1058. The court, after a trial, found Dr. Anderson's studies unpersuasive, stating "that neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video game exposure and aggressive thinking and behavior." *Id.* at 1063. The court was concerned that Dr. Anderson's research did not establish a causal link between violent video games and violent behavior, did not assess the significance of any link, and did not compare video games to other forms of media violence to which minors are exposed. *Id.* at 1063-67.

Finally, in *Maleng*, a district court in the Western District of Washington ruled on cross-motions for summary judgment that a Washington state statute violated the First Amendment. 325 F.Supp.2d at 1183, 1190. The statute at issue forbade the distribution to minors of video games involving violence against law enforcement personnel. *Id.* at 1190. The court found that the obscenity standard from *Ginsberg* was inappropriate because the statute did not cover sexually explicit material, and instead applied strict scrutiny. *Id.* at 1185-86. The court held that the State had not carried its burden of proving that games covered by the statute caused aggressive feelings or behavior. *Id.* at 1189. The court further ruled that the statute was "both over-inclusive and under-inclusive" because the set of games covered by the statute did not reflect the harms the legislature sought to alleviate; the statute was therefore not narrowly tailored. *Id.*

Although none of the above cases holding violent video laws unconstitutional are Ninth Circuit cases binding on this court, they nevertheless reflect a strong judicial antagonism toward such laws that this court should not ignore.

D. Standard Applicable to the Act-Strict Scrutiny

1. The Legislature Has the Power to Enact Laws Restricting Expressions of Violence to Minors If the

Law Passes Strict Scrutiny

Despite the suggestion in some of the cases discussed above that a law restricting expressions of violence to minors is unconstitutional unless the restricted speech incites imminent lawlessness as described in *Brandenburg*, the court believes that a state legislature has the power to enact laws that restrict speech to protect the well being of minors provided the laws pass strict scrutiny. Although the values protected by the First Amendment are generally no less applicable when government seeks to control the flow of information to minors, the First Amendment rights of minors are not co-extensive with those of adults. *Erznoznik*, 422 U.S. at 213-14. As noted in *Sable Communications*, the Supreme Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors." 492 U.S. at 126; *see also Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997) ("[T]he government may have a compelling interest in protecting minors from certain things that it does not for adults.")

*9 However, the Act is a content-based regulation and it is presumptively invalid. *R.A.V.*, 505 U.S. at 382. Therefore, to be constitutional, the Act must promote the compelling interest of protecting the physical and psychological well-being of minors by the least restrictive means and the means must actually further the articulated interest. *Sable*, 492 U.S. at 126.

2. The Act Promotes a Compelling Interest

The purpose of the Act is to prevent violent, aggressive and antisocial behavior by minors who play violent video games and to prevent psychological and neurological harm to them. *See* 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179 § 1). These purposes, except to the extent they intend to merely control a minor's thoughts, are compelling interests. The government clearly has a compelling interest in protecting the physical and psychological well-being of minors. *R.A.V.*, 505 U.S. at 382. However, as the Supreme Court has noted

> The government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

Free Speech Coalition, 535 U.S. at 253 (internal quotation marks and citation omitted). As noted by Judge Posner in *Kendrick*,

> Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

244 F.3d at 577.

Although Judge Posner's comments emphasize the need to proceed carefully in restricting a minor's exposure to violence, the Act nevertheless passes the first requirement of strict scrutiny as the government has a compelling interest in protecting the physical and psychological well-being of minors. The state can legitimately restrict speech if such a restriction is narrowly tailored and will prevent or significantly decrease the likelihood of antisocial and aggressive behavior in minors-not merely how a minor thinks of violence.

3. The Act Does Not Choose the Least Restrictive Means

The cases cited in this opinion that either preliminarily or permanently barred enforcement of similar laws found that the government had not established that the laws actually furthered their articulated purposes or that the laws were narrowly tailored to accomplish those purposes. The analyses in those cases often combine discussion of the two questions. In this court's analysis of the Act, it will attempt to separate the questions and first discuss whether the defendants have established that the Act addresses its goals by the least restrictive means and then discuss whether defendants have shown a causal connection between the restrictions imposed by the Act and the compelling interest sought to be addressed by the Act.

*10 The Act contains two definitions of a "violent video game;" a game needs only satisfy one definition to be covered. Cal. Civ. Code § 1746(d)(1). The second definition, contained in § 1746(d) (1)(B), has no exception for material with some redeeming value and is therefore too broad. The definition could literally apply to some classic literature if put in the form of a video game. *See Kendrick*, 244 F.3d at 577-78. Therefore, subsection B is an unconstitutional restriction of First Amendment rights.

The definition of "violent video game" in subsection A is drawn from the obscenity definition approved in *Ginsberg*. Therefore, there is some precedent for finding the definition sufficiently narrow to meet constitutional standards. However, despite the fact that "[i]n assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor," *Erznoznik*, 422 U.S. at 214 n. 11 (internal quotation marks, citations, and brackets omitted), the Act applies in the same way to all minors under the age of eighteen. The studies cited by the State do not demonstrate that exposure to violent video games of those nearing the age of majority has the same deleterious effect on them as it does, for example, on those under age fourteen. In light of the fact that, upon turning eighteen, one can vote and fight in a war, a showing needs to be made that an individual nearing the age of majority needs to be shielded from uncensored speech to the same extent as an early adolescent. *See Kendrick*, 244 F.3d at 577 ("People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.").

Although the court held in granting its preliminary injunction against enforcement of the Act that it was not vague, *see Video Software Dealers Ass'n v.*

Schwarzenegger, 401 F.Supp.2d at 1040-42, some terms such as "image of a human being" are broad and not sufficiently narrow. "An image of a human being" is not limited to what appears to be an actual living human being. As observed in *Kendrick,* if "the games used actors and simulated real death and mutilation convincingly ..., a more narrowly drawn statute might survive a constitutional challenge." 244 F.3d at 579-580.

The State has also not shown that the Act will accomplish its goal of protecting the physical and psychological well-being of minors more effectively than the existing, narrower industry standards.[FN3] "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). To pass the strict scrutiny test, therefore, the state must demonstrate that the industry labeling standards, either alone or combined with technological controls that enable parents to limit which games their children play, do not equally address the state's interest in protecting the physical and psychological well-being of children. The State has not demonstrated that the Act is narrowly tailored to address its purpose. Therefore, the Act cannot pass strict scrutiny.

> FN3. The court is not suggesting that the ESRB standards should be adopted as law, but, rather, mentions those standards as ones that support the State's interest but do not involve State intrusions on First Amendment rights.

4. State Has Not Shown That the Act Actually Furthers the Articulated Interest

*11 The courts that have found similar laws unconstitutional have had before them much of the same evidence that is presently offered by the State. None has been satisfied that a sufficient causal link has been established between the playing of violent video games and the physical and psychological well-being of children. *See Kendrick*, 244 F.3d at 578-579; *Interactive Digital*, 329 F.3d at 958-959; *Hatch*, 443 F.Supp.2d at 1070; *Granholm*, 426 F.Supp.2d. at 652-53; *Blagojevich*, 404 F.Supp.2d at 1073. The State relies heavily on the work of Dr. Anderson, whose studies have been analyzed by most of the courts. The State points out that the *Kendrick* court did not have before it Dr. Anderson "up-dated meta-analysis." However, the court in *Hatch* did and reached the following conclusion:

> This Court's review of the article reveals it to be completely insufficient to demonstrate an empirical, causal link between video games and violence in minors. The article, itself, reports that the body of violent video game literature is not sufficiently large to conduct a detailed meta-analysis of a specific feature. The author notes "[t]here still is not a large enough body of samples in this domain for truly sensitive tests of potential age differences in susceptibility to violent video game effects." Dr. Anderson also notes the lack of longitudinal studies as a "glaring empirical gap" in video game research. Even assuming the methodology employed by Dr. Anderson to be correct, Dr. Anderson's meta-analysis is far too slight to bear the weight of the State's argument.

443 F.Supp.2d at 1069 (internal citations to Anderson article omitted).

Nevertheless, this court is not as doubtful as others courts have been as to the legislature's power to restrict the access of minors to violent video games or as skeptical of Dr. Anderson's conclusions. The legislature does have the power, despite *Brandenburg*, to enact legislation that limits a minor's First Amendment rights if the legislation can be shown to truly protects a minor's psychological and physical well-being and is narrowly drafted to pass strict scrutiny. However, at this point, there has been no showing that violent video games as defined in the Act, *in the absence of other violent media*, cause injury to children. In addition, the evidence does not establish that video games, because of their interactive nature or otherwise, are any more harmful than violent television, movies, internet sites or other speech-related exposures. Although some reputable professional individuals and organizations have expressed particular concern about the interactive nature of video games, there is no generally accepted study that supports that concern. There has also been no detailed study to differentiate between the effects of violent videos on minors of different ages.

The court, although sympathetic to what the legislature sought to do by the Act, finds that the evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech required by the Act.

5. Labeling Requirement

*12 The Act requires video games that meet its definition of "violent" to be labeled, on the front of the package, with a white "18" outlined in black and at least two inches square. Cal. Civ. § 1746.2. The parties disagree as to whether the labeling requirement is commercial speech or compelled speech requiring the game creators and distributors to carry a message with which they disagree. In light of the conclusion that the Act is unconstitutional, the court does not reach this issue.

IV. ORDER

For the foregoing reasons, the court permanently enjoins the defendants from enforcing Cal. Civ.Code §§ 1746-1746.5.

401 F. Supp. 2d 1034 (N.D. Cal., 2005)
ORDER GRANTING PRELIMINARY INJUNCTION

United States District Court,
N.D. California.
San Jose Division.

VIDEO SOFTWARE DEALERS ASSOCIATION, and Entertainment Software Association, Plaintiffs,
v.
Arnold SCHWARZENEGGER, in his official capacity as Governor of the State of California; Bill Lockyer, in his official capacity as Attorney General of the State of California; George Kennedy, in his official capacity as Santa Clara County District Attorney; Richard Doyle, in his official capacity as City Attorney for the City of San Jose; and Ann Miller Ravel, in her official capacity as County Counsel for the County of Santa Clara, Defendants.

No. C-05-04188-RMW.

Dec. 21, 2005.

Background: Associations of companies in video game industry brought action challenging constitutionality of California law requiring that violent video games be labeled and prohibiting rental or sale of those games to minors. Associations moved for preliminary injunction barring state and local officials from enforcing law.

Holdings: The District Court, Whyte, J., held that: (1) associations did not establish likelihood of success on merits of claim that law's definition of "violent

video game" rendered law unconstitutionally vague;
(2) associations showed that they were likely to succeed on the merits of their claim that challenged law violated First Amendment, in seeking to restrict minors' access to violent video games, or at least that serious questions on issue were raised;
(3) associations showed that they were likely to succeed on the merits of claim that labeling requirement violated First Amendment, or at least that serious questions on issue were raised;
(4) associations showed threat of irreparable harm; and
(5) preliminary injunction was warranted.

Motion granted.

Theodore J. Boutrous, Jr., Amy L. Tenney, Ethan D. Dettmer, H. Mark Lyon, Katherine A. Fallow, Paul M. Smith, for Plaintiffs.

Zackery P. Morazzini, Kathryn J. Zoglin, Robert R. Fabela, for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

[Re Docket No. 5, 27, 28, 41, 48]

WHYTE, District Judge.

Plaintiffs move for a preliminary injunction prohibiting California state and local officials from enforcing a recently passed law, effective January 1, 2006, which requires violent video games to be labeled and prohibits the rental or sale of those games to minors ("Act"). The Act includes a narrow definition of "violent video games," requires specified labeling of such games and imposes a civil penalty of up to $1,000 for violations. For the reasons given below, the court grants the plaintiffs' motion for a preliminary injunction.

I. BACKGROUND

The plaintiffs are the Video Software Dealers Association ("VSDA") and the Entertainment Software Association ("ESA"), two groups who describe themselves as associations of companies in the video game industry. The defendants are California Governor Arnold Schwarzenegger, California Attorney General Bill Lockyer, Santa Clara County District Attorney George Kennedy, Santa Clara County *1038 Counsel Ann Ravel, and San José City Attorney Richard Doyle. Kennedy and Ravel ("County defendants") joined the opposition filed by Schwarzenegger and Lockyer ("State defendants"), so the court can generally consider the defendants as a group for the purposes of the plaintiffs' motion for a preliminary injunction.FN1

> FN1. Two weeks late, City Attorney Doyle filed a motion joining in the State and County defendants' oppositions. Doyle raises no new arguments and plaintiffs have not objected to his untimely joinder.

On October 7, 2005, Schwarzenegger signed into law Assembly Bill 1179, which is to take effect on January 1, 2006, as new California Civil Code §§ 1746-1746.5. The Act will restrict the sale and rental of certain violent video games to minors. *Id.* § 1746.1(a). The Act contains a two-part definition of a "violent video game":

(d)(1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

(2) For purposes of this subdivision, the following definitions apply:

(A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

(C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

(E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

(3) Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved *1039 include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless

mutilation of the victim's body, and helplessness of the victim.

Id. § 1746(d).

On October 17, 2005, the plaintiffs filed a complaint, and two days later, a motion for a preliminary injunction, seeking to prevent enforcement of this new law. The plaintiffs claim the Act is unconstitutional and specifically assert that: (1) video games are a form of expression protected by the First Amendment of the U.S. Constitution, even for minors, (2) the Act's definition of "violent video game" is unconstitutionally vague, and (3) the labeling provisions of the Act run afoul of the First Amendment. The State and County defendants assert that the Act is narrowly tailored to further a compelling state interest, and that it is neither impermissibly vague nor violative of the First Amendment.

California is not the first state to attempt to limit minors' access to violent video games. While the Ninth Circuit has yet to consider the legislature's ability to implement such regulation, the Seventh and Eighth Circuits have found specific ordinances on the subject run afoul of the First Amendment. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003). Several district courts have also struck down similar ordinances. *See Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash. 2004); *Entm't Software Ass'n v. Blagojevich*, 404 F.Supp.2d 1051, 2005 WL 3447810 (E.D. Ill. 2005) (granting permanent injunction); *Entm't Software*

Ass'n v. Granholm, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005) (granting preliminary injunction).FN2

> FN2. The court notes that, as in the instant case, VSDA and ESA were plaintiffs in *Maleng*, *Blagojevich*, and *Granholm*. *Maleng*, 325 F.Supp.2d at 1180; *Blagojevich*, 404 F.Supp.2d at 1055-56, 2005 WL 3447810, at *1, 2005 U.S. Dist. LEXIS 31100 at *1; *Granholm*, 2005 WL 3008584 at *1. VSDA was also a plaintiff in *Interactive Digital*, 329 F.3d at 954, 956.

II. ANALYSIS

A. Standard for Preliminary Injunction

The decision to grant a preliminary injunction is within the discretion of a district court. *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 839 (9th Cir. 2002). There are two tests for determining whether a district court may grant a preliminary injunction. Under the traditional test for granting preliminary injunctive relief, the applicant must demonstrate: "(1) a likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Dollar Rent A Car of Wash., Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985). Alternatively, the moving party must show "that serious questions are raised and the balance of hardships tips sharply in favor of the moving party." *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839-40

(9th Cir. 2001). These alternative showings "represent extremes of a single continuum, rather than two separate tests." *Clear Channel Outdoor Inc. v. City of Los Angeles,* 340 F.3d 810, 813 (9th Cir. 2003) (internal citation and quotation marks omitted).

B. Analysis of Preliminary Injunction Factors

1. Likelihood of Success on the Merits

First, the court considers the plaintiffs' claim that the Act is unconstitutionally *1040 vague, as an impermissibly vague definition of "violent video game" would leave nothing for the defendants to enforce and render the Act unconstitutional as a whole.

a. Vagueness

The plaintiffs claim the Act is unconstitutional because it is impermissibly vague. The Act's definition of "violent video game" is a unique amalgam, but this alone does not make it unconstitutionally vague. Section 1746(d)(1)(A) is essentially the obscenity standard from *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), but directed towards depictions of violence instead of depictions of nudity or sex. Section 1746(d)(1)(B) uses the phrase "especially heinous, cruel, or depraved," which appears to have been taken from Arizona's statutory list of aggravating factors for considering whether to impose the death penalty. *See* Ariz. Rev. Stat. § 13-703.F.6 (2005).[FN3] The defendants submit that the definition under the Act is "exceedingly narrow."

State Opp'n at 18.

> FN3. That there is case law on the meanings of these phrases, albeit in other contexts, makes it more likely that they define a standard that an ordinary person can understand and apply.

Although "we can never expect mathematical certainty from our language," a restriction must be particularly clear if it "abuts upon sensitive areas of basic First Amendment freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (parentheses removed). This precision is required even for regulations designed to protect children:

> It is essential that legislation aimed at protecting children from allegedly harmful expression-no less than legislation enacted with respect to adults-be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.

Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 689, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968) (ellipses omitted). No court has considered whether a definition of "violent video game" identical to the one in the Act is unconstitutionally vague, but courts have found a number of other legislative enacted definitions impermissibly vague. *See Maleng*, 325 F.Supp.2d at 1190-91; *Blagojevich*, 404 F.Supp.2d at 1076-78, 2005 WL 3447810 at 22-24, 2005 U.S. Dist. LEXIS 31100 at *66-70; *see also Granholm*, 2005 WL 3008584 at *3-4.

The plaintiffs' primary argument here is that the Act's definitions are ill-suited to a medium divorced from everyday reality. Video game characters can deviate from human norms to greater or lesser degrees, and the plaintiffs claim this makes the second prong of the definition, which refers to "images of human beings or characters with substantially human characteristics," impossible for a reasonable person to apply. However, the plaintiffs overlook the limitation contained in § 1746(d)(1) of the Act, which applies to both prongs of the definition: "'Violent video game' means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting *an image of a human being,* if those acts are depicted in the game in a manner that does either of the following." (emphasis added). The language with which plaintiffs take issue, "images of human beings or characters with substantially human characteristics," thus only comes into play once the acts depicted have already been determined to be "killing, maiming, dismembering, or sexually assaulting an image of a human being." ***1041** This does make the phrase "upon images of human beings or characters with substantially human characteristics" in the second prong superfluous, but "assaulting an image of a human being" appears, nevertheless, to be the express requirement of the statute as written. Thus, the Act restricts only certain forms of violence against "an image of a human being;" there are no restrictions on violence against non-humans.

The plaintiffs also complain that "the Act generally uses the word 'includes' to modify the specific examples of behavior covered by the definition. This open-ended definition, say plaintiffs, does not confine the range of depictions that trigger the 'violent video game label.' " Mot. at 17. Contrary to plaintiffs' assertion, the Act uses "includes" only once, in § 1746(d)(2)(E): " 'Torture' includes mental as well as physical abuse of the victim. In either case ...." "Either," according to WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, means "being the one or the other of two." Any open-endedness introduced by "includes" is immediately limited by "either" in the next sentence. Torture, for the purposes of the Act, is either mental or physical abuse of a victim.

The Act also uses "include" once, in § 1746(d)(3): "Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved *include* infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim." (emphasis added). While this does not limit what may be considered to determine whether a killing is "especially heinous, cruel, or depraved," "heinous," "cruel," and "depraved" are each cabined by the definitions of those terms in § 1746(d)(2)(A)-(C).

The plaintiffs further object that other parts of the definition, such as "virtually inflict," "consciousness" of the "virtual victim," and "high degree of pain," have no readily-ascertainable meaning in the context of a video game. While such semantic considerations do show the difficulty of using language with "mathematical certainty," they do not show the Act is unconstitutionally vague. It should be readily apparent to an ordinary person that with such language the Act was intended to cover games in which it looks like a player can harm people in the ways described.

The parties submitted to the court video games and videotapes of video games being played. *See* Jimenez Decl., Exs. A, B; Waldman Decl., Exs. A, B; Chan Decl., Exs. A, B; Carraway Decl., Exs. A, B; Borasi Decl., Exs. A, B; Rosen Decl., Exs. A, B; Morazzini Decl., Ex. A. Before oral argument, the court asked the parties to attempt to apply each prong of the Act's definition of "violent video game" to seven of the games included in the parties' submissions. The plaintiffs, somewhat predictably, claimed that the Act was too vague to hazard a guess as to which games were covered and which games were not. The defendants were not much more helpful. The State defendants asserted that *Postal II* would be covered by the Act. They also pointed out that another of the games was discussed in a declaration the plaintiffs submitted; one of the plaintiffs' witnesses stated that *Medal of Honor: Frontline* "may" be covered by the Act. *See* Price Decl. ¶ 19.

Despite the parties' reluctance to attempt to apply the Act's definition of "violent video game" to the games submitted, the court will nonetheless analyze two of the games as part of its inquiry into whether the Act is impermissibly vague. As the following analyses show, the Act *1042 should be simple enough for an ordinary person to apply to the games submitted to the court.[FN4]

FN4. The court has generally only considered the videotape evidence. However, two of the games, *Jade Empire* and *Full Spectrum Warrior*, were also played.

Postal II involves a character who has apparently "gone postal" and decided to kill everyone he encounters. Morazzini Decl., Ex. A. The game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. *Id.* Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. *Id.* People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. *Id.* The player's character makes sardonic comments during all this; for example, urinating on someone elicits the comment "Now the flowers will grow." *Id.*

The court agrees with the State defendants that *Postal II* would fall within the Act's definition of "violent video game". First, "the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being," as required by § 1746(d). The game also meets both prongs of the definition (though either alone is sufficient). Shooting schoolgirls in the knee and then setting them afire appeals to the deviant interests of minors, satisfying § 1746(d)(1)(A)(i). Whether something is "patently offensive" under community standards is a question of fact, *see Reno v. ACLU*, 521 U.S. 844, 873-74, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), but the court can easily imagine that *Postal II* "is patently offensive to the standards" of some communities "as to what is suitable for minors," satisfying § 1746(d)(1)(A)(ii). The game appears to have no "literary, artistic, political, or scientific value for minors," satisfying § 1746(d)(1)(A)(iii). The game thus is a "violent video game" under the first definition in the Act. Furthermore, shooting schoolgirls in the kneecap is inflicting serious injury, and then setting them afire and urinating on them as they crawl about is especially cruel and depraved (as those terms are defined in the Act) and constitutes torture. This satisfies § 1746(d)(1)(B).

Conversely, *Full Spectrum Warrior* would not be a "violent video game" under the Act. The player controls two four-man U.S. Army squads fighting in an Afghanistan-like urban environment. Carraway Decl., Exs. A, B. The squad members have personalities; they complain about their mission and use profanity when they come under heavy fire. *Id.* Careful planning is necessary to succeed; much of the game is spent using one squad to distract an enemy while the other squad circles around him to get a good shot. *Id.* Enemies are usually shot at a distance, and they fall down bloodlessly when shot or killed with grenades. *Id.*

In *Full Spectrum Warrior,* "the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being," as required by § 1746(d). However, it would be hard to say that U.S. military operations appeal to the deviant or morbid interests of minors. Also, the game has some political value. It thus does not satisfy the first part of the Act's definition, § 1746(d)(1)(A). Also, there is no way to kill enemies that is especially heinous, cruel, or depraved; killings are generally at a distance and fairly impersonal. This does not satisfy the second part of the Act's definition, § 1746(d)(1)(B).

The plaintiffs have not shown they are likely to succeed on their claim that the Act is unconstitutionally vague.

*1043 b. First Amendment

The court next considers the plaintiffs' claim that the Act runs afoul of the First Amendment. Because the statutes and ordinances at issue in *Kendrick, Interactive Digital, Blagojevich,* and *Granholm* are not materially distinguishable from the Act, the court finds that the plaintiffs are likely to succeed on the merits or at least that serious questions are raised in this portion of their case.

i. Survey of Prior Cases

As several courts have recently considered to what extent the First Amendment allows governments to limit minors' access to video game violence, the court will summarize the relevant cases.

In *Kendrick,* the Seventh Circuit reversed a district court's denial of a preliminary injunction against enforcement of a city ordinance. 244 F.3d at 573-4, 580. This ordinance required parents to accompany minors who wished to play video games containing "graphic violence" in public places. *Id.* at 573. Judge Richard Posner, writing for the panel, explored the difference between sexual obscenity and violence. *Id.* at 574-76. Judge Posner did not explicitly select a standard of review for the ordinance at issue, though he did state that the city's grounds for promulgating it had to "be compelling and not merely plausible." *Id.* at 576. He also expressed doubt that a government could have a compelling interest in preventing minors from playing violent video games. 244 F.3d at 576-79. Judge Posner noted that the City had little data to compel a conclusion that the games covered by the ordinance increased aggressive behavior in minors. *Id.* at 578-79. Among the evidence was some of the work of Craig Anderson. *Id.* at 578. Judge Posner concluded that a preliminary injunction was appropriate because the ordinance's "conjectural" benefits were outweighed by the risk of infringing on First Amendment rights. *Id.* at 580.

In *Interactive Digital,* the Eighth Circuit reversed a district court and ordered a permanent injunction against enforcement of a county ordinance that forbade anyone to "sell, rent, or make available graphically violent video games to minors." 329 F.3d at 956. The court expressly held that the ordinance should be analyzed using strict scrutiny, rejecting the County's suggestion to use the less stringent standard from *Ginsberg. Id.* at 958-60. The County presented a psychologist who claimed that playing violent video games increased aggressive thoughts and behavior, but the court found this testimony fell short of the required "substantial supporting evidence" necessary to justify the ordinance. *Id.* at 958-59.

In *Maleng,* Chief Judge Robert S. Lasnik of the Western District of Washington ruled on cross-motions for summary judgment that a Washington state statute violated the First Amendment. 325 F.Supp.2d at 1183, 1190. The statute at issue forbade the distribution to minors of video games involving violence against law enforcement personnel. *Id.* at 1190. The court found that the obscenity standard from *Ginsberg* was inappropriate because the statute did not cover sexually explicit material, and instead applied strict scrutiny. *Id.* at 1185-86. The court found that the State had not carried its burden of proving that games covered by the statute caused aggressive feelings or behavior. *Id.* at 1189. The court further ruled that the statute was "both over-inclusive and under-inclusive" because the set of games covered by the statute did not reflect the harms the legislature sought to alleviate; the statute was therefore not narrowly tailored. *Id.*

In *Granholm,* a district court preliminarily enjoined enforcement of a statute *1044 that would prohibit distribution of certain violent video games to minors. 2005 WL 3008584 at *1. The statute applied only to games that satisfied both parts of a two-part definition of "ultra-violent explicit video game;" one of these parts was modeled on the statute upheld in *Ginsberg.* 2005 WL 3008584 at *1. The court ruled that the statute under consideration, as a content-based restriction on expression, was subject to strict scrutiny. *Id.* at *2. The court found that the evidence considered by the legislature, including studies by Anderson, were unlikely to be sufficient to "demonstrate a compelling interest in preventing a perceived harm." *Id.* at *3 (quotation marks removed). The court found that the statute was not narrowly tailored and was likely to have a chilling effect on adults' free expression because it would cause video game creators to steer clear of the boundaries of the statutory definition. *Id.*

Finally, in *Blagojevich,* a district court permanently enjoined enforcement of an Illinois statute criminalizing the sale or rental of certain violent video games to minors. at 1057-58, 2005 WL

3447810 at 1-2, 2005 U.S. Dist. LEXIS 31100 at *2-3, 7-8. The court interpreted *Kendrick* as applying strict scrutiny and found that the statute was "a content-based regulation subject to the strictest scrutiny under the First Amendment." *Id.* at 1072, 2005 WL 3447810, *17, 18, 2005 U.S. Dist. LEXIS 31100, *52, 55. Among the justifications for the statute were "preventing violent, aggressive, and asocial behavior" and "preventing psychological harm to minors." *Id.* at 1072, 2005 WL 3447810, *18, 2005 U.S. Dist. LEXIS 31100, *53. The proffered evidence justifying the statute included fourteen studies by Anderson. *Id.* at 1058, 2005 WL 3447810, *3, 2005 U.S. Dist. LEXIS 31100, *10-11. The court, after a trial, found Anderson's studies unpersuasive, stating "that neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video game exposure and aggressive thinking and behavior." *Id.* at 1063, 2005 WL 3447810, *8, 2005 U.S. Dist. LEXIS 31100, *24-25. The court was concerned that Anderson's research did not establish a causal link between violent video games and violent behavior, did not assess the significance of any link, and did not compare video games to other forms of media violence to which minors are exposed. *Id.* at 1063-64, 2005 WL 3447810, *8-9, 2005 U.S. Dist. LEXIS 31100, *25-27.

The court in *Blagojevich* also considered the constitutionality of a provision requiring violent games covered by the statute to bear a two-square-inch label stating "18". *Id.* at 1057, 1081, 2005 WL 3447810, *2, 27, 2005 U.S. Dist. LEXIS 31100, *7, 83. The court rejected the argument that the labeling provision should be analyzed under the commercial speech standard of *Zauderer v. Office of Disciplinary*

Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). *Id.* at *83-85. The court instead found the labeling requirement to be constitutionally impermissible compelled speech under *Riley v. National Federation of Blind, Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). *Id.* at *85-86.

ii. The California Statute

The Act will regulate video games, which, even though mere entertainment, are nonetheless protected by the First Amendment. *See Interactive Digital,* 329 F.3d at 957-58. Children "are entitled to a significant measure of First Amendment protection." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). The Act seems primarily designed to restrict minors' access to a class of particularly violent video games.

*1045 As an initial matter, the parties dispute what analytical framework the court should use to evaluate the Act. The plaintiffs suggest that of *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Under *Brandenburg,* a state may regulate expression it fears will cause unlawful or violent behavior only if it can prove the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce" such action. *Id.* at 447, 89 S.Ct. 1827. The Act seems to be intended more to prevent harm to minors than preventing minors from engaging in real-world violence. *See* Cal. A.B. 1179 § 1.

The defendants claim the Act should be analyzed using the Supreme Court's decision in *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d

195 (1968). In *Ginsberg*, the Court allowed New York to restrict the access of minors to material with nudity or sexual content, even though such a restriction on adults would have been invalid. *Id.* at 634-43, 88 S.Ct. 1274. The New York statute forbade the sale of material deemed "harmful to minors" to those under seventeen years of age, and defined

> "[h]armful to minors" [as] any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and
>
> (iii) is utterly without redeeming social importance for minors.

Id. at 646, 88 S.Ct. 1274. The Court allowed the statute at issue in *Ginsberg* to stand because the New York legislature had a rational basis for limiting minors' access to such obscene material. *Id.* at 643, 88 S.Ct. 1274. Neither the Supreme Court nor the Ninth Circuit has ever extended the *Ginsberg* analysis beyond sexually-obscene material. *Maleng*, 325 F.Supp.2d at 1186. Nor, on the other hand, have the plaintiffs shown that either the Supreme Court or the Ninth Circuit has ever held that sexual obscenity represents a unique category of expression that is the only category to which a state may permissibly restrict minors' access without running afoul of the First Amendment.

The defendants have been unable to explain why the deferential standard of *Ginsberg* should also be used to analyze California's attempt to limit minors' access to violent video games. At oral argument, the County defendants expressed the view that there are few constitutional boundaries to a state's power to limit minors' access to expression that the State can establish is harmful to minors. As examples, the County defendants suggested that a state could regulate a minor's access to games about embezzling, bomb building, and shoplifting, without violating the First Amendment, if a causal connection with harm to children could be established. No court has previously endorsed such a limited view of minors' First Amendment right. The prevailing view, and the one this court will follow, is that limitations on a minor's access to violent expression are subject to strict scrutiny. However, even under strict scrutiny analysis, a court must consider the potential harm to a child that is being addressed by any legislation that limits a child's access to expression.

"Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). A state may limit expression based on content only if the state (1) has a compelling interest and (2) "chooses the least restrictive ***1046** means to further the articulated interest." *Sable Communications of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). "[T]here is a compelling interest in protecting the physical and psychological well-being of minors." *Id.* The Seventh Circuit in *Kendrick* nevertheless expressed doubt that government could have a compelling interest in preventing minors from playing violent video games. 244 F.3d at 576-79. Judge Posner, writing for the panel, stated that "shield[ing] children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *Id.* at 577. It is uncertain that even if a causal link exists between violent video games and violent behavior, the First Amendment allows a state to restrict access to violent video games, even for those under eighteen years of age.

Also, a state "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). The State defendants point to a four-and-a-half-page bibliography as compelling evidence the California legislature considered when passing the Act. *See* Notification of Manual Filing, App. A at 14-18. This bibliography lists two pages of articles by Craig Anderson dealing with the relationship between violence and video games. *Id.* at 14-16. (It also lists material on the questionable constitutionality of restricting minors' access to violent video games, *id.* at 14,[FN5] 18,[FN6] and websites for interest groups, *id.* at 17, [FN7] 18.[FN8]) The court in *Blagojevich,* after a trial, found Anderson's studies unpersuasive, stating "that neither Dr. Anderson's testimony nor his research establish a solid causal link between violent video game exposure and aggressive thinking and behavior." 404 F.Supp.2d at 1063, 2005 WL 3447810, at *8, 2005 U.S. Dist.

LEXIS 31100 at *25-26. The court was concerned that Anderson's research did not establish a causal link between violent video games and violent behavior, did not assess the significance of any link, and did not compare video games to other forms of media violence to which minors are exposed. *Id.* at 1061-64, 2005 WL 3447810, *7-9, 2005 U.S. Dist. LEXIS 31100, *23-27. This court anticipates that the defendants here may face similar problems proving the California legislature made "reasonable inferences based on substantial evidence." *See Turner,* 512 U.S. at 666, 114 S.Ct. 2445.

FN5. Vikram David Amar, Alan Brownstein, *Can States Constitutionally Regulate Video Games, As California Is Considering Doing?: The First Amendment Framework That Would Probably Apply,* FindLaw (Apr. 30, 2004) *at* http://writ.news.findlaw.com/commentary/20040430/brownstein. html.

FN6. *Maleng,* 325 F.Supp.2d 1180.

FN7. Mothers Against Violence in America, http://www.mavia.org.

FN8. National Institute on Media and the Family, http:// www.mediafamily.org.

To be valid, the Act must pass muster under strict scrutiny. Whether, as the court in *Kendrick* indicated, the First Amendment may prevent a state from having a legitimate compelling interest in restricting the access of minors to violent video games, or, as the court in *Blagojevich* ruled, Anderson's research is insufficient to show such a compelling interest, the plaintiffs have shown they are likely to succeed on the merits of their claim that the Act violates the First Amendment, or at least that serious questions are raised.

c. Labeling Requirement

In *Central Hudson Gas & Electric v. Public Service Commission of *1047 New York,* the Supreme Court explained the strength of the First Amendment in the commercial context:

> For commercial speech [to be protected by the First Amendment,] it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. 557, 566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

The Act requires video games that meet its definition of "violent" to be labeled, on the front of the package, with a white "18" outlined in black and at least two inches square. § 1746.2. This provision is not unconstitutional, despite plaintiffs' suggestion otherwise, merely because it conflicts with the industry's voluntary ratings system. However, the Supreme Court has stated that "[a] court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."

United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 824, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). The parties disagree whether the labeling provision affects commercial speech and thus is to be analyzed under *Zauderer,* or whether the provision compels speech and is to be analyzed under *Riley.* The court in *Blagojevich* found a very similar labeling provision to be compelled speech and violative of the First Amendment. 2005 WL 3447810 at *28-29, 2005 U.S. Dist. LEXIS 31100 at *85, 86. Defendants here have made no argument that the Act's labeling requirement is permissible under *Riley,* and the court finds that the plaintiffs have shown they are likely to succeed on the merits of their claim that, or at least have raised serious questions about whether, the Act's labeling provision violates the First Amendment.

2. Threat of Irreparable Injury

The Supreme Court has stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). To the same extent plaintiffs are likely to succeed on their claim the Act violates the First Amendment, they have shown a threat of irreparable harm. On the other hand, a court should not freely enjoin an action of a legislature, because "it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Econ. Equity v. Wilson,* 122 F.3d 718, 719 (9th Cir. 1997). Further, a state has an "interest in the well-being of its youth." *ACLU,* 521 U.S. at 865, 117 S.Ct. 2329. However, a preliminary injunction would, if defendants ultimately prevail, only slightly delay enforcement of the Act, and the Supreme Court has noted that "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Plaintiffs have shown potential irreparable harm.

3. Balance of Hardships

If this court does not preliminarily enjoin enforcement of the Act, the plaintiffs' members will have to institute labeling and monitoring as mandated by the Act, which plaintiffs claim will infringe upon their members' First Amendment rights, as well as the First Amendment rights of minors in California. It will also involve considerable expense to implement. If the court does preliminarily enjoin enforcement* 1048 of the Act, the defendants will merely be delayed a short time in implementing the Act, if it is ultimately found to be constitutional. The court finds that the balance of hardships weighs in favor of the plaintiffs.

4. Public interest

There is a definite public interest in First Amendment freedoms, but this has been discussed already in the section on the plaintiffs' likelihood of success on the merits. The defendants claim there is a substantial public interest in protecting minors from the psychological harms they claim violent video games inflict. The public interest also would favor allowing the public's elected officials legislate, as the public elected them to do. The public also has a strong interest in enjoying its First Amendment freedoms. This factor does not significantly weigh in favor of either side.

C. Conclusion

The plaintiffs have shown at least that serious questions are raised concerning the States' ability to restrict minors' First Amendment rights in connection with exposure to violent video games, including the question of whether there is a causal connection between access to such games and psychological or other harm to children. The balance of hardships tips sharply in the plaintiffs' favor as the potential infringement of First Amendment rights and the costs in time and expense of implementing the Act outweigh the potential harm of a short delay in the implementation of the Act, if ultimately held constitutional.

III. ORDER

For the foregoing reasons, the court grants the plaintiffs' motion for a preliminary injunction. The defendants and their agents are hereby preliminarily enjoined from enforcing any provision of the Act (future California Civil Code §§ 1746-1746.5) until further order of this court.

California Civil Code
Division 3. Obligations
Part 4. Obligations Arising from Particular Transactions
Title 1.2A. Violent Video Games
→ **§ 1746. Definitions**

For purposes of this title, the following definitions shall apply:

(a) "Minor" means any natural person who is under 18 years of age.

(b) "Person" means any natural person, partnership, firm, association, corporation, limited liability company, or other legal entity.

(c) "Video game" means any electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own monitor, or is designed to be used with a television set or a computer monitor, that interacts with the user of the device.

(d)(1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

(2) For purposes of this subdivision, the following definitions apply:

(A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

(C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

(E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

(3) Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

CREDIT(S)

(Added by Stats. 2005, c. 638 (A.B. 1179), § 2.)

California Civil Code

Division 3. Obligations

Part 4. Obligations Arising from Particular Transactions

Title 1.2A. Violent Video Games

→ **§ 1746.1. Sale and rental to minors prohibited; affirmative defenses; non-application of prohibition to enumerated relatives or legal guardian**

(a) A person may not sell or rent a video game that has been labeled as a violent video game to a minor.

(b) Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence that a purchaser or renter of a violent video game was not a minor or that the manufacturer failed to label a violent video game as required pursuant to Section 1746.2 shall be an affirmative defense to any action brought pursuant to this title. That evidence may include, but is not limited to, a driver's license or an identification card issued to the purchaser or renter by a state or by the Armed Forces of the United States.

(c) This section shall not apply if the violent video game is sold or rented to a minor by the minor's parent, grandparent, aunt, uncle, or legal guardian.

CREDIT(S)

(Added by Stats. 2005, c. 638 (A.B. 1179), § 2.)

California Civil Code

Division 3. Obligations

Part 4. Obligations Arising from Particular Transactions

Title 1.2A. Violent Video Games

→ **§ 1746.2. Package labels**

Each violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white "18" outlined in black. The "18" shall have dimensions of no less than 2 inches by 2 inches. The "18" shall be displayed on the front face of the video game package.

CREDIT(S)

(Added by Stats. 2005, c. 638 (A.B. 1179), § 2.)

California Civil Code
Division 3. Obligations
Part 4. Obligations Arising from Particular Transactions
Title 1.2A. Violent Video Games
→ **§ 1746.3. Penalties**

Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars ($1,000), or a lesser amount as determined by the court. However, this liability shall not apply to any person who violates those provisions if he or she is employed solely in the capacity of a salesclerk or other, similar position and he or she does not have an ownership interest in the business in which the violation occurred and is not employed as a manager in that business.

CREDIT(S)

(Added by Stats. 2005, c. 638 (A.B. 1179), § 2.)

California Civil Code
Division 3. Obligations
Part 4. Obligations Arising from Particular Transactions
Title 1.2A. Violent Video Games
→ **§ 1746.4. Violations; reporting**

A suspected violation of this title may be reported to a city attorney, county counsel, or district attorney by a parent, legal guardian, or other adult acting on behalf of a minor to whom a violent video game has been sold or rented. A violation of this title may be prosecuted by any city attorney, county counsel, or district attorney.

CREDIT(S)

(Added by Stats. 2005, c. 638 (A.B. 1179), § 2.)

California Civil Code
Division 3. Obligations
Part 4. Obligations Arising from Particular Transactions
Title 1.2A. Violent Video Games
→ **§ 1746.5. Severability**

The provisions of this title are severable. If any provision of this title or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

CREDIT(S)

(Added by Stats. 2005, c. 638 (A.B. 1179), § 2.)

CONCURRENCE IN SENATE AMENDMENTS
AB 1179 (Yee)
As Amended September 2, 2005
Majority vote

ASSEMBLY: (September 8, 2005)		(May 5, 2005)	SENATE:	22-9

(vote not relevant)

Original Committee Reference: HUM. S.

SUMMARY : Prohibits the sale or rental of violent video games to minors. Specifically, this bill :

1) Expresses the Legislature's findings that exposing minors to depictions of violence in video games makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.

2) Declares that the state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.

3) Prohibits the sale or rental of violent video games to minors, defined as persons who are under 18 years of age, and requires each violent video game distributed in California to be labeled with a solid white 18 outlined in black.

4) Defines "violent video game" as a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

a) A reasonable person, considering the game as a whole, would find it appeals to a deviant or morbid interest in minors; it is patently offensive to prevailing standards in the community as to what is suitable to minors; and it causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors; or,

b) Enables a player to virtually inflict serious injury upon human beings or characters with substantially human characteristics in a manner which is especially, heinous, cruel or depraved in that it involves torture or serious physical abuse to the victim. Defines the terms: heinous, cruel, depraved, torture, and serious physical abuse; and lists pertinent factors to consider in determining whether the violence is especially heinous, cruel, or depraved.

5) Provides that violation of the title may be prosecuted by any city attorney, county counsel, or district attorney, and may result in fines up to $1,000. It shall be an affirmative defense that the defendant reasonably relied on evidence that the purchaser was not a minor or that the manufacturer failed to label a violent video game as required.

6) Clarifies that the section does not apply if the violent video game is sold or rented to a minor by a minor's parents, grandparent, aunt, uncle, or legal guardian.

The Senate amendments delete the contents of this bill and insert provisions from AB 450 (YEE) described above.

EXISTING LAW :

1) Prohibits the sale, lease, rental, or provision of any video game intended for use by any person less than 18, which contains any commercial advertisement for alcohol or tobacco products in the design, presentation, packaging or advertisement of the video game.

2) Requires every video game retailer to provide consumers with information about the video game rating system, including posting a sign in a prominent area.

3) Prohibits the sale or distribution of harmful matter to minors; "harmful matter" means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest; and depicts or describes in a patently offensive way sexual conduct; and lacks serious literary, artistic, political, or scientific value for minors.

AS PASSED BY THE ASSEMBLY, this bill dealt with community care facilities.

FISCAL EFFECT : None

COMMENTS : This bill is sponsored by the American Academy of Pediatrics, Common Sense Media, and Girl Scout Councils of California. According to the bill's sponsors, "This legislation is necessary because: 1) children are playing violent video games; 2) violent video games have been proven to be harmful to children's physical, mental and emotional well being; and 3) children currently have free access to purchase or rent violent, 'M-rated' games that are not recommended for their age level."

The sponsors state that the best selling video games glorify and reward players for committing heinous acts of crime and violence. The National Institute on Media and the Family reported that 87% of boys play M-rated games and 78% list an M-rated game among their favorites. Proponents of this bill argue that the current voluntary rating system is not effective. They cite to an undercover study done by the Federal Trade Commission (FTC) in 2003 in which 69% of the unaccompanied 13 to 16-year-olds purchased M-rated games.

Opponents of this bill argue that legislation is unnecessary. Entertainment Software Association (ESA) contends that it is working with dealers and retailers across the country to ensure that retailers have information about the Entertainment Software Rating Bureau (ESRB) and enforce the ESRB ratings. Under the voluntary system, retailers are not supposed to sell games rated "Mature" by ESRB to children under age 17.

Opponents of this bill also argue that it is unnecessary because most video games do not contain violence. They contend that people over 18 are the primary purchasers of computer and console games, and that parents are involved in the purchase of games more than 80% of the time. California Retailer's Association argues that this bill would be too difficult for retailers to implement. Opponents further argue that this bill is unconstitutional because it regulates protected speech in violation of the First Amendment. They caution that taxpayers would be liable for a plaintiff's court costs and attorney's fees in the event of a successful challenge of an enactment of the legislation.

The First Amendment protects the freedom of speech, which includes entertainment as well as political and ideological speech. (Shad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981).) Courts have repeatedly held that video games are considered to be "speech" for First Amendment purposes. (See, Interactive Digital Software Assoc. v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); American Amusement Machine Assoc. v. Kendrick, 244 F.3d 572 (7th Cir. 2001).)

Obscenity is one of the few categories of speech which has historically been unprotected. (Miller v. California, 413 U.S. 15 (1973).) The United States (U.S.) Supreme Court has defined "obscenity" as sexually-explicit material. (Id., at 19, n. 2.) This bill uses language very similar to the Supreme Court's definition of "obscenity." Thus far courts have declined to expand the definition of obscenity to patently graphic violence. (Video Software Dealers Assoc. v. Maleng, 325 F. Supp. 2d 1185 (Wash. Dist. Ct. 2004).)

This bill does not seek to restrict all violent video games, only the sale of the most heinously violent games to youth under 18. Although courts have recognized that minors have First Amendment rights, they have also acknowledged that those rights are not always subject to the same protections as adults' rights.

Generally, an attempt to regulate the content of protected forms of speech must be necessary to serve a compelling state interest, and the regulation must be narrowly tailored to achieve that interest. (Republican Party of Minn. v. White, 536 U.S. 765, 774-75 (2002).) The legislative intent section of this bill posits that the state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games. Courts have repeatedly recognized that a state has a legitimate and compelling state interest in safeguarding both the physical and psychological well-being of minors. (Sable Comm., Inc. v. FCC, 492 U.S. 115 (1989).)

Proponents of this bill have presented research and several news articles linking video games and violence. Opponents of this bill argue that other studies indicate that youth violence is caused by a number of factors with the main culprits being drugs, guns and gangs. Courts have found that studies do not support that video games cause individuals to commit violent acts. (See, AAMA, 244 F.3d 572.)

Proponents of this bill present professional testimony and studies to support that violent video games have a psychological impact on youth, in particular increased aggression. The sponsors summarize the research as concluding that teens are more impressionable than previously thought because they are still wiring their brains' circuits for self control, responsibility, and relationships. The sponsors state that dozens of studies conclude that playing violent games leads to increased physiological arousal, increased aggressive thoughts, increased aggressive feelings, increased aggressive behaviors, and decreased pro-social or helping behaviors.

Courts in other jurisdictions have struck down regulations attempting to limit the sale of violent video games to youth because of a lack of evidence to support that violent video games are psychologically harmful. (Interactive, 329 F.3d at 958.) Proponents of this bill seem to have presented significantly more evidence of video games' negative psychological impact on children than in those previous cases in which the courts found the evidence to be lacking.

Other attempted regulations have failed because the research did not support the purpose of the law. (Video Software, 325 F. Supp. 2d at 1188 no showing that banning video games would lead to a decrease in actual violence against law enforcement officers.) The sponsors of this bill have presented evidence directly related to the desired outcome: the research presented supports that violent video games lead to increased aggression and violence in youth. Thus, regulating the sale of such games appears necessary for the stated interest of "preventing violence, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors."

Opponents argue there is no showing that violent video games have a greater impact on youth than other forms of media. Proponents counter that studies support that video games are more harmful than other forms of violent media because there is an increased amount of violence, the violence is interactive (especially in the first-person games), and the video games incorporate techniques traditionally used in education, such as participation, repetition and reward.

Finally, any regulations must be narrowly tailored to fulfill the state's compelling state interest. Unlike regulations which have failed in other states, this bill seeks to restrict only the most extreme depictions of violence against humans. (Compare, Video, 325 Fed. Supp. 2d at 1189-1190.) The language used in this *bill regulates the sale of only those games that* contain the most heinous, cruel or depraved acts of violence. It also is limited to those games which, taken as a whole, lack any redeeming social, literary, artistic, political, or scientific values, which is consistent with the Supreme Court's obscenity definitions and has survived vagueness challenges.

Courts have rejected many attempts to regulate violence because the regulations contained vague language. This bill specifically defines the terms heinous, cruel, depraved, torture, and serious physical abuse; and lists pertinent factors to consider in determining whether the violence is especially heinous, cruel, or depraved. The term "heinous, cruel, or depraved" is used in federal law to determine if an aggravating factor exists in a crime so as to warrant the death penalty. (18 U.S.C. Section 3592(c)(6).) This bill incorporates the definitions used in the federal criminal jury instructions for this consideration. In the context of death penalty challenges, the term "heinous, cruel, or depraved" has withstood the challenge of being unconstitutionally vague because it includes the accompanying definitions. (See, e.g., United States v. Jones, 132 F.3d 232 (5th Cir. 1998), citing Maynard v. Cartwright, 486 U.S. 356 (1988).)

Analysis Prepared by : Elizabeth Linton / JUD. / (916) 319-2334

FN: 0013164

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
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No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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July 22, 2009

CORPORATE DISCLOSURE STATEMENT

Respondent Entertainment Merchants Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.[*]

Respondent Entertainment Software Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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[*] At the outset of this litigation, Respondent Entertainment Merchants Association was known as the Video Software Dealers Association. Respondent asks that Court's docket be updated to reflect Respondent's current name.

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INTRODUCTION

Despite Petitioners' efforts to conjure up some argument for review of the Ninth Circuit's decision, in reality the decision is a routine application of established First Amendment principles to a content-based ban on protected expression. In 2005, California enacted a law ("the Act") that makes it illegal to sell or rent video games with certain kinds of violent content to minors. Cal. Civ. Code §§ 1746-1746.5. A number of other jurisdictions have passed similar laws in recent years. All of those laws have been struck down on First Amendment grounds. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) ("*IDSA*"); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001) ("*AAMA*") (preliminary injunction); *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

In a careful and closely reasoned opinion that expressly embraced the reasoning adopted by these other courts, a unanimous panel of the Ninth Circuit affirmed a district court decision permanently enjoining the Act. The Court of Appeals, like all of the other courts before, observed that video games contain the type of expression (music, art, narrative) that is protected by the First Amendment, and that the Act selectively restricts distribution of video games based on their content. Pet. App. 16a-17a. Applying strict scrutiny, the court held that the evidence invoked by California to justify the Act suffered from "significant, admitted flaws in methodology" and "did not support the Legislature's purported interest in preventing psychological or neurological harm" to minors – a conclusion shared by the many other courts that have considered that same evidence. Pet. App. 31a. The Ninth Circuit also found that the State had wrongly chosen to ban the games without exploring less restrictive alternatives, such as working with parents and retailers, and using the existing voluntary Entertainment Software Rating Board rating system, to ensure that minors play games that their parents deem appropriate for their age. Pet. App. 32a-34a.

Petitioners offer no persuasive reason for the Court to review this ruling. There is no split of authority on the questions presented. To the contrary, the lower courts are unanimous as to the constitutionality of bans on distribution of violent video games. That is unsurprising since the proper approach to resolving these questions is well established in prior decisions of this Court. This Court, for example, has long recognized that the obscenity exception to the First Amendment is confined to sexually explicit materials. And it has just as clearly held that, when courts are applying strict scrutiny to content-based regulations of speech, they must scrutinize the proffered justifications to assure that there is evidence that the law actually serves real and legitimate state interests. There is no need for the Court to revisit these familiar principles just because they have now been applied, in a consistent series of cases, to a new medium of creative expression.

STATEMENT

A. Respondents and the Nature of Video Games.

Respondents are associations of companies that create, publish, distribute, sell and/or rent video games, including games that may be regulated as "violent video games" under the Act. Video games are a modern form of artistic expression. Like motion pictures and television programs, video games tell stories and entertain audiences through the use of complex pictures, sounds, and text. *See* Pet. App. 16a-17a. These games frequently contain storylines and character development as richly detailed as (and sometimes based on) books and movies. *Id.* 9a. Like great literature, games often involve themes such as good versus evil, triumph over adversity, struggle against corrupt powers, and quest for adventure. Excerpts of Record ("ER") 68-69, 76-90. For example, both *Resident Evil 4* and *Tom Clancy's Rainbow Six 3* – two of the games that Respondents have placed in the record – contain detailed plots and battles of good against evil, and each parallels movies (*Resident Evil*) or a book (*Rainbow Six*) that minors in California are legally able to obtain without restriction. ER 78-80, 87-88.

These games also contain depictions of violence. *Resident Evil 4,* for example, allows the main character to "kill" images of zombies or mutants. ER 79-80. Another game, *God of War*, provides a storyline drawn from Greek mythology. ER 83-86; *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (noting that *God of War* "tracks the Homeric epics in content and theme"). The game follows the adventures and travails of Kratos, a Spartan warrior, in his efforts to kill Ares, the God of War, in a complex quest that takes him through ancient Athens and Hades. ER 83-86.

B. The Video Game Industry's Voluntary Rating System.

Like other popular media, including motion pictures and television, the video game industry has adopted a voluntary and widely used rating system for video games. Pet. App. 10a. That system, which the Federal Trade Commission ("FTC") has called the "most comprehensive" of industry-wide media rating systems, is implemented by the Entertainment Software Rating Board ("ESRB"), a self-regulatory body that assigns independent age ratings and content descriptions for video game content. *Id.*; ER 95. The ESRB gives one of six age-specific ratings to each game it rates: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen); M (Mature); and AO (Adults Only). Pet. App. 10a, n.9. The ESRB also assigns content descriptors to each game, such as "Crude Humor," "Language," "Suggestive Themes," and "Cartoon Violence," among over two dozen others. *Id.* 10a.

The purpose of the ESRB system is to provide easily understood information about games to consumers and parents to empower them to make informed choices about the games they may buy, rent, or play. ER 95. Like the movie rating system, the ESRB system is entirely voluntary; nonetheless, the program has a high participation rate, *id.*, as games cannot be certified for publication on any game console without an ESRB rating, and major retail outlets will not carry games that do not have an ESRB rating. Similarly, video game retailers throughout the nation are part of a widespread and voluntary effort to educate consumers about the ESRB system and to implement a store-by-store policy of preventing the sale of "M" games to individuals under age 17. ER 60.

Although imperfect, these efforts have been successful. The FTC has found that parents are involved in 83% of video game purchases for minors. ER 95-96. Moreover, when unaccompanied minors do attempt to purchase M-rated games, their chances of success are much less than when minors attempt to purchase R-rated DVDs or CDs with explicit lyrics. *Blagojevich*, 404 F. Supp. 2d at 1075; Press Release, FTC, *FTC Issues Report on Marketing Violent Entertainment to Children* (Apr. 12, 2007), available at http://www.ftc.gov/opa/2007/04/marketingviolence.shtm; *see also* Press Release, FTC, *Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games* (May 8, 2008), available at http://www.ftc.gov/opa/2008/05/secretshop.shtm (FTC findings from 2008 showing that 80 percent of retailers declined to sell M-rated games to minors). Further, the current-generation game consoles manufactured by Microsoft, Nintendo, and Sony include parental controls allowing parents to limit a child's playing of games based on the games' rating. ER 1236.

C. The Act.

The Act imposes a civil penalty of up to $1,000 on any person who "sell[s] or rent[s] a video game that has been labeled as a violent video game to a minor." Cal. Civ. Code § 1746.1(a). A "violent video game" is defined by the Act as one "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that meets one of two sets of criteria. *Id.* § 1746(d)(1). The first set of criteria – the only portion that California defended below – requires that the depictions be such that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," be "patently offensive to prevailing standards in the community as to what is suitable for minors," and "cause[] the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *Id.* § 1746(d)(1)(A). Under a second provision, which California has conceded is unconstitutional, a game is restricted if the actions depicted enable "the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim." *Id.* § 1746(d)(1)(B) (ER 22).

The Act's "violent" video game ban purportedly serves two purposes: "preventing violent, aggressive, and antisocial behavior" and "preventing psychological or neurological harm to minors who play violent video games." Pet. App. 23a-24a; 2005 Cal. Legis. Serv. Ch. 638 (A.B. 1179 § 1(c)); ER 22. Furthermore, the Act purports to make "findings" that "[e]xposing minors to depictions of violence in video games" makes them "more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior," and that "[e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games." *Id.* §§ 1(a), (b) (ER 22).

In addition to imposing substantial penalties on persons who sell or rent "violent" video games to minors, the Act imposes an additional, content-based burden on video games. The Act provides that "[e]ach violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white '18' outlined in black. The '18' shall have dimensions of no less than 2 inches by 2 inches" and must be placed on the face of the video game package. Cal. Civ. Code § 1746.2.

D. The District Court's Decisions.

Respondents brought suit in the Northern District of California seeking to enjoin enforcement of the Act under the First Amendment. The district court issued two opinions, one granting a preliminary injunction and one granting summary judgment for Respondents.

In its decisions, the district court recognized that video games are "protected by the First Amendment" and that "[c]hildren 'are entitled to a significant measure of First Amendment protection.'" Pet. App. 46a-47a (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975)). The Court then rejected Petitioners' argument that the deferential standard of review under *Ginsberg v. New York*, 390 U.S. 629 (1968), should be extended beyond restrictions on sexual speech to minors, and should govern this case. Pet. App. 53a-57a. Applying strict scrutiny, the court held that the State had not shown that the Act furthered the State's purported interests because the State's "evidence does not establish the required nexus between the legislative concerns about the well-being of minors and the restrictions on speech required by the Act." *Id.* 64a. The court concluded that "there has been no showing that violent video games as defined in the Act, *in the absence of other violent media*, cause injury to children," and that "the evidence does not establish that video games ... are any more harmful than violent television, movies, internet sites or other speech-related exposures." *Id.* (emphasis in original).

In addition, the district court held that the State had failed to demonstrate that plausible, less restrictive alternatives would be ineffective to achieve the State's goals. In particular, the court held that the State failed to demonstrate that "industry labeling standards, either alone or combined with technological controls that enable parents to limit which games their children play," are insufficient to protect the State's interest. *Id.* 62a.

E. The Ninth Circuit's Decision.

Petitioners appealed to the Ninth Circuit, which affirmed unanimously. After establishing that it was undisputed that video games contain expressive elements that are generally protected by the First Amendment, the Court of Appeals began by rejecting the invitation "to boldly go where no court has gone before" and hold that violent expression could be treated as obscenity for minors. Pet. App. 23a. In a thorough discussion that canvassed both this Court's precedents and the many lower court precedents, the Ninth Circuit explained that obscenity had always been limited to material containing sexual expression. *Id.* 17a-22a. It observed that these limits on obscenity applied with equal force in the context of minors' First Amendment rights. Citing *Ginsberg*, the Court of Appeals explained that the case was concerned with "the relationship between the state and minors with respect to ... 'sex material'" and was not an open-ended invitation to restrict other material for minors. *Id.* 22a.

The Court of Appeals then concluded that the Act failed strict scrutiny. Beginning with this Court's longstanding recognition that a content-based restriction on expression is "presumptively invalid," *id.* 23a (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)), the court first considered whether the Act furthers a compelling state interest. It concluded that the protection of the psychological and neurological health of minors was a compelling interest in the abstract, but it went on to observe that the government could not engage in "thought control" for the sake of helping minors, and that any claim of a compelling interest would need to be supported by evidence that demonstrates "a causal link between minors playing video games and actual psychological or neurological harm." *Id.* 31a-32a. The court stressed that the State did not need to prove its point to a "scientific certainty," but that it did need to point to evidence that at least made it reasonable to infer that video games were in fact harmful. *Id.* 32a.

The Ninth Circuit then reviewed the evidence presented by the State and found it severely lacking on multiple fronts. First, the court observed that none of the evidence even claimed to prove that depictions of violence in video games *cause* any sort of harm. Instead, the studies were *correlative* in nature. *Id.* 31a-32a. Second, it found that the studies largely attempted to show a correlation between aggression and video games, rather than linking them to psychological or neurological harm. Because Petitioners had disclaimed any interest in regulating video games to prevent violence, the

Court of Appeals found the studies inapposite to support California's claimed interests. *Id.* 30a. The court also identified other methodological flaws in the studies cited by the State, such as a reliance on small sample sizes. *Id.* 28a. Taken together, the Ninth Circuit held that Petitioners' evidence failed to support the Act, a conclusion it noted that numerous other courts had reached in reviewing the same evidence. *Id.* 29a, 31a-32a (citing *AAMA, Blagojevich, Hatch, Granholm*).

Finally, the Ninth Circuit found that the Act was also unconstitutional because it was not the least restrictive means of accomplishing California's objectives. Citing this Court's decision in *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000), the Court of Appeals observed that California had not even tried to work with parents and retailers to achieve its goals. Pet. App. 33a-34a. The court also noted that California had ignored the availability of parental controls on video game consoles that allow parents to limit the type of games playable on the console. *Id.* 33a.

Having concluded that the Act failed strict scrutiny, the Ninth Circuit declined to reach Respondents' other arguments, including a claim that the Act was unconstitutionally vague.

REASONS FOR DENYING THE WRIT

I. The Decision Below Applied Settled Law in a Manner Entirely Consistent with Every Comparable Ruling in Other Circuits.

Petitioners offer no persuasive argument for a grant of review of a decision in which the Ninth Circuit merely applied settled law in an area where there is a strong consensus among the lower courts.

Violence as obscenity. California was not the first state to try to restrict distribution of video games it considered too violent for minors. Such laws have proved politically popular, but every one has been struck down under the First Amendment. In those cases, two other circuit courts and six district courts have addressed the question whether violent video games may be treated as obscenity for minors. Each has concluded, as the Ninth Circuit did here, that the obscenity-for-minors exception to the First Amendment cannot be stretched to encompass violent expression. *See IDSA*, 329 F.3d at 958 ("Simply put, depictions of violence cannot fall within the legal definition of obscenity for either minors or adults."); *Swanson*, 519 F.3d at 771;[2] *AAMA*, 244

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[2] The Eighth Circuit has held that violent video games may not be regulated as obscenity on two different occasions. *See supra*. It has also held that videos of movies containing violence are not obscene for minors. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 688 (8th Cir. 1992) (striking down ban on rental of violent videos to minors and holding that videos "contain[ing] violence but not depictions or descriptions of sexual conduct cannot be obscene").

F.3d at 574 (holding that "[v]iolence and obscenity are distinct categories of objectionable depiction" and refusing to treat violent video games as obscenity); *Henry*, 2007 WL 2743097, at *4; *Foti*, 451 F. Supp. 2d at 830; *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1068 (D. Minn. 2006), *aff'd* 519 F.3d 768 (8th Cir. 2008); *Granholm*, 426 F. Supp. 2d at 652; *Blagojevich*, 404 F. Supp. 2d at 1076; *Maleng*, 325 F. Supp. 2d at 1185.

In addition, in closely related contexts, two other circuits have refused to treat violent expression as obscenity for minors. *See James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002), *cert. denied* 537 U.S. 1159 (2003) (declining to "extend our obscenity jurisprudence to violent, instead of sexually explicit, material" in tort suit against creators of movies and video games containing violent expression); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 67 (2d Cir. 1997) (holding that "trading cards" featuring infamous criminals were not obscenity for minors).

Petitioners gloss over these precedents in two terse footnotes, Pet. 5-6 nn. 1&2, but the Ninth Circuit expressly embraced them in holding that violent expression is not obscenity. Pet. App. 20a-21a, 22a-23a (citing *IDSA*, *AAMA*, *Granholm*, *Maleng*, *Webster*, *James*, and *Eclipse*). There is no need for this Court to take up a question that has been answered so consistently in the lower courts.

Moreover, the Ninth Circuit's decision is an unremarkable application of this Court's precedents, which have frequently observed that expression must include a sexual component to be classified as obscenity. In *Miller v. California*, this Court set forth the modern test for obscenity and expressly held: "State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which *depict or describe sexual conduct*." 413 U.S. 15, 23-24 (1973) (emphasis added) (internal citations omitted).

Miller echoed earlier obscenity precedents that likewise tied obscenity to sexual expression. In *Roth v. United States*, this Court observed that "[o]bscene material is material *which deals with sex* in a manner appealing to prurient interest." 354 U.S. 476, 487 (1957) (emphasis added). And in *Cohen v. California*, it held that a jacket displaying a non-sexual "scurrilous epithet" was not obscene because obscene "expression must be, in some significant way, erotic." 403 U.S. 15, 20, 22 (1971).

The requirement that obscenity be limited to sexual expression is unchanged in the context of obscenity for minors. In *Ginsberg*, this Court held that sexually explicit materials could be regulated as obscenity for minors, even when they did not rise to the level of obscenity for adults. *Ginsberg*, 390 U.S. at 641. As the Ninth Circuit explained, *Ginsberg* was thus a narrow holding that was concerned solely with the "relationship between the state and minors with respect to a certain subject matter – 'sex material.'" Pet. App. 22a (citing *Ginsberg*, 390 U.S. at 636-37).

The Ninth Circuit's decision not to treat non-sexual expression as obscenity for minors directly follows from these precedents and creates no conflict in the law warranting this Court's review.

Proof of harm. Review is equally unwarranted for the second question Petitioners raise: whether strict scrutiny requires California to show a causal relationship between violent video games and harm to minors. The Ninth Circuit held that, although the State was not required to demonstrate that video games were harmful to a "scientific certainty," it was required to come forward with evidence that establishes "a causal link between minors playing violent video games and actual psychological or neurological harm." Pet App. 31a-32a. That holding, too, is a straightforward application of this Court's strict scrutiny precedents that creates no conflict among the circuits.

First, as Petitioners tacitly concede, the Ninth Circuit's application of the strict scrutiny standard of proof is consistent with the determinations of every other court to have considered the issue. For example, in *IDSA*, the Eighth Circuit held that the government was required to come forward with more than "anecdote and supposition" to justify restricting protected expression. *IDSA*, 329 F.3d at 959 (quoting *Playboy*, 529 U.S. at 822). And in *AAMA*, the Seventh Circuit found that the government had no "compelling" interest in regulating video games given that the studies it cited "d[id] not find that video games have ever caused anyone to commit a violent act." *AAMA*, 244 F.3d at 578.

The district courts have reached the same conclusion. In *Blagojevich*, after a full trial, he court found that Illinois "had come nowhere near making the necessary showing" to restrict violent video games because it had failed "to present substantial evidence showing that [they] cause[] minors to have aggressive feelings or engage in aggressive behavior." 404 F. Supp. 2d at 1074; *see also Maleng*, 325 F. Supp. 2d at 1189 ("[T]he Court finds that the Legislature's belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence."). Three other district courts favorably cited the causation analysis of these decisions. *Granholm*, 426 F. Supp. 2d at 652-53 (quoting *Blagojevich* decision); *Foti*, 451 F. Supp. 2d at 832 ("[M]uch of the same evidence [presented by the government] has been considered by numerous courts and in each case the connection was found to be tenuous and speculative."); *Henry*, 2007 WL 2743097 at *6 n.4 (observing the lack of any evidence to support regulating video games but observing that other courts had reviewed "extensive research" and had found it "tenuous, speculative, and uncompelling").

All told, the Ninth Circuit's approach to the State's evidence is consistent with the approach taken by the two other Courts of Appeals and six district courts that have addressed the question. No court has adopted a more lenient standard, let alone concluded that the social science evidence supported regulation.

The decision is also consistent with this Court's holdings concerning strict scrutiny. As explained in greater detail below, this Court has consistently required a heightened evidentiary showing to satisfy strict scrutiny. *See infra* Part III. The Ninth Circuit merely applied those principles of heightened review and presumptive unconstitutionality in holding that California needed to come forward with at least some evidence that video games cause harm to minors.[3]

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In sum, the Ninth Circuit's decision adds to a unanimous and sizeable consensus in the lower courts, and faithfully applies the principles this Court has set out in the First Amendment area. This Court's review of the case is therefore unwarranted.

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[3] Petitioners suggest that this Court's recent decision in *FCC v. Fox Television Stations, Inc.* has authorized a more lenient standard. Pet. 13-14. But that decision involved deferential review of agency action under the Administrative Procedure Act in which any reasoned explanation is sufficient to support regulation. 129 S. Ct. 1800, 1813-14 (2009). Moreover, the decision reviewed regulation in the broadcasting context, an area in which the government has traditionally had greater power to regulate expression. *Id.* at 1819-22 (Thomas, J. concurring) (citing *Red Lion* and *Pacifica*). That precedent has no application in the context of strict scrutiny, which is the polar opposite of arbitrariness review in terms of the deference accorded to agency action pertaining to broadcasting.

II. This Case Would Be a Poor Vehicle for Considering the Questions Presented.

Even if this Court were inclined to review the consensus conclusions of the lower courts reflected in the Ninth Circuit's decision, this case would not be a good vehicle for such a review.

First, the record does not contain even a single game that Petitioners can claim would be covered by the statute. The statute twice provides that works must be judged "as a whole." Cal. Civil Code § 1746(d)(1)(A)(i), (iii). But the only portions of video games that Petitioners submitted in the district court were isolated scenes from selected games. As the Ninth Circuit noted, such brief excerpts do not "include any context or possible storyline within which the violence occurs." Pet. App. 9a-10a, n.8.[4] That means that it is impossible to assess whether the games involved would meet the statutory requirements. This Court should not attempt to carve out a new obscenity doctrine on a record devoid of meaningful evidence of what the State is purporting to regulate. That is particularly true here, where one of the main questions about the proposed new category of supposed "violent obscenity" is whether it is really possible to differentiate between violent works that are and are not "obscene."

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[4] Respondents placed six video games containing depictions of violence into the record, but Petitioners have refused to say whether they would be covered by the Act. The State's hesitancy on this score points to the Act's vagueness. *See infra*.

Second, the judgment below is supported by an alternative ground: the Act's definition of prohibited expression is unconstitutionally vague. The Act prohibits video games that appeal to a minor's "deviant" and "morbid" interests. Cal. Civ. Code § 1746-1746.5. In addition, it applies to depictions of violence to "an image of a human being." *Id.* § 1746(d)(1). The Ninth Circuit had no occasion to address vagueness in light of the Act's numerous other flaws, but similar language has been struck down as vague by other courts, which have noted that such terms have no defined meaning. *Granholm*, 426 F. Supp. 2d at 655-56 (finding the term "morbid" to be vague in this context); *Foti*, 451 F. Supp. 2d at 836 (same); *Webster*, 968 F.2d at 690 (affirming district court's conclusion that statute lacks requisite specificity because, *inter alia*, term "morbid" was not defined); *Blagojevich*, 404 F. Supp. 2d at 1077 (prohibition on depictions of "human" violence vague in the context of video games where superhuman characters are common). Indeed, Petitioners have not even been willing to take a position on whether the games that Respondents submitted in the record are covered by the Act.

This Court is properly reluctant to grant review when an alternative ground supports the outcome below. *Cf. Northwest Austin Municipal Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2573 (2009) ("It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.") (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam) (internal quotation marks and alteration omitted)).

Third, additional alternative grounds support the Ninth Circuit's application of the strict scrutiny standard. Petitioners ask this Court to address whether a causal standard is appropriate, but the Ninth Circuit's conclusion that the Act failed strict scrutiny was based in part on reasons other than a failure to show causation. The Court of Appeals found that the Act was not the least restrictive means of achieving California's goals. *See supra* at 11. And even with respect to the studies themselves, the Ninth Circuit found that their flaws went deeper than failing to demonstrate causation. For example, the court noted that the proffered studies were geared almost exclusively towards attempting to show a link between video games and violent behavior, an argument that Petitioners specifically disclaimed. Pet. App. 24a, 28a-30a; *id*. 31a (studies do not "support the Legislature's purported interest in preventing psychological or neurological harm"). The Court also found that the studies suffered from "significant, admitted flaws in methodology," such as relying on a small sample size and the selective use of data. *Id*. 31a.

In short, the issues raised by California come to this Court on an insufficient record and the outcome below is supported by numerous alternative grounds. These defects make the petition a particularly poor vehicle for considering the questions presented, even if the Court were otherwise inclined to do so.

III. The Decision Below Is Correct on the Merits.

Apart from failing to meet the standards for certiorari review, the Ninth Circuit's decision is plainly correct.

A. The Court of Appeals Correctly Did Not Treat Violence as Obscenity.

In over fifty years of obscenity jurisprudence, this Court has never applied the obscenity doctrine outside the context of sexual speech. What the State proposes in this case would effect a sea change in the permissible regulation of all media – including books, movies, and television programs – that contain violent content and are accessible to minors. The Court should not extend the obscenity doctrine beyond its current narrow scope to encompass a broad and ill-defined category of violent expression.

1. First, the premise of Petitioners' argument – that minors are deserving of lesser First Amendment protection and must be shielded from violent speech in order to protect them – is fundamentally inconsistent with the Court's First Amendment jurisprudence. The rule in *Ginsberg* is a narrow extension of a category of wholly unprotected speech in the context of minors, but the general rule is that First Amendment protections apply to minors and that parents, not the government, are the proper arbiters of what minors may view.

The Court has long held that "[m]inors enjoy the protection of the First Amendment." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231 (2003).

Outside of limited contexts such as public schools, the government may not generally act as a censor on what material is appropriate for minors. As the Court held in striking down an ordinance that restricted the display of non-obscene nudity visible to minors:

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.

Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975) (footnote omitted).

The proper arbiters of what minors view are parents, not the government. "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 805. The State's argument that depictions of violence fall outside First Amendment protection would reverse this established presumption. The State may not simply substitute its judgment in the guise of assisting parents. *See, e.g.*, *IDSA*, 329 F.3d at 959-60 (rejecting argument that "the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to government to regulate what minors read and view"); *AAMA*, 244 F.3d at 578

("[C]onditioning a minor's First Amendment rights on parental consent of this nature is a curtailment of those rights").

Contrary to Petitioners' argument, *see* Pet. 7-10, *Ginsberg* is a narrow extension of a category of *unprotected* speech to minors. As discussed *supra* at 13-14, the Court has limited the obscenity doctrine to sexual materials, and there is no basis for departing from that well-settled principle here. Likewise, the Court has never applied *Ginsberg* outside of sexual content and has held that it constitutes "relatively narrow and well-defined circumstances" permitting government restriction of speech to minors. *Erznoznik*, 422 U.S. at 213; *see also Miller*, 413 U.S. at 23-24 (obscenity doctrine is "carefully limited").

Petitioners' position that the Court should hold that the expression covered by the Act falls outside the First Amendment is expansive and would set a dangerous precedent. Under Petitioners' argument, the government could censor a wide variety of information and images to minors without any judicial scrutiny of the effect of such images or the efficacy of the government's restriction. The history of the development of media is filled with such knee-jerk attempts to suppress new expressive works based on a generalized fear that they are "dangerous," particularly for children. *See, e.g., Winters v. New York*, 333 U.S. 507, 510 (1948) (true crime novels); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (motion pictures); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 65-66 (2d Cir. 1997) (trading cards); *Juvenile Delinquency (Comic*

Books): Hearings Before the Subcomm. To Investigate Juvenile Delinquency in the United States of the S. Comm. on the Judiciary, 83rd Cong. (Apr. 21, 22, June 4, 1954) (comic books). Strict scrutiny must be applied to guard against the tendency to overreact to novel forms of expression.

2. Second, contrary to Petitioners' suggestion, the rationales for placing obscenity outside the protection of the First Amendment do not apply to depictions of violence – in video games or any other media. The Court has long recognized that certain obscene sexual expression may be banned based on its appeal to the "prurient interest," not because it leads to "antisocial conduct." *Roth*, 354 U.S. at 485-87; *see also supra* at 14 (reviewing precedents limiting obscenity to sexual expression). Sex, unlike violence, is a subject uniquely considered to be outside children's purview. Violence, on the other hand, is a regular part of children's literature and stories, which "engages the interest of children from an early age, as anyone familiar with the classic fairy tales . . . is aware." *AAMA*, 244 F.3d at 577. As Judge Posner has noted, the sexual magazines at issue in *Ginsberg* were plainly "an adult invasion of children's culture and parental prerogatives" whereas video games "with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes." *Id.* at 578.[5]

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[5] Petitioners concede that the state statutes cited on pages 10-11 of the petition all concern prohibitions on depictions of sexual conduct, in those cases sexually violent conduct. While certain depictions of sexual violence may properly be treated as

Indeed, limiting exposure to violent content to 17-year-olds "would not only be quixotic, but deforming; it would leave [minors] unequipped to cope with the world as we know it." *Id.* at 577. Such concerns are simply not present with the *Ginsberg* category of obscene sexual speech that may be prohibited to minors.

At bottom, the State's rationale for treating depictions of violence as obscenity rests not on a workable analogy to restrictions on some sexual speech, but rather on two separate, impermissible motivations. First is a concern that exposure to images of violence will itself cause minors to commit actual violence, an argument cited by the California Legislature that underlies much of the State's social scientific research. *See* Pet. App. 24a-25a; Brief of *Amicus* Eagle Forum Education & Legal Defense ("EFELDF Br.") 12-13 (parading purely anecdotal evidence that video games were somehow "associated" with various crimes). That argument founders on *Brandenburg v. Ohio*, 395 U.S. 444 (1969); the government may not restrict speech to prevent violent behavior by recipients except where the targeted expression "'is *directed to* inciting or producing *imminent* lawless action and is *likely* to incite or produce such action.'" *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Brandenburg*, 395 U.S. at 447).

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obscene, it is the sexual component of the images that makes it so, not violence standing alone.

California's second motivation is to deter minors from thinking certain aggressive thoughts out of a sense that those thoughts are somehow deforming. Petitioners, relying on social science research, concede that the State is concerned with minors' "aggressive thoughts" and "desensitization to violence." Pet. 2; *see also* EFELDF Br. 4 (claiming that "images burn into children's impressionable minds"). But while expressive works like video games, movies or literature certainly "may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought," *Joseph Burstyn*, 343 U.S. at 501, that is not a permissible ground for government regulation. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Free Speech Coalition*, 535 U.S. at 253 (citation omitted); *see also American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985) ("Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us."), *aff'd* 475 U.S. 1001 (1986).

The State's "psychological harm" rationale in this case is simply a repackaging of those two impermissible rationales. While prevention of psychological harm to minors is a compelling interest in the abstract, the evidence cited by the Petitioners and *amici* relies heavily on preventing allegedly aggressive responses to stimuli and aggressive thoughts and desensitization. *Supra* at 20. The government's abstract concern with minors' psychological well-being in this case simply does not justify banning a novel category of speech without searching judicial review. This Court's obscenity jurisprudence is clear that content-based regulations sweeping beyond obscenity must be subject to strict scrutiny. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989).

3. Third, it would be impossible to extend the "carefully limited" boundaries of permissible obscenity regulation to depictions of violence without creating an intractable problem of how to define what speech could be outlawed. *Miller*, 413 U.S. at 23-24. The Court has been careful to closely guard those boundaries in the obscenity context. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (method a state uses to identify obscene materials must "scrupulously embody the most rigorous procedural safeguards" to prevent restriction of non-obscene materials). As noted above, the Act's definition of covered material is hopelessly vague and is not tied to the State's purported interests. Nothing in the Act's definition, or in any of the social science research cited by the State, provides a basis for determining what images of violence are allegedly so damaging to minors that they may be banned. The State fails to explain how to determine what constitutes prohibited violence against an "image of a human being," or why minors should be shielded from depictions of violence against an image of a human being rather than depictions of violence against a zombie, god, robot, or any other fantastical creature. The State's proposal to treat depictions of

simulated violence as obscenity has no stopping point.

B. The Court of Appeals Correctly Required Substantial Evidence of Proof of a Causal Relationship Between Video Game Violence and "Psychological Harm" to Minors.

The Court of Appeals was also plainly correct in requiring the State to provide sufficient evidence that the prohibited depictions of violent images in video games actually *cause* harm to minors. As explained in Part I *supra*, the Court of Appeals applied the proper strict scrutiny standard in assessing the constitutionality of the Act, and therefore review of that application is not warranted. The standard applied by the Court of Appeals – and not the lower "quantum of evidence" standard suggested by the State, Pet. 11 – also is undoubtedly correct.

Strict scrutiny is a searching standard designed to ensure that only content-based regulations that are strictly necessary to address a compelling state interest survive. *R.A.V.*, 505 U.S. at 395. Without a causal connection between the speech and the harm the government is seeking to address, there is no way to ensure that the regulation is narrowly tailored to promote the government interest, that it is actually directed to solving the purported harm, or that it is the least restrictive means of alleviating the harm. *See Playboy*, 529 U.S. at 813; *Free Speech Coalition*, 535 U.S. at 250 (rejecting government's argument that it could ban images of "virtual child pornography," and holding that "the *causal link* is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.") (emphasis added). Failing to require some proof of causation in this context would thus eviscerate the requirements of strict scrutiny.[6]

Admittedly lacking any proof of causation, the State argues that the Court should lower the quantum of evidence required for a Legislature to "predict" or "infer" that violent video games cause harm to children. Pet. 5, 12. That argument should be rejected as inconsistent with the requirements of strict scrutiny.

First, the correlational evidence submitted by the State in this case is simply too flimsy to be used to justify content-based restrictions. The difference between "causal" and "correlational" evidence here is not merely a matter of semantics; as the district court in *Blagojevich* concluded, after a full trial on the same evidence, without *any* evidence of causation, "it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games." 404 F. Supp. 2d at 1074; *see also* Pet. App. 30a (citing Dr. Anderson study where he could not rule out possibility that "previously hostile adolescents prefer violent media").

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[6] Indeed, even in cases involving regulation of commercial speech applying intermediate levels of scrutiny, the Court has demanded proof that the challenged regulation actually ameliorates the purported harm. *E.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (upholding lower court finding of no "credible evidence" that dissemination of alcohol would cause allegedly harmful "strength wars"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality) ("'[S]peculation or conjecture' . . . is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest."); *id.* at 531-32 (O'Connor, J., concurring) (Court must employ "closer look" at effectiveness of speech regulation and not merely defer to legislative judgment).

Moreover, the evidence cited by Petitioners[7] is far removed from showing any actual significant harmful impact, as numerous other courts have concluded. *See supra* at 15-16. Indeed, the author of the studies on which California primarily relies made numerous admissions in his testimony during the *Blagojevich* case that underscore the flimsiness and unreliability of California's purported evidence. Dr. Anderson has admitted, for example, that an "infinite" number of stimuli, including *even a picture of a gun*, could be responsible for aggressive thoughts, Pet. App. 28a-29a; he has abandoned studies of age effects of exposure to video games based on a suspicion that the studied effects were larger in individuals over 18, *id.* 28a; he and his fellow researchers have failed to show that exposure to video game violence has any greater effect than other violent content to which children are routinely exposed, *Blagojevich*, 404 F. Supp. 2d at 1063; and he has admitted the "glaring empirical gap" of the lack of longitudinal studies in the research, Pet. App. 28a; *see also Blagojevich*, 404 F. Supp. 2d at 1059-63, 1073-75 (discussing various flaws in evidence).[8]

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[7] Examples include studies of the intensity of noise blasts administered by minors after playing violent video games. *See, e.g.*, ER 605, 615, 617.

In sum, the Ninth Circuit hardly went out on a limb in concluding that the State's evidence did not support its proposition that exposure to violent video games is an actual cause of harm to minors, and that "inferences to that effect would not be reasonable." Pet. App. 32a. The State's evidence would be insufficient under any level of First Amendment scrutiny with teeth at all.

Second, lowering the evidentiary standard in evaluating content-based restrictions of speech would be fundamentally inconsistent with the demands of strict scrutiny. The Court has emphasized that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy*, 529 U.S. at 818. Deferring to the Legislature's inferences without searching review of the basis for those inferences would undermine that fundamental principle of judicial strict scrutiny. As the Court has explained, "[w]hen First Amendment compliance is the point to be proved, the risk of nonpersuasion . . . must rest with the Government, not with the citizen." *Id.*

Petitioners do not cite a single case in support of their argument that the courts should defer to the Legislature's judgment when it targets speech based on its content. That is not surprising, as the Court has squarely held the opposite. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"); *Sable*, 492 U.S. at 129 (rejecting argument for legislative deference "particularly . . . where the Legislature has concluded that its product does not violate the First Amendment").

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[8] The *Blagojevich* testimony is included in the record below in the Supplemental Excerpts of Record (SER) at 73-485.

Petitioners have no compelling argument to alter this framework. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), does not suggest otherwise. *Turner* was an intermediate scrutiny case and thus did not involve a content-based restriction on speech where the risk of government censorship is at its greatest and the Court must apply "the most exacting level of First Amendment scrutiny." *Id.* at 661-62. *Turner* also involved a policy-based predictive judgment about an area in which Congress had substantial experience, not an evaluation of scientific evidence that may be scrutinized as effectively (if not more effectively) by a court rather than a self-interested legislative body restricting disfavored speech.

Finally, Petitioners' assertion that evidence of harm is "unobtainable" under "responsible social science," Pet. 13, is wholly unsupported. Petitioners point to not a shred of evidence that the numerous manifest flaws in the social science research are the result of intractable ethical or methodological limitations. Indeed, the record demonstrates that numerous studies have actually attempted to measure the effects of violent video games on minors.

The Ninth Circuit was clear that it is not imposing an impossible hurdle ("scientific certainty") on the State. Pet. App. 32a. The State has simply failed to carry its burden of justifying the speech-restrictive position that it favors.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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AMICUS
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BRIEF

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IN THE

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ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF CALIFORNIA, AND
EDMUND G. BROWN JR., IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners,

v.

VIDEO SOFTWARE DEALERS ASSOCIATION AND
ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition.

The questions presented are:

1. Does the First Amendment permit any limits on offensive content in violent video games sold to minors?

2. Is a state regulation for displaying offensive, harmful images to children invalid if it fails to satisfy the exacting "strict scrutiny" standard of review?

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VIDEO SOFTWARE DEALERS ASSOCIATION AND
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

Eagle Forum Education and Legal Defense Fund ("EFELDF"), a nonprofit organization founded in

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[1] This brief is filed with the written consent of all parties, with timely notice provided in compliance with Rule 37.2(a) of the Supreme Court of the United States. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

1981, is a pro-family group that has long advocated fidelity to the text of the U.S. Constitution. Its mission includes affirming the responsibility of parents and the government to protect minors from harmful influences, such as the extremely violent video games at issue in this case. EFELDF has a longstanding interest in defending First Amendment rights of free speech, but maintains that the First Amendment does not require the exacting standard of strict scrutiny with respect to judicial review of laws that simply protect minors against damage from extremely violent video games.

SUMMARY OF ARGUMENT

The First Amendment does not prevent state legislatures from protecting children against exploitation by increasingly violent images and role-playing games. The decision below, in holding that disturbing images for children receive full First Amendment protection, ran afoul of this Court's free speech framework with respect to minors. *Certiorari* is necessary here to establish that California Assembly Bill 1179, signed into law in 2005 and codified at Civil Code §§ 1746-1746.5, was constitutional in mandating that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor" (§ 1746.1(a)) and in subjecting violators to a civil penalty of up to $1,000 (§ 1746.3).

The First Amendment does not render our nation's youth defenseless against the predatory, billion-dollar video game industry that churns out increasingly graphic blood and gore for impressionable minds to imbibe. Disturbing, emotionally scarring video games predictably sell better than tame ones, and the industry produces what sells best. But the decision below that the First Amendment ties the hands of state legislatures from protecting vulnerable children against such exploitation is baseless. It constitutes judicial supremacy for lower courts to invalidate, often with unjustified criticisms of well-intentioned legislators, laws protecting children against being drawn into brutally graphic video games.

The corruption of our nation's youth with increasingly deviant video games is a matter of national importance. Our nation's youth is in crisis, by any measure. A calamitous 30% of our nation's youth *fail* to graduate from public high school, and only 32% of those who attend public high school are ever qualified to attend a four-year college.[2] A substantial percentage of teenagers are hooked on these disturbing video games, and spend many hours each week playing them. Moreover, mass killings perpetrated by youngsters are frequently linked to addiction to violent video games. The First Amendment does not forbid state legislatures from keeping this harmful material from children. The California legislature, not known to be conservative, protected its youth against the predatory video game industry. It was an error with national implications for the Ninth Circuit to invalidate the California statute.

Voluminous research data reinforce the common-sense view that violent video games are hurtful to the young people addicted to them, and these games even place those around them at risk for being victimized too. Just as states properly regulate access by minors to pornography and games of chance (gambling), states should retain full authority to regulate access by minors to violent video games. It is not easy to prove a direct causal link between pornography and gambling and the harm they cause, just as for decades it was difficult to prove that smoking causes cancer. But lower courts should not require a direct causal link between violent video games and hurtful behavior by children in order to sustain a law regulating the games. The First Amendment does not impose such an exacting standard when the state is protecting children against exploitation.

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[2] http://www.manhattan-institute.org/html/ewp_03.htm

The Petition for Certiorari should be granted. The Court below unjustifiably interfered with a valid law duly enacted by a state legislature to protect children against the ravages of harmful images and destructive role-playing. This issue is one of national importance, and this case provides this Court with an ideal opportunity to clarify the authority of states to protect children against destructive and hurtful video games without having to prove a compelling interest under the First Amendment.

ARGUMENT

This Court should grant the Petition and clarify that violent video games marketed to children are not entitled to full First Amendment protection. The decision below correctly observed that "[t]he Supreme Court has not specifically commented on whether video games contain expressive content protected under the First Amendment." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958 n.11 (9th Cir. 2009). This Court can remove that uncertainty by granting the Petition.

Violent video games hurt children in two ways. Their increasingly realistic and disturbing images burn into children's impressionable minds much as pornography does, and the role-playing inherent in a video game causes the child to buy into the rampages of murder and other heinous crimes that he is acting out. The early market leader in video games was Nintendo, which adopted a policy against "excessive blood and violence," but it was trounced in sales by a 3 to 1 margin by more gory material produced by Sega, and Nintendo learned the message that "violence sells video games to children." *Violent Video Game Effects, infra*, at 5 (inner quotes omitted). Such content for children lies far outside the scope of the First Amendment. The decision below places no limit, nor could it under its logical framework, on the age of the participant or the offensiveness of the video game. Regardless of whether there is a First Amendment right to communicate such images to adults, there is no cognizable right to communicate them to children.

Numerous studies confirm the obvious: violent video games do cause addiction and harm. Overlooking this legitimate state interest in avoiding this proven harm, the decision below conflicts with the First Amendment framework established by this Court with respect to children. There has never been a full First Amendment right to flash highly objectionable and disturbing images specifically at children, or to entice them to participate in destructive role-playing behavior.

The decision below, in bestowing full First Amendment protection on the sale to minors of violent video games and their images, no matter how foul and disturbing, conflicts with the First Amendment framework established by this Court on an issue of national importance. This Court should grant *certiorari* to clarify that states need not prove the nearly impossible compelling interest in order to justify protecting children against these harmful images.

I. THIS COURT HAS NEVER EXTENDED FIRST AMENDMENT PROTECTIONS TO VIOLENT VIDEO GAMES FOR CHILDREN, AND THE DECISION BELOW CONFLICTS WITH THE CONCEPTUAL FIRST AMENDMENT FRAMEWORK ESTABLISHED BY THIS COURT.

This Court has held that the First Amendment does not confer protection on communications aimed at children as it does for adults. Children have always been afforded special protection by legislation that safeguards against their exploitation by businesses. Laws to protect children against smoking, alcohol, gambling and other vices are pervasive and can hardly be questioned. Laws having a rational basis which protect children against harmful images such as pornography are likewise both logical and constitutional. "[A] state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

The decision below failed to distinguish between a First Amendment right to communicate images to adults in contrast with the lack of such a right to communicate the same images to vulnerable and sensitive children. In a precedent central to the decision below, this Court held that:

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter ***may vary according***

> ***to the group to whom the questionable material is directed or from whom it is quarantined.***"

Ginsberg v. State of New York, 390 U.S. 629, 636 (1968) (emphasis added).

The *Ginsberg* Court made clear that proof of direct harm by the materials on children would not be required in order to sustain legislative protection of the children against receiving the materials:

> [T]he growing consensus of commentators is that while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either. We do not demand of legislatures "scientifically certain criteria of legislation."

Id. at 642-43 (footnote omitted, quoting *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911)). Although the court below said that it was not requiring the equivalent of "scientific certainty," 556 F.3d at 964, it did not accept anything less as sufficient.

The *Ginsberg* opinion provided ample justifications for not extending First Amendment protection to the distribution of offensive material to children. One of those justifications quoted the later-Chief Judge Fuld of the New York Court of Appeals:

> "While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards,

> broader than those embodied in legislation aimed at controlling dissemination of such material to adults."

Ginsberg, 390 U.S. at 640 (quoting *People* v. *Kahan*, 15 N. Y. 2d 311, 312, 206 N. E. 2d 333, 334 (Fuld, J., concurring)). Another rationale came from a prior U.S. Supreme Court decision: "this Court, too, recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" 390 U.S. at 640-41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

Justice Stewart added yet another justification for declining First Amendment protection for potentially offensive speech directed at minors, with his concurrence in *Ginsberg*:

> When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others "by way of sound trucks with loud and raucous noises on city streets." And so it was that my Brothers BLACK and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience. I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

390 U.S. at 649-650 (footnotes omitted) (Stewart, J., concurring).

Yet the decision below – and other decisions that have held likewise – never addressed these fundamental justifications for not extending full First Amendment protections to offensive communications to children. Instead, the lower court relied on a formalistic, superficial distinction: the *Ginsberg* case concerned pornography, while this case concerns disturbing images of violence. 556 F.3d at 959. None of the above reasons for drawing a distinction between communications directed at children and those directed at adults relies on that superficial difference in facts.

Stemming the tide of destructive material of various types to keep it from young people until they are old enough to avoid addiction or undue influence by it is a paramount duty of the State. This is not a usurpation of free speech, but is a rightful exercise of protection. "Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

It is noteworthy, although not necessarily dispositive, that the historic meaning of "obscenity" is "filth," which inherently encompasses degrading material beyond sexual material. The arbitrary limitation imposed by the court below to purely sexual content, and its extension of full First Amendment protection to all non-sexual communications to children, is untenable. *See* 556 F.3d at 960 n.13.

Displaying a shocking image to a child is conceptually identical to the utterance of "fighting words" to an adult, which this Court famously held to be outside of First Amendment protection in *Chaplinsky v.*

New Hampshire, 315 U.S. 568 (1942), holding that there is no First Amendment protection for communications:

> which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 572.

Despite the above framework recognizing the authority to regulate offensive communications directed at children, lower courts have acted more like appellate courts for state legislatures rather than as dual sovereigns. For example, as it invalidated a legislative limitation on minors' access to violent video games, one district court wrote:

> [T]he Court is concerned that the legislative record does not indicate that the Illinois General Assembly considered any of the evidence that showed no relationship or a negative relationship between violent video game play and increases in aggressive thoughts and behavior.

Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051, 1063 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006).

State legislatures do not have the diminished role of an administrative court in our federalist system, whereby state legislatures must justify their protection of children with a "legislative record." Another district court likewise invalidated state legislation by holding that the legislative record was not adequate: "The evidence that was submitted to the Legislature in connection with the bill that became the Statute is sparse and could hardly be called in any sense reliable." *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 832 (M.D. La. 2006). Judicial restraint toward state legislation on this issue has been replaced with judicial supremacy. A grant of the Petition for *Certiorari* would restore the proper authority of state legislatures in our dual sovereignty.

II. NUMEROUS STUDIES DEMONSTRATE THAT VIOLENT VIDEO GAMES DO CAUSE HARM IN CHILDREN AND THERE IS A NATIONAL INTEREST IN ALLOWING STATES TO MINIMIZE THAT HARM.

There are many studies confirming what should be obvious: hours of violent video-game-playing by an impressionable, addicted child leads to increased likelihood of violent behavior. The research demonstrates the severe mental and social damage caused by such games. For example, Iowa State University psychology Professor Craig Anderson and Assistant Professor Douglas Gentile documented three studies concerning video games and children ranging from early grade school to college. *See* Craig Anderson, Douglas Gentile and Katherine Buckley, *Violent Video Game Effects on Children and Adolescents*, (Oxford: 2007) [hereinafter, *Violent Video Game Effects*].

One study surveyed 189 high school students and found that those with more exposure to violent video games were less forgiving, thought violence was more typical, and acted more aggressively in their everyday lives.[3]

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[3] http://www.medicalnewstoday.com/articles/67221.php

Dr. Anderson observed, "Violent video games are significantly associated with: increased aggressive behavior, thoughts, and affect; increased physiological arousal; and decreased prosocial (helping) behavior." Craig Anderson, "Violent Video Games: Myths, Facts, and Unanswered Questions," APA Online (October 2003).[4] For example, an 11-year-old Mississippi boy shot his younger brother after an argument over a video game. "The younger brother allegedly got mad because he got beat at some video games and got the gun." "Boy shot, dies after video game argument," USA Today (June 9, 2009).[5]

In another study by Anderson and Gentile, college students and 9-12 year olds were randomly assigned violent and non-violent video games. After playing the video games, the participants participated in a computer game in which they could "punish" other participants by sending a noise blast to them. Those of both age groups who had played the violent games generally sent louder noise blasts, showing that their aggression was heightened, at least for a short time, after playing the violent video games.[6]

Video game harm is evident in heinous reported crimes. The Columbine massacre perpetrators were obsessed with the violent video game "Doom." Indeed, there has been a "horrendous spate of school shootings by boys with a history of playing video games," including West Paducah, Kentucky (Dec. 1997), Jonesboro, Arkansas (Mar. 1998), Springfield, Oregon (May 1998), Littleton, Colorado (Apr. 1999),

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[4] http://www.apa.org/science/psa/sb-anderson.html

[5] http://www.usatoday.com/news/nation/2009-06-09-videogame-death_N.htm

[6] http://www.medicalnewstoday.com/articles/67221.php

Santee, California (Mar. 2001), Wellsboro, Pennsylvania (June 2003) and Red Lion, Pennsylvania (Apr. 2003). *See Violent Video Game Effects, supra*, at 3. There have been numerous non-school shooting sprees associated with video game usage, which have left many dead, including the Washington, D.C. "Beltway" sniper shootings in Fall 2002. *See id.*

The popular "Grand Theft Auto" game has been associated with other murders by teenagers, including the murders of police officers. In the game, players kill police officers and commit other crimes, becoming desensitized and even brainwashed into violent thought and action patterns. In 2005, 17-year-old Devin Moore, who played the game avidly, shot two police officers and a civilian and escaped in a police car. All of these actions mimicked those he had rehearsed for hundreds of hours in the video game. *See* Chris Mautner, "Bloody Good Game, 'Grand Theft Auto IV' Could Restart Violence Criticism," *Patriot News* (Harrisburg, PA) C01 (Apr. 28, 2008). "As electronic games become more immersible and more realistic in visual presentation, it can be more difficult for people who are vulnerable to this to be capable of distinguishing reality from the fantasy," observed Penn State Professor Marolyn Morford. *Id.*

Video games certainly do immerse the player in interactive violence, often forming life-long habits of aggression. Video games teach the child how to kill and how to best target his aim, then train the child to enjoy the sport of killing, and desensitize him to the effects of his participatory violence. *See* Lt. Col. Dave Grossman and Gloria DeGaetano, *Stop Teaching Our Kids To Kill* 65-81 (1999). After studying a few hundred college students, Dr. Anderson noted, "'We found that students who reported playing more violent video games in junior and high school engaged in more aggressive behavior.'" "Violent Video Games Can Increase Aggression," APA Online (Apr. 23, 2000).[7]

The stress attributed to violent video games can even be physically harmful. Eighteen-year-old Peter Burkowski, an avid video gamer, collapsed and died of a heart attack while playing games in an arcade. Deputy coroner Mark Allen believed that "it's possible that the stress of the games triggered the attack." Stephen Kiesling, "Death of a Video Gamer," Video Games 14-15 (Oct. 1982).[8] Research has shown that violent video games "increase[] heart rate, blood pressure, and stress hormone levels." *Violent Video Game Effects, supra*, at 149.

An article about Internet cafes in Shanghai describes that "a Taiwanese man died of exhaustion after playing computer games non-stop for 32 hours in an Internet cafe. He was found in the cafe's toilets, bleeding from the nose and foaming at the mouth, and died before he reached hospital." "Death by Computer Games," *Shanghai Star* (May 1, 2003).[9] The report added, "[j]ust days earlier a South Korean man perished in similar circumstances, after spending 86 hours in an Internet cafe." *Id.*

Although such deaths are unusual, the stress violent video games cause can be seen in most players. Players' limbs twitch; "[o]ften, they pound the machines as if they were battling real invaders." Stephen Kiesling, "Death of a Video Gamer," *supra*.

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[7] http://www.apa.org/releases/videogames.html

[8] http://home.hiwaay.net/~lkseitz/cvg/death.html

[9] http://app1.chinadaily.com.cn/star/2003/0501/vo2-4.html

Cardiologist Robert S. Eliot, M.D. at the University of Nebraska Medical Center has performed studies in which patients showed dramatic increases in heart rate and blood pressure after only one minute of playing a video game. *Id.* The intense addictiveness of video games can engross children, causing them to skip meals and exercise, at the expense of their health. "Death by Computer Games," *Shanghai Star* (May 1, 2003). There is little doubt that these games cause real harm, particularly to vulnerable minors.

In addition to harming children psychologically and physically, violent video games undermine a child's social abilities. "Friends and family are neglected. Homework is ignored. Other pastimes are given up. The 'gamer' soon becomes a lonely, underachieving nerd . . . ." "Death by Computer Games," *Shanghai Star* (May 1, 2003).[10]

Children who play violent video games have difficulty obeying authorities, treating peers properly, and succeeding in school. A lecture presented to the American Psychological Association in 2005 by Jessica Nicoll and Kevin Keifer suggested the same thing as the studies by Anderson and Gentile: that at least for a short time after playing violent video games, the players exhibited greater aggressiveness. *See* Jessica Nicoll & Kevin M. Kieffer, "Violence in Video Games: A Review of the Empirical Research," Presentation to the American Psychological Association (August 2005). One study of over 600 8th and 9th graders showed that participants who play violent video games had more disputes with people in authority and were more likely to be involved in fights or otherwise become physical with other students. Time spent playing violent video games also correlated inversely with academic achievement.[11]

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[10] http://app1.chinadaily.com.cn/star/2003/0501/vo2-4.html

Just as researchers could be found for decades to deny that smoking causes lung cancer, researchers can also be found to deny that violent video games cause harm despite common sense and overwhelming evidence indicating otherwise. Husband and wife Dr. Lawrence Kutner and Cheryl Olson used a $1.5 million federal grant and compiled their pro-video-game views in a book marketed to parents. *See* Kutner and Olson, *Grand Theft Childhood: The Surprising Truth About Violent Video Games, and What Parents Can Do* (2008). In it they tell parents not to spank their children and to keep them away from guns. They excoriate state legislators who seek to protect children against violent video games, *id.* at 207, and even point fingers at populations: "New Orleans is known for having many of the real-world problems portrayed in such video games as the *Grand Theft Auto* series, including high levels of street and family violence, alcohol and drug abuse, drug importation, gangs, prostitution and corruption." *Id.* at 206. These researchers insist that concerns for the violent video games that depict these problems as entertainment for children are "basically no different from the unfounded concerns previous generations had about the new media of their day." *Id.* at 229. "Remember," the researchers concluded in their final words, "we're a remarkably resilient species." *Id.*

Our "resilient species" can elect representatives to protect against the corruption of the youth. There should be no constitutional difficulty in passing legislation to prevent the display of addictive, disturbing images to children in violent video games, much less any social reason to reject such legislation.

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[11] http://mentalhealth.about.com/od/cybermentalhealth/a/vidviolence805.htm

Both scientific studies and incidents of shocking crimes support the claim that violent video games harm children psychologically, physically, and socially. Respecting state sovereignty in protecting children against peddlers of harmful images is an issue of national importance, particularly where, as here, the usage by teenagers is increasing:

> In 1992 13.3% of the young men reported playing video games at least 6 hours per week during their senior year in college. By 2005 that figure had increased to 21.4%.

Video Game Effects at 3. A grant of *certiorari* is warranted here to prevent even greater harm caused by video games.

III. THE STATE MAY ENHANCE PARENTAL RIGHTS BY REQUIRING PARENTAL APPROVAL FOR POTENTIALLY HARMFUL VIDEO GAMES.

Parents have a right to protect their children from destructive exploitation, and this right can and should include protection from violent video games. The state may properly affirm, uphold, and augment these parental rights through laws protecting children from harmful video games. In contrast, the decision below prevents the State of California from furthering the right of a parent to choose whether his or her child plays violent video games.

Laws preventing children from accessing extremely violent video games enhance parental rights, giving parents greater control over child-rearing. The parent who wishes to protect his child from such games is aided by laws prohibiting the purchase of the games without the parent's knowledge. The parent who wishes to allow his child to play violent video games can still purchase the game for the child. Violent video game regulations, like the one at issue here, enhance the ability of parents to protect their children from such games without inhibiting those parents who do not wish to shelter their children from violent video games.

The decision below erred in interpreting the First Amendment to interfere with these parental rights. The State of California properly exercised its constitutional authority to augment parental authority in protecting children against harmful images. As this Court explained in *Ginsberg*, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg*, 390 U.S. at 639.

Children do not possess the same constitutional rights as adults. "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." Nathan Phillips, "*Interactive Digital Software Ass'n v. St. Louis County*: The First Amendment and Minors' Access to Violent Video Games," 19 Berkeley Tech. L.J. 585, 600-601 (2004). But "recent decisions regarding local regulation of video games failed to acknowledge the ability of local governments to protect parental rights and the welfare of children." *Id.* at 586 (citing *Interactive Digital*

Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003)).

Just as underage children are prevented from viewing movies with certain ratings, the constitutionality of which cannot be seriously disputed, the government may constitutionally prevent children from accessing extremely violent video games without parental consent. "The fact that parental rights are protected by allowing access when children are accompanied by their parents, similar to the motion picture industry, further supports the validity of the ordinance." Rosalie Berger Levinson, "State and Federal Constitutional Law Developments," 35 Ind. L. Rev. 1263, 1267 (2002).

Parental discretion and control are allowed—and encouraged—on other topics from smoking to using lead paint. Studies confirm that the harm caused by video games is greater than that caused by passive smoke, exposure to lead and even exposure to asbestos in connection with laryngeal cancer. *Violent Video Game Effects*, *supra*, at 144. States can properly regulate the latter, and should be able to regulate the former.

The State of California has not interfered with the video game industry's right to produce and sell the most violent and extreme video games imaginable to *adults*. But California did enhance parental rights to supervise their children and, if desired, to limit their children's access to violent video games. This statute constitutionally limited access by children to highly offensive, addictive, and potentially harmful images.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: June 22, 2009

AMICUS
CURIAE
BRIEF

MOTION FILED

JUL 22 2009

No. 08-1448

IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, In His Official Capacity
as Governor of the State of California, and
EDMUND G. BROWN JR., In His Official Capacity as
Attorney General of the State of California,
Petitioners,

v.

VIDEO SOFTWARE DEALERS ASSOCIATION AND
ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI AND BRIEF OF *AMICUS CURIAE* OF CALIFORNIA STATE SENATOR LELAND Y. YEE, Ph.D., ASSISTANT PRESIDENT pro TEMPORE, THE CALIFORNIA PSYCHOLOGICAL ASSOCIATION, AND THE CALIFORNIA PSYCHIATRIC ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* OUT OF TIME IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rules 37.2(b) of the Rules of the Supreme Court, California Senator Leland Y. Yee, Ph.D., Assistant President pro Tempore, The California Psychological Association, and the California Psychiatric Association respectfully moves this Court for leave to file the accompanying *amicus curiae* out of time in support of the Petition for Writ of Certiorari submitted by Petitioner Arnold Sewarzenegger, in his official capacity as Governor of the State of California, and Edmund G. Brown Jr. in his official capacity as Attorney General of the State of California. Respondents have not granted consent, thereby making this motion necessary.

On May 19, 2009, the Petition for Writ of Certiorari was filed. On June 2, 2009, the Court, granted Respondents' request for an extension to file a response to the Petition for Writ of Certiorari. The Court's extended this response to July 22, 2009.

Counsel for *amicus curiae* misread Rule 37.2(a) to permit the filing of its brief up to July 22, 2009. Specifically, Rule 37.2(a) provides that an *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket *or a response is called for by the Court*, whichever is later, and that time will not be extended. (emphasis added). Counsel for *amicus curiae* understood the Court's extension for the Respondents' response to be the date *called for by the Court* thereby extending the filing of the *amicus curiae* brief as well.

Notwithstanding this misinterpretation, it is respectfully submitted that leave to file this brief out of time should be granted because the issues presented in the Petition for Writ of Certiorari, as augmented by this attached brief, are of national importance which warrant this Court's review.

Indeed, this Petition encompasses constitutional questions with far reaching national implications regarding protecting the children of the United States from the negative lasting impact of interactive violent video games. The importance of this Petition is easily grasped by a simple survey of the state and local legislation which have been enacted to address the dangers associated with interactive violent videos games. These percolating constitutional questions surfacing nationwide all concern narrowing a minor's access to violent interactive video games. Hence, not only is the time ripe for the Court to grant certiorari, but there are compelling reasons to do so.

Respondents are not prejudiced by granting this Motion for Leave to File this *amicus curiae* Brief supporting the Petition for a Writ of Certiorari. Counsel for the Respondents objected to the filing of this *amicus curiae* brief because it was untimely. It is no surprise, however, that Senator Yee and the organizations have weighed in because they have long been advocates of the legislation at issue. In fact, certainly known to Respondents, Senator Yee is the author of the California statute at the core of this case.

We respectively submit that the Respondents' ground for objection is far outweighed by the numerous factors supporting the Court's granting leave to file this *amicus curiae* brief supporting the Petition.

For the above reasons, respectfully request that this motion for leave to file the attached brief amicus curiae out of time be granted.

Respectfully submitted,

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The California Psychiatric
Association

QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offense to prevailing community standards as to what is suitable for minors, and causes the games as whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition.

The questions presented are:

1. Does the First Amendment permit statutory limits on the sale and rental of violent video games to minors when compelling reasons exist to support such state restrictions?
2. Should the flexible standard that is applied to restrictions on the sale of sexual material to minors under *Ginsberg v. State of New York*, 390 U.S. 629 (1968) equally apply to a State's regulation of harmful, interactive extremely violent video games?

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BRIEF OF *AMICUS CURIAE* OF CALIFORNIA STATE SENATOR LELAND Y. YEE, Ph.D., ASSISTANT PRESIDENT pro TEMPORE, THE CALIFORNIA PSYCHOLOGICAL ASSOCIATION, AND THE CALIFORNIA PSYCHIATRIC ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

Senator Leland Y. Yee is the author of the California statute which is at the core of this case. He serves the California Senate as the Assistant President pro Tempore. Prior to involvement in elected office, Senator Yee earned a doctorate degree in Developmental Psychology at the University of Hawaii and then worked in various mental health and school settings.

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for amicus curiae authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or its counsel make an monetary contribution to the preparation or submission of this brief.

Prior to serving in the California Legislature, Dr. Yee spent eight years on the San Francisco Unified School District Board of Education where he worked for the improvement of the education system for school children. During his tenure in the Legislature, Senator Yee has fought for children, mental health services, working families, open government, and civil rights. In addition to authoring legislation protecting minors from the harmful effects of ultraviolent video games, Senator Yee has passed other laws geared to safeguarding children.[2] Likewise, of equal interest is the fact that Senator Yee has worked to defend and guarantee the constitutional right of free speech.[3]

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[2] Most notably, in 2004, he authored legislation protecting children from being exploited through prostitution and has been acknowledged for his work by receiving the Special Friend of Children Award by the National Association of School Psychologists.

[3] For his legislative and community efforts, Senator Yee has also been honored with the Freedom of Information Award by the California Newspaper Publishers Association. In addition, as result of his work for public access, open government and free speech rights, Californians Aware named Yee "Senator Sunshine." His legislation includes laws protecting high school and college teachers and other employees from retaliation by administrators as a result of student speech. In fact, Senator Yee authored legislation making California the first state in the nation to specifically prohibit censorship of college student press, including school newspapers and broadcast journalism.

The California Psychiatric Association is a nonprofit corporation whose member psychiatrists are medical doctors specializing in the comprehensive care of adults and children with mental and emotional disorders that stem from biological and psychosocial causes, including those with drug and other addictions. The Association is dedicated to the prevention and treatment of mental disorders; to the furtherance of psychiatric education and research; and to the furtherance of psychiatric procedures for the public welfare. The Association has approximately 3,500 members, and is a component, Area 6, of the American Psychiatric Association, the largest professional association of psychiatrists in the United States.

The California Psychological Association and the California Psychiatric Association, as with Senator Yee, are concerned about the mental health of children.

Simply put, not only do *amicus* have a direct and vital interest in the specific statute before the Court, but additionally have a longstanding interest in safeguarding the mental well-being of children.

SUMMARY OF ARGUMENT

By any measure, California has a compelling interest in protecting the physical and psychological care of minors. When juxtaposed against the backdrop of protecting the First Amendment, this Court has held that the Constitution does not confer the protection on communication aimed at children as it does for adults. When weighing the conflicting concerns of minors this Court correctly carved a flexible standard of review and not a strict scrutiny approach. We know, of course, that a state can prohibit the sale of sexually-explicit material to minors under a "variable obscenity" or "obscenity as to minors" standard. *Ginsberg v. New York*, 390 U.S. 629 (1968). Just as it was rational for the State to conclude that that type of material was harmful to minors, the restrictions to assist parents in protecting their children's well-being is, in a practical sense, no different than the concerns supporting California's enactment of California Civil Code Sections 1746 – 1746.5.

Indeed, restricting the sale and rental of extremely violent interactive videos to minors advances the very same societal interests understood in *Ginsberg*. Contrary to the Ninth Circuit's decision not to step beyond the perception that *Ginsberg* was meant exclusively to apply to sexually explicit materials and not to equally harmful materials depicting violence, the Court should grant certiorari to address what clearly is a question of first impression. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

Needless to say, the world is much different today than it was in 1968 when *Ginsberg* was decided. What *has* remained for the past 40 years, however, is the understanding that the First Amendment does not protect harmful materials to minors.

In 2006, a Federal Trade Commission study revealed that nearly 70 percent of 13 to 16 year olds are able to successfully purchase Mature or M-rated video games. These M-rated games, labeled by the industry as such in an attempt to "police" the distribution of harmful videos, are designed specifically for adults. The content in these type of games enable the user to murder, burn, and maim law enforcement officers, racial minorities, members of clergy as well as sexually assault women.

In his March 29, 2006 testimony submitted to the Subcommittee on the Constitution, Civil Rights, and Property Rights of the United States Senate Judiciary Committee, Senator Yee noted that the interactive nature of video games is vastly different than passively listening to music, watching a movie, or reading a book. With interactive video games, the child becomes a part of the action which serves as a potent agent to facilitate violence and overtime learns the destructive behavior. This immersion results in a more powerful experience and potentially dangerous learned behavior in children and youth. In fact, often times it is the same technology that our military and police use to simulate and train for real life battle conditions and violent law enforcement confrontations in the community.

Moreover, there is a practical side in favor of the State's effort to regulate the sale or rental of violent video games to children. Parents can read a book, watch a movie or listen to a CD to discern if it is appropriate for their child. These violent video games, on the other hand, can contain up to 800 hours of footage with the most atrocious content often reserved for the highest levels and can be accessed only by advanced players after hours upon hours of progressive mastery.

Just as the technology of video games improves at astonishing rates, so to does the body of research consistently demonstrate the harmful effects these violent interactive games have on minors. Over three thousand peer-reviewed studies, produced over a period of 30 years documenting the effects of screen violence (including violent video games), have now been published in the professional journals of the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and the American Psychiatric Association and others.

These data suggest very strongly that participating in the playing of violent video games by children and youth increase aggressive thought and behavior; increase antisocial behavior and delinquency; engender poor school performance; desensitize the game player to violence; and reduced activity in the frontal lobes of the brain.

Notably, extended play has been observed to depress activity in the frontal cortex of the brain which controls executive thought and function, produces intentionality and the ability to plan sequences of action, and is the seat of self-reflection, discipline and self-control.

The United States Surgeon General has also warned of a demonstrated link between screen violence and subsequent physical aggression in children and adolescents that is stronger than the link between second hand smoke and cancer.

Finally, new data shows that the intensity of interactive video games may be habituating and that 2-3 hour sessions of intense interactions with video games raise adrenaline levels in children and produces extended physiological arousal. In the medical community concern has been raised at prolonged and regularly repeated states of adrenalized arousal and hyper-vigilance involved in children watching violent video games and the possible harmful effects on still developing bodies and brains.

As a society, we understand the clear commonsense reasons to prohibit the sale of alcohol, tobacco, firearms, driver's licenses and pornography to minors. That same common sense approach applies in the foundation and enactment of California Civil Code Sections 1746 – 1746.5. Given that the First Amendment does not protect the State's restriction on the sale or rental of harmful violent video games to minors, the Court should grant *certiorari* and uphold the statutory safeguards necessary in this modern day world.

ARGUMENT

Numerous reasons support granting the Petition for *Certiorari* in order to confirm that the free speech protections of the First Amendment are not violated when States properly restrict the sale and rental of violent video games to minors. Indeed, although there are no clear conflicts among the circuit courts on this issue, other guidelines employed by this Court warrant granting *certiorari*.

For example, in exercising its discretion whether to grant certiorari, Rule 10 of the Supreme Court Rules instructs that the Court's jurisdiction will be granted for compelling reasons. The nation's interest in the health of its children, along with this admittedly significant constitutional question, easily qualifies the issues in this case as compelling.

Additionally, while there have been several court decisions striking down legislation similar to the state statute in this case, there currently exist active or proposed legislation enacting varying degrees of restriction on violent video games in other States. Specifically, the *Legislative Tracker* webpage at http://www.GamePolitics.com lists the numerous pieces of local, state and federal legislation that exist which address in some fashion the growing concern surrounding violent video games. For example, according to *Legislative Tracker*, Massachusetts, New York, Utah, Pennsylvania, Maryland, Georgia, as well the House of Representatives with the *Video Game Health Labeling Act of 2009* all have active or proposed legislation addressing in some manner society's concerns with a minor's access to violent video games. http://www.GamePolitics.com

In other words, one part of the country may restrict what is otherwise unfettered in an other part of the country. Coupled with this practical "conflict" application of law, the increasing number of state and possible federal laws proscribing a minor's access to violent video games makes this percolating issue, if not already, an issue to be eventually taken up by the Court.

Moreover, the identified factors in Rule 10, while not fully measuring the character of the reasons for this Court's granting *certiorari*, include a scenario where a United States Court of Appeals has decided important questions of federal law contrary to this Court's relevant decisions. The appellate court's misapplication of the strict scrutiny test as well as its reluctance to correctly apply this Court's reasoning seen in *Ginsberg* further warrants *certiorari* in this case.

I. THIS COURT HAS ACKNOWLEDGED SOCIETY'S RATIONAL AND COMPELLING INTEREST IN DISTINGUISHING AND LIMITING THE RIGHTS ENJOYED BY MINORS.

The courts have long agreed that there is an overriding justification in protecting children from conduct pervasive in society. Without questions, restricting a minor's access to gambling, smoking and alcohol serve the community's interest in both protecting a minor's development as well as safeguarding against the individual and widespread collateral consequences which flow from a minor's early addiction to these vices.

As a general proposition, many constitutional rights vary in the degree to which the exercise of the right by minors is protected from government abridgment. For example, minors do not have the right to exercise the franchise. Similarly, a minor's right to have an abortion may be subject to regulations that would be rejected as unduly burdensome if they were applied to adult women. Thus, there is a recognized foundation for distinguishing between minors and adults in analyzing the constitutionality of regulations.

This foundation comports with the common sense intuition that, because children lack maturity to make wise judgments, their autonomy deserves less respect from the state than does the autonomy of adults. While paternalistic state regulations are correctly viewed as demeaning when applied to adults, there are considered appropriate, if not necessary, for children.

In *Ginsberg*, of course, this Court concluded that the state had greater authority to limit the exercise of protected freedoms because children were involved and, in relying on its precedents, recognized that "the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'"

As it relates to expressive materials, there is no language from this Court suggesting that the state's interest in protecting minors from such material *is limited* to speech with sexual content. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) a case concerning restrictions on films depicting nudity from being shown in drive-in movies, the Court was unwilling to protect minors from brief exposure to such images.

However, the alleged harm caused by the minimal exposure to nude images a child passing by a drive-in theater might witness cannot realistically be compared to harm resulting from repeated and long term exposure to violent video games. In fact, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court supported an FCC determination that the radio broadcast of a George Carlin monologue containing "filthy words" could be restricted precisely because it was accessible to young children.

Children, this Court has acknowledged, are different in the eyes of the law because of brain development. *Ropers v. Simmons*, 543 U.S. 551 (2005). Under the "evolving standards of decency" test, the Court held that it was cruel and unusual punishment to execute a person who was under the age of 18 at the time of the murder. Writing for the majority, Justice Kennedy cited a body of sociological and scientific research that found that juveniles have a lack of maturity and sense of responsibility compared to adults. Adolescents were found to be over-represented statistically in virtually every category of reckless behavior.

In *Ropers*, the Court noted that in recognition of the comparative immaturity and irresponsibility of juveniles, almost every state prohibited those under age 18 from voting, serving on juries, or marrying without parental consent. The studies also found that juveniles are also more vulnerable to negative influences and outside pressures, including peer pressure. They have less control, or experience with control, over their own environment. This unequivocal commonsense approach by the Court to constitutional matters and children should be likewise applied in addressing the deepening dangers to minors from violent video games.

In sum, "[A] state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik*, at 212. Here, California's control on the sale or rental of violent video games to minors fall within the permissible advancement of a significant, if not compelling, public interest in protecting the development and mental health of minors.

II. VIOLENT VIDEO GAMES ARE HARMFUL TO MINORS ALLOWING THE STATE CLEAR JUSTIFICATION IN REGULATING CHILDREN'S ACCESS TO THESE TO MATERIALS.

There have been thousands of studies in the area of the effects of violent video games on children. Craig A. Anderson, Ph.D., Director, Center for the Study of

Violence, Department of Psychology at Iowa State University has been a leader in this area of study. On his website, Dr. Anderson describes the results of his studies and research. See http://www.CraigAnderson.org

In researching the association between media violence and aggressive behavior, Dr. Anderson, along with others, has determined that there is a significant relation between exposure to media violence and aggressive behavior. He believes that "Exposing children and adolescents (or "youth") to violent visual media increases the likelihood that they will engage in physical aggression against another person. "By "physical aggression" we mean behavior that is intended to harm another person physically, such as hitting with a fist or some object. A single brief exposure to violent media can increase aggression in the immediate situation. Repeated exposure leads to general increases in aggressiveness over time. This relation between media violence and aggressive behavior is causal."

Moreover, Dr. Anderson concluded, repeated consumption of media violence over time increases aggression across a range of situations and across time because of several related factors:

1. It creates more positive attitudes, beliefs, and expectations regarding aggressive solutions to interpersonal problems. In other words, youth come to believe that aggression is normal, appropriate, and likely to succeed.

2. It also leads to the development of aggressive scripts, which are basically ways of thinking about how the social world works. Heavy media

violence consumers tend to view the world in a more hostile fashion.

3. It decreases the cognitive accessibility of nonviolent ways to handle conflict. That is, it becomes harder to even think about nonviolent solutions.

4. It produces an emotional desensitization to aggression and violence. Normally, people have a negative emotional reaction to conflict, aggression, and violence, and this can be seen in their physiological reactions to observation of violence (real or fictional, as in entertainment media). For example, viewing physical violence normally leads to increases in heart rate and blood pressure, as well as to certain brain wave patterns. Such normal negative emotional reactions tend to inhibit aggressive behavior, and can inspire helping behavior. Repeated consumption of media violence reduces these normal negative emotional reactions.

5. Repetition increases learning of any type of skill or way of thinking, to the point where that skill or way of thinking becomes fairly automatic. Repetition effects including learning how to aggress.

In his March 21, 2000 testimony before the United States Commerce Committee hearing on the "The Impact of Interactive Violence on Children," Professor Anderson at the outset stated what his extensive research revealed:

> "Though there are many complexities in this realm of behavioral research, there is one clear and simple message that parents, educators, and public policy makers such as yourselves need to

hear: Playing violent video games can cause increases in aggression and violence."

Repeatedly thinking about violent characters, choosing to be aggressive, enacting that aggressive choice, and being rewarded for it can be conceived as a series of learning trials influencing a variety of types of aggressive knowledge structures. *"Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior,"* Advances in Experimental Social Psychology, Vol. 36 (2004).

The American Academy of Pediatrics also, with numerous others, concludes that exposure to violence in media, including violent video games, can contribute to aggressive behavior, desensitization to violence, nightmares and fear of being harmed. *"Media Violence,"* American Academy of Pediatrics, Volume 108, Number 5, (November 2001). The study by the American Academy of Pediatrics found that American children between 2 and 18 years of age spend an average of 6 hours and 32 minutes each day using media, including video games.

Predicated on years of studies and research, the American Psychological Association formally recognized the serious negative impact of violent video games on this nation's children and passed its Resolution "On Violence in Video Games and Interactive Media." This prestigious association of experts concluded not only that there are long term negative effects on children in playing these violent video games, but that the industry, the public, parents, caregivers and educational organizations had a responsibility to intercede in this epidemic. The California statute authored by Senator Yee and enacted into law was a response to that call for assistance given our children's unfettered access to violent video games.

In the end, commonsense tells us what this mountain of research reveals. Society has a direct, rational and compelling reason in restricting a minor's access to violent video games. This Court has never directly dealt with this precise issue, but its precedent in protecting children clearly leads one to believe that the Court will agree and reverse the lower court thereby upholding California's statute.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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July 22, 2009

JOINT APPENDIX

No. 08-1448

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

ARNOLD SCHWARZENEGGER, Governor of the
State of California, and EDMUND G. BROWN Jr.,
Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

**On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

◆

JOINT APPENDIX
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case # C-05-04188 RMW

Date	Docket #	Description
10/17/05	1	Complaint
10/19/05	7	Declaration of Crossan R. Anderson in Support of Motion for Preliminary Injunction
10/19/05	8	Declaration of Ted Price in Support of Motion for Preliminary Injunction
10/19/05	9	Declaration of Douglas Lowenstein in Support of Motion for Preliminary Injunction
11/10/05	25	Declaration of Adam Keigwin
11/10/05	26	Declaration of Zackery P. Morazzini
11/10/05	31	Appendix A to Request for Judicial Notice in Support of Defendants' Opposition to Motion for Preliminary Injunction Material from Assembly Judiciary Committee filed on AB 450
11/10/05	32	Appendix B to Request for Judicial Notice in Support of Defendants' Opposition to Motion for Preliminary Injunction Material from Senate Judiciary Committee File on AB 450

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California;	CASE NO. C 05 4188 COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Filed Oct. 17, 2005)

BILL LOCKYER, in his official capacity as Attorney General of the State of California; GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney, RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose, and ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,

Defendants.

COMPLAINT

Plaintiffs Video Software Dealers Association ("VSDA") and Entertainment Software Association ("ESA"), by and through their attorneys, aver and allege as follows:

NATURE OF THE ACTION

1. Plaintiffs are associations whose members include companies that create, publish, manufacture, distribute, import, sell, or rent video games to the public. Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against enforcement of a new California statute that significantly infringes upon constitutionally protected rights of free expression.

2. The challenged act, Chapter 638, Statutes of 2005 (hereinafter, the "Act"), was signed into law on October 7, 2005, and is due to go into effect on January 1, 2006. The Act penalizes the sale or rental of video games based solely on their expressive content and imposes strict labeling requirements, in violation of the First Amendment. Specifically, the Act makes it illegal for anyone in California to sell or rent to anyone under the age of 18 a "violent" video game. According to the Act, a "violent video game" is a game "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being. . . ." Act, § 1746(d)(1). A person who violates the Act is subject to substantial fines. *Id.* § 1746.3. The Act also unconstitutionally compels speech by manufacturers, distributors, importers, and retailers by requiring that each prohibited video game "that is imported into or distributed in California for retail sale shall be labeled with a solid white '18' outlined in black." *Id.* § 1746.2. The label must measure no less than 2 inches by 2 inches, and must be displayed on the front of the video game package. *Id.*

3. The Act violates the First Amendment and other provisions of the United States Constitution by creating penalties for the sale or rental of video games based solely on a game's purportedly "violent" content. The First Amendment prohibits such content-based censorship. Not only does the Act directly restrict the dissemination and receipt of a considerable amount of fully protected expression,

but, because of its numerous vague terms, the Act also creates a chilling effect on a great deal of speech, as video game creators, publishers, manufacturers, distributors, importers, and retailers will respond to the Act's uncertainty by self-censoring, depriving adults and children of access to undeniably protected expression.

4. Similar efforts to regulate video games based on their expressive content have been struck down by every court that has considered this issue, including the Seventh and Eighth Circuits, and a District Court in the Ninth Circuit. *See American Amusement Mach. Ass'n v. Kendrick,* 244 F.3d 572, 579-80 (7th Cir. 2001) (holding that video games are protected expression, and striking down ordinance that similarly sought to restrict minors' access to "violent" video games); *Interactive Digital Software Ass'n v. St. Louis County,* 329 F.3d 954, 957 (8th Cir. 2003) (noting that "[t]he mere fact" that video games "appear in a novel medium is of no legal consequence," and striking down ordinance restricting "violent" video games); *Video Software Dealers Ass'n v. Maleng,* 325 F. Supp. 2d 1180, 1184-85 (W.D. Wash. 2004) (finding that video games are "expressive and qualify for the protections of the First Amendment," and invalidating state statute restricting video games); *see also James v. Meow Media, Inc.,* 300 F.3d 683, 696 (6th Cir. 2002) (confirming that the First Amendment protects the communicative aspect of video games, and rejecting attempts to impose tort liability on "violent" video games); *Sanders v. Acclaim Entm't,*

Inc., 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (same); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (same).

5. Just as the Act restricts protected expression in violation of clear and binding precedent, it imposes an additional significant First Amendment burden on those who manufacture, distribute, import, sell, and/or rent video games. As explained in Paragraph 2 hereof, the Act requires that any "violent" video game "imported into or distributed in California" be labeled with a 2 inches by 2 inches label bearing the number "18." Act, § 1746.2. This requirement – which conflicts with the voluntary labeling system already employed by the video game industry – significantly burdens the expression rights of Plaintiffs' members. It also unconstitutionally compels speech by forcing Plaintiffs' members to relay a government message with which they may disagree, and for which there is no legitimate, much less substantial, underlying purpose.

6. Because some of Plaintiffs' members create, publish, manufacture, distribute, import, sell or rent games that may fall within the statutory definition, they may be subject to liability under the Act. The Act will violate the free speech rights of Plaintiffs' members not only through direct restriction, but also as a result of the Act's inevitable chilling effect on video game expression.

7. Plaintiffs maintain that (a) the Act is void and of no force and effect because it is unconstitutional

under the First and Fourteenth Amendments to the Constitution of the United States and thus actionable under 42 U.S.C. § 1983; and (b) Plaintiffs and their members, as well as many citizens of California, will suffer immediate, serious, and irreparable injury if the Act takes effect.

JURISDICTION AND VENUE

8. This action arises under the Constitution of the United States, the First and Fourteenth Amendments thereto, and the laws of the United States, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1343(a)(3). This action is brought against the defendants in their official capacity pursuant to 42 U.S.C. § 1983.

9. Venue is proper in the Northern District of California. Many of Plaintiff VSDA's and Plaintiff ESA's members are located in and/or do business in this judicial district, and the claims thus arise in this district. Upon information and belief, Defendants Doyle, Kennedy and Ravel also reside in this judicial district, and are responsible for enforcing the Act within this judicial district.

INTRADISTRICT ASSIGNMENT

10. This action is properly assigned to the San Jose Division of this Court, as a substantial part of

the events or omissions which give rise to the claim occurred in the County of Santa Clara. Civil L.R. 3-2(c) & (e).

PARTIES

11. Plaintiff VSDA, established in 1981, is the not-for-profit international trade association for the $24 billion home entertainment industry. VSDA is incorporated in the State of Delaware and its principal place of business is Los Angeles, California. VSDA represents more than 1,000 companies throughout the United States, Canada, and other nations. Its members operate approximately 10,000 retail outlets in the U.S., including more than 1,250 in the State of California, that sell and/or rent DVDs, VHS cassettes, and console video games. Membership comprises the full spectrum of video retailers (from single-store operators to large chains), video distributors, the home video divisions of major and independent motion picture studios, and other related businesses that constitute and support the home video entertainment industry.

12. Plaintiff ESA is a nonprofit trade association organized under the laws of the State of Delaware with its principal place of business in the District of Columbia. A fundamental purpose of ESA is to serve and promote the business and public affairs interests of companies that publish entertainment software used for video games, including such companies' right to publish and distribute works of

expression that are protected under the First Amendment to the United States Constitution and similar provisions of the constitutions of various states. ESA members include a number of entities that produce, distribute, and/or import video games to owners and operators of sales and rental outlets within the City of San Jose, the County of Santa Clara, and throughout California.

13. The interests that Plaintiffs VSDA and ESA seek to protect in this action are germane to the purposes of each organization, and neither the claims nor the forms of relief sought in this action require participation by individual members of Plaintiffs. One or more members of each association have standing to bring this action in their own right.

14. Plaintiffs are threatened with immediate, serious, and irreparable injury as a result of the enactment and imminent enforcement of the Act. Once the Act is in force, Plaintiffs and their members will be subject to liability for disseminating works fully protected under the First Amendment. The Act will have an immediate and vast chilling effect upon constitutionally protected speech because those who sell, rent, or permit to be sold or rented video games (and their respective distributors and importers) will, to avoid liability under the Act, refrain from offering for rental or sale a wide array of games, either to minors or to all customers. This will in turn chill video game creators, publishers, manufacturers, distributors, and importers from creating, publishing, manufacturing, distributing, and importing works

that may run afoul of the Act's vague definition of prohibited content. Plaintiffs will also be unlawfully compelled by the Act to disseminate a message on behalf of the State of California that is not tied to a legitimate regulatory purpose.

15. The Act will also cause irreparable harm to willing listeners – including both those under age 18 and adults – who will be deprived of the ability to hear speech from Plaintiffs' members. In this facial challenge to the Act, Plaintiffs have standing to assert not only their own rights and harm, but also that of the potential recipients of speech from Plaintiffs' members.

16. Defendant Arnold Schwarzenegger is the Governor of the State of California. As Governor, he is vested with "the supreme executive power" of the State and "shall see that the law is faithfully executed." Cal. Const. art. 5, § 1. This injunctive action is brought against Governor Schwarzenegger in his official capacity.

17. Defendant Bill Lockyer is the Attorney General of the State of California. He is the "chief law officer" of the State and has the duty to "see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. 5, § 13. Additionally, Attorney General Lockyer has "direct supervision over every district attorney" in the State. *Id.* If, at any point a district attorney of the State fails to enforce adequately "any law of the State," the Attorney General must "prosecute any violations of

the law." *Id.* Finally, the Attorney General "shall assist any district attorney in the discharge" of duties when "required by the public interest or directed by the Governor. . . ." *Id.* This injunctive action is brought against Attorney General Lockyer in his official capacity.

18. Defendant George Kennedy is the District Attorney responsible for enforcing the law within the County of Santa Clara. Pursuant to the California Government Code, the District Attorney must prosecute "all actions for the recovery" of fines and penalties. Cal. Gov't Code § 26521. The Act provides that violations thereof may be prosecuted by any District Attorney. § 1746.4. This injunctive action is brought against District Attorney Kennedy in his official capacity.

19. Defendant Richard Doyle is the City Attorney responsible for enforcing the law within the City of San Jose. The California Government Code requires the City Attorney to perform legal services as required by the Legislature. Cal. Gov't Code § 41803. The Act provides that violations thereof may be prosecuted by any City Attorney. § 1746.4. This injunctive action is brought against City Attorney Doyle in his official capacity.

20. Defendant Ann Miller Ravel is the County Counsel responsible for enforcing the law within the County of Santa Clara. In that capacity, she must "discharge all the duties vested in the district attorney." Cal. Gov't Code § 26529. This injunctive

action is brought against County Counsel Ravel in her official capacity.

BACKGROUND

Video Games and the First Amendment

21. The Act seeks to regulate the content of a certain medium of expression (defined as "video games" under the Act) and limit access to certain video games based solely on the content of the expression depicted or contained therein.

22. Video games are a form of artistic expression much like other forms of protected expression, such as movies, books, and music. Video games contain extensive storylines and character development, comparable to that of books and movies. The storylines and plot, and associated dialogue among characters, continue throughout the game play and are an integral part of the game itself. Like the best of literature, the storylines often involve familiar themes such as good versus evil, triumph over adversity, struggle against corrupt governments and rulers, and/or quest for adventure. Expression in other media, such as movies and books, draws thematic ideas directly from video games. Video games similarly draw and evolve themes from other media.

23. Video games also feature the artwork of some of the best modern graphic artists. The typical video game contains many different animated or

computer-generated illustrations. Video games also contain music, much of it original and performed by top musicians and orchestras. Like the music that plays during movies, the music in video games enhances and complements the expression conveyed by the images and dialogue, often in dramatic fashion.

24. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," U.S. Const. amend. I, and the prohibitions of the First Amendment apply to the State of California, U.S. Const amend. XIV.

25. The First Amendment shields verbal expression, written expression, visual expression, entertainment, art, and music. The protections of the First Amendment apply just as much to video games as they do to books, newspapers, films, theater, and music.

26. The First Amendment also protects expressions and depictions of violence devoid of obscene sexual content. Thus, video games depicting violence – like movies or illustrations that depict violence – are fully protected by the First Amendment.

The Act's Restrictions on Protected Speech

27. The Act was passed by the California Legislature on September 8, 2005, and was signed into law by Governor Schwarzenegger on October 7, 2005. A true, complete, and accurate copy of the Act is

attached hereto as Exhibit 1, and is incorporated herein as if fully set forth. The Act is due to go into effect on January 1, 2006.

28. The Act seeks to suppress expression in the video game medium because of the supposed effect of that expression on minors under the age of 18. The Act asserts that the restrictions on speech are justified by a compelling state interest in "preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games." Act § 1(c).

29. The Act seeks to suppress expression in games deemed "violent video games," defined by the Act as follows:

> "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:
>
> (A) Comes within all of the following descriptions:
>
>> (i) A reasonable person, considering the game as a whole, would find [it] appeals to a deviant or morbid interest of minors.
>>
>> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

> > (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors[; or]
>
> (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

Act § 1746(d)(1).

30. The Act defines the terms contained in § 1746(d)(1)(B) as follows:

> (A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.
>
> (B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.
>
> (C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.
>
> (D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness,

> extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.
>
> (E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.
>
> (3) Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

Act, §§ 1746(d)(2), (3).

31. Section 1746.1(a) of the Act would impose restrictions on freedom of expression by making it unlawful for any "person" to "sell or rent a video game that has been labeled as a violent video game to a minor." Act, § 1746.1(a). A minor is defined as a person under 18 years of age. *Id.* § 1746(a). A "person" under the Act means "any natural person, partnership,

firm, association, corporation, limited liability company, or other legal entity." *Id.* § 1746(b).

32. The Act further provides that "[e]ach violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid, white '18' outlined in black. The '18' shall have dimensions of no less than 2 inches by 2 inches" and "shall be displayed on the front face of the video game package." Act, § 1746.2.

33. A person who violates any provision of the Act is subject to a $1,000 fine. Act, § 1746.3.

34. A person is not liable under the sale/rental prohibition if the person selling or renting a prohibited game presents "[p]roof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence that a purchaser or renter of a violent video game was not a minor or that the manufacturer failed to label a violent video game as required" by the Act. Act, § 1746.1(b). The Act states that the restriction on the sale or rental of a "violent" video game to a minor does not apply if the person selling or renting the game is the "minor's parent, grandparent, aunt, uncle, or legal guardian." *Id.*, § 1746.1(c). The Act does not, however, establish an exemption for minors who purchase or rent "violent" video games with parental permission.

35. The Act states that the sale/rental restrictions, and the labeling requirements, do not apply to any person who: (a) "is employed solely in the capacity of a salesclerk or other, similar position";

(b) "does not have an ownership interest in the business in which the violation occurred"; and (c) "is not employed as a manager in that business." Act. § 1746.3.

36. The Act permits a parent, legal guardian, or other adult acting on a minor's behalf to report a suspected violation of the Act to a city attorney, county counsel, or district attorney, and any of those officials may prosecute a violation of the Act. Act, § 1746.4.

The Act Violates the First Amendment

37. By restricting the sale or rental of video games deemed "violent" under the statute, the Act imposes penalties based on the content of the games' expression. The Act therefore is subject to the most exacting scrutiny under the First Amendment.

38. No compelling state interest exists that justifies the broad suppression of speech imposed by the Act. The Act is based on purported legislative findings that exposing minors to "violent" video games makes "minors more likely to experience feelings of aggression," promotes "violent, antisocial or aggressive behavior," and causes "a reduction of activity in the frontal lobes of the brain." Act § 1(a). But those claims, which ignore conflicting evidence, are not supported by credible factual support. The purported legislative "findings" are not based on reasonable inferences drawn from substantial evidence.

39. In addition, the Act suppresses purportedly "violent" expression without any legislative finding or underlying evidence that exposure to such expression is directed to and likely to cause imminent violent action by the game player. Instead, the Legislature merely concluded that players of violent video games are "more likely" to experience "feelings" of aggression. Act, § 1(a).

40. The Act is not the least restrictive means of achieving any of the Legislature's asserted goals, and the Legislature refused to consider less speech-restrictive means of regulating minors' access to "violent" video games, including those that were proposed by Plaintiffs and their members (such as educational efforts, parental controls, and retailer enforcement initiatives).

41. The Act presents Plaintiffs' members with the possibility of arbitrary and discriminatory enforcement because the Act fails to set forth minimal standards for enforcement. The Act does not set forth adequately specific standards for determining which video games have sufficient "violent" content to fall within the Act's prohibitions.

42. The Act is rife with unconstitutionally vague terms, which fail to give reasonable notice of what conduct is prohibited. The vague terms include, but are not limited to: "killing, maiming, dismembering, or sexually assaulting *an image of a human being*"; "deviant or morbid interest of minors"; "patently offensive to prevailing standards in the

community as to what is suitable for minors"; "virtually inflict serious injury upon images of human beings or characters with substantially human characteristics"; "virtually inflict a high degree of pain"; "the player relishes the virtual killing"; "shows indifference to the suffering of the victim"; "the virtual victim must be conscious of the abuse"; "shockingly atrocious"; "virtually inflict severe mental or physical pain or suffering"; and "gratuitous violence." These terms have no clear meaning, especially in the context of video games. For example, how would a person assess whether a particular video game depicted violence against a character with "substantially human characteristics"? Would a character with magical powers qualify? What about a zombie? A centaur? Likewise, what is meant by a "deviant or morbid interest of minors"? How can a person "virtually inflict" physical or mental pain? How can a "virtual victim" be "conscious" of anything? At what point does a computerized image experience a "high degree of pain"? What constitutes a player "relish[ing] [a] virtual killing?" Persons of ordinary intelligence are forced to guess at the meaning and scope of the Act.

43. Even setting aside the inherent ambiguity in the Act's terms, the Act requires video game publishers, manufacturers, distributors, and importers to assess whether a video game is violent based on subjective assessments of a game player's intent. For example, various provisions of the Act require an assessment based on whether the player "intend[s] to

inflict a high degree of pain" or "relish[es] the virtual killings." Act, §§ 1746(d)(2)(A),(B). Given that the course of play differs for each game player, video game publishers, manufacturers, distributors, and importers will be unable to assess whether a particular game falls within the Act's prohibitions.

44. The lack of adequate guidelines to determine "violent" conduct will have a chilling effect on the expression of Plaintiffs' members. Under the Act, video game creators, publishers, manufacturers, distributors, and importers must determine which games may be subject to the statute's penalties. By their nature, games offer the player a wide range of possible game play of significant duration. Even if only a small portion of a game contained content that theoretically met the Act's definitions, the entire game would be suppressed. Moreover, to ensure that the games do not violate the Act, those who import and/or distribute video games in California would be expected to review the entire possible course of play in a particular game. The significant burdens imposed by the law will ultimately lead to a chilling of speech of video game creators, publishers, manufacturers, distributors, importers, retailers and consumers.

45. In addition, the Act forces anyone who imports or distributes video games in California to determine which video games may be considered "violent," and thus must be labeled with the large "18" sticker, to avoid penalties under the labeling provisions. As a result, different manufacturers,

distributors, and importers will almost certainly reach different, and conflicting, determinations as to what types of game play qualify for the "18" label under the Act.

46. The Act's labeling requirement imposes an additional content-based burden on Plaintiffs' members that is unsupported by a compelling state interest. The video game industry has already invested significant amounts of money and resources into developing labels, signs, and materials that educate parents and consumers about the industry's voluntary rating system. That system – which the FTC has called the "most comprehensive" of industry-wide media rating systems – is implemented by the Entertainment Software Rating Board ("ESRB"), a self-regulatory body that assigns independent ratings and descriptions for video game content. The Act's size, appearance, and placement requirements conflict with the ESRB rating system, and complying with the Act's requirements in this regard would be extremely costly, burdensome, and impractical for those who are required to label games under the Act. These requirements also unconstitutionally compel manufacturers, distributors, and importers – and the retailers that display the games – to disseminate a State message for which there is no underlying substantial regulatory interest.

47. Some of the content displayed by the video games created, published, manufactured, distributed, imported, rented, sold, and/or otherwise made available to the public by Plaintiffs or their members,

while fully protected by the United States Constitution, may be deemed by law enforcement officials in California, including the Defendants, to meet the Act's definitions for "violent video games," thus subjecting Plaintiffs or their members to the threat of prosecution, as well as creating a chilling effect on their rights to freedom of expression.

48. The Act would infringe the First Amendment rights of (i) businesses physically present in California, including Plaintiffs' members, who face the threat of prosecution if they do not comply with restrictions on their right to distribute constitutionally protected expression, (ii) potential customers of those businesses – including both those under 18 as well as adults – who, because of these restrictions, will be deprived of the opportunity to receive fully protected speech, and (iii) businesses located outside California, including members of Plaintiffs, whose ability to distribute and/or import their creative works within California will be burdened based on the content of those works of expression.

49. The Act threatens Plaintiffs, their members, and other businesses that create, publish, manufacture, distribute, import, sell, or rent video games, as well as adults and those under 18 who wish to receive the speech in those games, with serious, immediate, and irreparable injury for which there is no adequate remedy at law.

50. In this facial constitutional challenge to the Act, Plaintiffs have standing to assert the rights of,

and harm to, the potential customers of Plaintiffs and their members.

51. The Act would cause Plaintiffs and their members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

52. In the event Plaintiffs prevail on any claims under the Constitution of the United States set forth in this Complaint, Plaintiffs are entitled to recover attorneys' fees under 42 U.S.C. § 1988.

COUNT I

(First and Fourteenth Amendments – Freedom of Expression)

53. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 52 as if fully set forth herein.

54. The Act would restrict access to video games based solely upon the "violent" content of the creative expression depicted. The content of the expression made subject to these restrictions is not obscene or obscene as to minors. Nor does it fall within any other category of expression that may constitutionally be regulated based solely upon its content.

55. The Act imposes unconstitutional content regulation by prohibiting a person from disseminating

any video game meeting the statutory definition of a "violent video game" to any person under the age of 18 and by requiring manufacturers, distributors, and importers to place large labels on prohibited games. The Act restricts the freedom of video game creators, publishers, manufacturers, distributors, importers, and retailers, as well as purchasers, renters, and other players of such games, to communicate and receive expression that is not constitutionally subject to regulation based upon its content. The Act's suppression of "violent video games" is unsupported by any legislative finding, or underlying evidence, that exposure to such expression is directed to and likely to cause imminent violent action by the game player. Moreover, the Act's stated purposes are not based on credible evidence and are not sufficient under the First Amendment to justify the broad content discrimination imposed by the Act. Not only does the Act fail to serve a compelling governmental interest, but the Act is not narrowly tailored to serve any such interest, and the Legislature did not give adequate consideration to less speech-restrictive means of achieving its goals.

56. The Act does not establish standards for determining which games contain content meeting the description set forth in Paragraphs 29 and 30 hereof. The Act would impose upon those who disseminate video games the burden of determining whether each such video game meets the description set forth in Paragraphs 29 and 30 hereof, prior to publishing, manufacturing, distributing, importing,

or otherwise holding that game out to the public. The Act imposes upon every such person the risk of substantial penalties. This burden and risk are aggravated by the vagueness of the statutory description of the regulated content. The Act thus would establish an unconstitutional scheme of censorship under which even works of expression that do not meet the statutory description in the Act would be suppressed because of the burden placed upon video game publishers, manufacturers, distributors, importers, and retailers of determining the scope of the Act's coverage and because of the risk of erroneous determinations. Persons disseminating video games (and their respective manufacturers, distributors, and importers) would be induced to refuse to include certain works in their inventories or on their premises, for fear of running afoul of the Act's ambiguous prohibitions. Imposition of this burden and risk serves no compelling interest and is not narrowly tailored to serve any such interest.

57. Furthermore, the Act would compel video game manufacturers, distributors, and importers to label every game that might be "violent" under the Act's ambiguous definition. The labeling requirement essentially compels video game manufacturers, distributors, and importers – and the retailers that display the games – to disseminate the government's message that minors should be denied access to certain video games, even though the games are fully protected as to both minors and adults. Forcing individuals to disseminate a message on behalf of the

State of California violates the First Amendment every bit as much as restricting the dissemination of individuals' own messages.

58. For each of the reasons set forth above, and others, the Act is unconstitutional under the First Amendment to the United States Constitution, as applied to the State of California by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Act would cause Plaintiffs and their members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

COUNT II

(First and Fourteenth Amendments – Vagueness)

59. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 58 as if fully set forth herein.

60. The Act is unconstitutionally vague in that many of the terms and phrases employed therein have no clear meaning in the context of animated video games, including but not limited to, the terms and phrases "killing, maiming, dismembering, or sexually assaulting *an image of a human being*"; "deviant or morbid interest of minors"; "patently offensive to prevailing standards in the community as to what is suitable for minors"; "virtually inflict

serious injury upon images of human beings or characters with substantially human characteristics"; "virtually inflict a high degree of pain"; "the player relishes the virtual killing"; "shows indifference to the suffering of the victim"; "the virtual victim must be conscious of the abuse"; "shockingly atrocious"; "virtually inflict severe mental or physical pain or suffering"; and "gratuitous violence." Persons of ordinary intelligence are forced to guess at their meaning and at the scope of the Act.

61. The unconstitutional vagueness of the Act will have a chilling effect on video game creators, publishers, manufacturers, distributors, importers and retailers and on those who seek to hear and view the prohibited video games. In addition, the Act will impose substantial burdens upon persons who sell, rent, or permit to be sold or rented video games, preventing them from exercising their constitutionally protected freedom of expression, The Act's vagueness is also likely to lead to enforcement by law enforcement officials on an unfair, subjective, and *ad hoc* basis. Because many of the Act's terms have no clear meaning, the Act will restrict a far broader range of video games than even the State claims it is seeking to regulate, because manufacturers, distributors, and importers likely will respond to the uncertainty and fear of penalties by labeling a much broader category of video games. As a result, Plaintiffs' members' protected expression will not reach willing recipients.

62. For each of the reasons set forth above, and others, the Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as the First Amendment to the United States Constitution, as applied to the State of California by the Due Process Clause of the Fourteenth Amendment. The Act would cause Plaintiffs and their members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States. The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

COUNT III

(Fourteenth Amendment - Equal Protection)

63. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 62 as if fully set forth herein.

64. The Act regulates and restricts under the threat of substantial penalties certain works of expression presented through the medium of video games. These same regulations, restrictions, and penalties do not apply to other works of expression containing the same or similar content, but communicated in other media, including, by way of example only, cable television, broadcast television, movies, books, magazines, and the like. Indeed, many of these other media – which compete with video games for consumers – contain expression that is based on video games that could fall within the

prohibitions of the Act. Likewise, video games that could fall within the Act's prohibitions may themselves be based on similar speech in other, unregulated media.

65. The Act arbitrarily and irrationally would establish a legislative scheme of classifications that burden fundamental rights and that are not closely related to any compelling state interest.

66. For the foregoing reasons, and others, the Act is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Act would cause Plaintiffs and their members to be subjected to the deprivation of rights, privileges, and immunities secured to them by the Constitution and laws of the United States, The Act thus constitutes a deprivation of rights actionable under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand that this Court enter a judgment in Plaintiffs' favor and against Defendants as follows:

(a) That this Court issue a declaratory judgment that the Act is void and of no force and effect;

(b) That this Court issue a preliminary injunction and a permanent injunction against Defendants enjoining them from enforcing, or directing the enforcement of, the Act in any respect;

(c) That Plaintiffs be awarded their attorneys' fees under 42 U.S.C. § 1988;

(d) That Plaintiffs be awarded their costs herein; and

(e) That this Court order such other general and equitable relief as it deems fit and proper.

(d) [sic] That Plaintiffs be awarded their costs herein; and

(e) [sic] That this Court order such other general and equitable relief as it deems fit and proper.

Respectfully submitted.

DATED: October 17, 2005.

GIBSON, DUNN & CRUTCHER LLP
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H. MARK LYON
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By: /s/ Theodore J. Boutrous, Jr./EDD
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VIDEO SOFTWARE DEALERS
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Assembly Bill No. 1179

Passed the Assembly September 8, 2005

____
Chief Clerk of the Assembly

Passed the Senate September 8, 2005

____
Secretary of the Senate

This bill was received by the Governor this ___ day of ____________, 2005, at ___ o'clock ___m.

____
Private Secretary of the Governor

CHAPTER___

An act to add Title 1.2A (commencing with Section 1746) to Part 4 of Division 3 of the Civil Code, relating to violent video games.

LEGISLATIVE COUNSEL'S DIGEST

AB 1179, Yee. Violent video games: sales to minors.

Existing law regulates the sale of certain merchandise, such as political items and sports memorabilia.

This bill would require violent video games to be labeled as specified and would prohibit the sale or rental of those violent video games, as defined, to minors. The bill would provide that a person who violates the act shall be liable in an amount of up to $1,000 for each violation.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.

(b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

(c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.

SEC. 2. Title 1.2A (commencing with Section 1746) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 1.2A. VIOLENT VIDEO GAMES

1746. For purposes of this title, the following definitions shall apply:

(a) "Minor" means any natural person who is under 18 years of age.

(b) "Person" means any natural person, partnership, firm, association, corporation, limited liability company, or other legal entity.

(c) "Video game" means any electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own monitor, or is designed to be used with a television set or a computer monitor, that interacts with the user of the device.

(d)(1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

(A) Comes within all of the following descriptions:

(i) A reasonable person, considering the game as a whole, would find [sic] appeals to a deviant or morbid interest of minors.

(ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.

(iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

(B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim,

(2) For purposes of this subdivision, the following definitions apply:

(A) "Cruel" means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

(B) "Depraved" means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim,

(C) "Heinous" means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

(D) "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing,

(E) "Torture" includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

(3) Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.

1746.1. (a) A person may not sell or rent a video game that has been labeled as a violent video game to a minor.

(b) Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence that a purchaser or renter of a violent video game was not a minor or that the manufacturer failed to label a violent video game as required pursuant to Section 1746.2 shall be an affirmative defense to any action brought pursuant to this title. That evidence may include, but is not limited to, a driver's license or an identification card issued to the purchaser or renter by a state or by the Armed Forces of the United States.

(c) This section shall not apply if the violent video game is sold or rented to a minor by the minor's parent, grandparent, aunt, uncle, or legal guardian.

1746.2. Each violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white "18" outlined in black. The "18" shall have dimensions of no less than 2 inches by 2 inches. The "18" shall be displayed on the front face of the video game package.

1746.3. Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars ($1,000), or a lesser amount as determined by the court. However, this liability shall not apply to any person who violates those provisions if he or she is employed solely in the capacity of a salesclerk or other, similar position and he or she does not have an ownership interest in the business in which the violation occurred and is not employed as a manager in that business.

1746.4. A suspected violation of this title may be reported to a city attorney, county counsel, or district attorney by a parent, legal guardian, or other adult acting on behalf of a minor to whom a violent video game has been sold or rented. A violation of this title may be prosecuted by any city attorney, county counsel, or district attorney.

1746.5. The provisions of this title are severable. If any provision of this title or its application is held to be invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, v.	CASE NO. C 05 4188 DECLARATION OF CROSSAN R. ANDERSEN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Filed Oct. 19, 2005)

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL LOCKYER, in his official capacity as Attorney General of the State of California; GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney, RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose, and ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,

Defendants.

DECLARATION OF CROSSAN R. ANDERSEN

Pursuant to 28 U.S.C. § 1746, I, Crossan R. Andersen, under penalty of perjury state as follows:

1. I am employed as President of the Video Software Dealers Association (hereafter, "VSDA" or "the Association") and have been so employed since January 1999. I previously served VSDA as its Senior Vice President and General Counsel and began my employment with VSDA in 1995. VSDA's principal offices are located in Los Angeles, California, where I reside.

2. I am admitted to practice in the State of California. I have previously served as a Trial Attorney for the United States Department of Justice, Antitrust Division (1971-1980), and as an Assistant United States Attorney for the Central District of California (1980-1988). From 1988 to 1995, I was employed as counsel to the Motion Picture Association of America.

3. The VSDA was established in 1981 as a not-for-profit trade association for the home entertainment industry. The Association represents more than 1,000 companies throughout the United States, Canada, and other nations. Its members operate thousands of retail outlets in the United States that sell and/or rent DVDs, VHS cassettes, and console video games. VSDA's membership comprises the full spectrum of movie video and video game retailers (from single-store retailers to large chains), video and video game distributors, the home video divisions of major and independent motion picture studios, and other related businesses that constitute and support the home video entertainment industry. Membership of the Association includes more than 1,250 retailers and retail stores that sell or rent console video games within the State of California, many of which are within the Northern District of California. These VSDA members would have standing in this matter to seek judicial relief in their own right.

4. As President of VSDA, I am called upon to represent VSDA and the distribution and retailing of home entertainment, including console video games and other packaged video products. This

regularly includes representation in consumer and trade media, at conventions and other trade events and before federal and state governments and international trade organizations. I have personal knowledge of the facts stated in this declaration.

5. In my capacity as President of VSDA, I have remained informed concerning the issues and process concerning the recently enacted Chapter 638, Statutes of 2005 (the "Act"), which is due to take effect on January 1, 2006. The Act imposes civil penalties on retailers, distributors, and manufacturers of video games, including many of VSDA's members, for selling or renting to persons under age 18 what the Act defines as "violent video games." The Act defines "violent" video games are those "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being," if the actions fall within one of two descriptions: either the game must "appeal to a deviant or morbid interest of minors" or it must enable "the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel or depraved in that it involves torture or serious physical abuse to the victim." Act, § 1746. Violation of the Act subjects the offender to a $1,000 fine. Act, § 1746.3.

6. The Act also requires that "[e]ach violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white '18' outlined in black. The '18' shall

have dimensions of no less than 2 inches by 2 inches" and must be placed on the face of the video game package. Act, § 1746.2. Failure to label a "violent" video game subjects a manufacturer or distributor to a $1,000 penalty. Act, § 1746.3.

7. The Act will have place [sic] significant burdens on VSDA's members based on the content of the video game expression that they make available. Because of its serious penalties and vague terms, the Act will also have a significant chilling effect on the expression of VSDA's members.

8. The Act's labeling requirements appear to apply to anyone who "distributes" video games in California. In light of the breadth of the Act, the Act may be read to apply not only to manufacturers, distributors and importers, but also to retailers. Under the Act, VSDA's distributor and importer members must review their present offerings and attempt to determine which video game titles might come within the coverage of the Act's definition of "violent" video games. Moreover, they must make guesses about the content of video games not yet released but which, by custom and trade practice, are ordered in advance of the release of the game. Retailers may also be subjected to liability if they sell so-called "violent" video games acquired by means other than through manufacturers, importers, or distributors. For example, many VSDA members sell, rent and trade games that they acquire from customers through game trading and others acquire games for sale through returns (that may have labels removed or could have originally

been sold at out-of-state outlets and thus would not have been labeled). In addition, retailers currently have substantial stocks of games in inventory and out on rental. These categories of games may not be labeled as required by the Act, and the State may take the view that retailers must determine whether the games may be sold to minors under the Act.

9. While the VSDA and its affected members can try to guess which video games might be covered by the Act, it is impossible for VSDA's members to determine with any degree of certainty whether any number of the titles they distribute are covered by the Act's definition of "violent" video games because, in the context of virtual depictions featured in most games, the language used in the act to define "violent" is vague and without definite meaning.

10. For example, a game is defined in the Act as "violent" if it includes the ability to "virtually inflict serious injury upon images of human beings or characters with substantially human characteristics." Act, § 1746. In a medium in which all depictions are computer generated and animated, even the meaning of "substantially human characteristics" as that term is used in the Act's definition of "violent" is without definite meaning. Combatants, including the player's fictional character and the opponent, in many games are more or less mythological, often possessed with "powers" not possessed by humans. There is no reasonable way for VSDA and its members to determine whether a depiction in a computer game involves violence against characters with

"substantially human characteristics," particularly given that many video games include animated, extra-terrestrial, and fantasized "human" forms with superhuman powers.

11. The Act's definition of "violent" video games contains other inherently vague terms, too numerous to list in full here. By way of example, the Act would require video game manufacturers, distributors and importers to discern the mental processes of the virtual "victims," which by their nature have no mental processes. The Act's definition of "serious physical abuse" apparently would require VSDA's members to determine whether a "victim" in a video game experiences "pain," and to what degree. *See* Act, § 1746(d)(2)(D). They would also be required to assess the level of "consciousness" of a "virtual victim." *See id.* § 1746(d)(2)(E). Moreover, the law would require inquiry by VDSA's members into the mental state of the *player* of the video game: for example, whether the player "intends to virtually inflict a high degree of pain"; whether the "player relishes the virtual killing or shows indifference to the suffering of the victim"; and whether the player "specifically intend[s] the abuse." *See id.*, §§ 1746(2)(A),(B),(D). It will be impossible for VSDA's members to discern how potential game players will react to video games. VSDA's members will be unable to apply these vague terms in attempting to comply with the Act.

12. The Act's labeling requirements would also force VSDA's members to disseminate video games in a manner that is inconsistent with current practices. At present, video game publishers use

the entirety of a video game's limited packaging to convey information about the content of the game – including the game's ESRB rating and content descriptors. The labels imposed by the Act – which are quite large relative to the total size of game packaging – will obscure and eliminate important product information, marketing and operational messages which appear on the game's label or packaging. These messages represent important speech for retailers and convey information and messages about the product which retailers would not willingly eliminate from the games, but for the sanctions imposed by the Act.

13. VSDA has long supported widespread use of the ESRB rating system, encouraging all retailers to use it (by voluntarily choosing to not rent or sell AO-rated games to minors at all, and to provide minors with M-rated games only with parental consent), and to prominently display consumer information concerning the ESRB rating system in their stores. VSDA and its members have together invested thousands of dollars developing awareness of the ESRB rating system and seeking its acceptance by consumers as a useful guide, attempting to give it the same level of public awareness and acceptance as is enjoyed by the familiar Motion Picture Association of America's ratings for movies.

14. The Act compels retailers to speak in a manner inconsistent with the fundamental message they seek to advance. For example, video retailers displaying a T-rated video game are conveying to consumers that, according to the ESRB's

definitions, the game has "content that may be suitable for ages 13 and older." Notwithstanding this, the Act would also require T-rated games meeting the definition of "violent" to be labeled with an "18" – indicating that such games are suitable only for adults, and will not be sold or rented to those ages 13-17. These two messages are fundamentally at odds with each other, and retailers are thus concerned about the confusion this will cause their customers. To reduce the strong likelihood of confusion between the conflicting established rating system and the requirements of the Act, retailers will be forced to disregard the voluntary ESRB system.

15. Existing California law, Chapter 630, Statutes of 2004 (Ca. 2004) Section 2630, requires retailers in California to promote with signage "a video game rating system or notifying consumers that a rating system is available to aid in the selection of a game." Cal. Bus. & Prof. Code § 20650. In addition, retailers are required to "make available to consumers, upon request, information that explains *the* video game rating system." *Id.* (emphasis added). Among video game retailers in California, in practice the ESRB is *the* rating system which receives signage and about which information is provided under this law. The ESRB ratings system and its individual ratings conflict with the labeling required by the Act. Thus, retailers are required by California law to provide information concerning voluntary advisory ratings standards which are fundamentally at odds with the message conveyed by the "18" label. Retailers themselves will be confused by what message may be lawfully conveyed to

consumers inasmuch as they will be required to enforce the "18" restriction and concurrently provide information about the ESRB ratings which advise that some "18" labeled games are suitable for ages 13-17.

16. Moreover, an "18" label is a symbol commonly used to communicate that certain materials are sexually explicit and intended only for adult audiences (*e.g.*, "Must be 18 to Enter," "No One Under 18 Admitted"). VSDA members in California are concerned that requiring an "18" on all games covered by the Act will create such stigma that M-rated, T-rated, or even lower rated games carrying the "18" label will no longer be perceived as products which simply contain material some parents might find unsuitable for their children (like R-rated or PG-13-rated movies) and instead be treated as though they were sexually explicit adult products – even pornography. Indeed, some adult consumers, wary of being seen carrying an "18" product to the checkout counter, will be chilled in their efforts to acquire it. Additionally, VSDA's members may be chilled by simply choosing not to sell products labeled with an "18" in order to avoid the stigmatizing effects of those labels.

17. As described above, the Act's vague definitions will lead to varying conclusions as to which games are prohibited by the Act. But a retailer that receives "18"-labeled video games from a manufacturer or distributor has no discretion to re-classify the games as non-violent. Even if a retailer disagrees with an assessment that a video game is prohibited under the Act, a retailer

may not lawfully sell an already labeled game to a minor and such a sale would subject the retailer to a $1,000 penalty. Act, §§ 1746.1, 1746.3.

18. As a rule, many video retailers in California who rent video games do so under contractual agreements they enter into with their adult customers. Under these agreements, the adult customer may designate other family members, including their children, as authorized by the parent to rent movies or games using the parent's account. Many of these contracts allow the parent to designate, for each child authorized to rent, what ratings limitations, if any, the parent chooses to place on the products rented or purchased by the child. This Act burdens retailers and their customers (who are consenting parents under these agreements) by obligating the retailer to disregard the parent's wishes and instead restrict their children to the "18" rating imposed by the state.

19. Not only will the Act have a burdensome and chilling effect on the expression of VSDA's members, but by virtue of its interaction with [illegible]her provisions of California law, it may also subject VSDA's members to a number of private civil suits based on alleged violations of the Act. Cal. Bus. & Prof. Code § 17200 has been interpreted to give a broad right of action based on harms incurred as a result of a violation of a state law like the Act. If the Act is permitted to go into effect, it may subject VSDA's members to civil suits based on a wide – and conflicting – range of interpretations of the Act. The significant difficulties interpreting the Act's vague definitions,

discussed herein, will only be exacerbated by the serious burdens (including possible broad financial liability) imposed on VSDA's members by such lawsuits.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 18, 2005.

/s/ Crossan R. Andersen
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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, v.	CASE NO. C 05 4188 DECLARATION OF TED C. PRICE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Filed Oct. 19, 2005)

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL LOCKYER, in his official capacity as Attorney General of the State of California; GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney, RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose, and ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,

Defendants.

DECLARATION OF TED C. PRICE

Pursuant to 28 U.S.C. § 1746, I, Ted C. Price, under penalty of perjury state as follows:

1. I am the President and CEO of Insomniac Games, Inc. and have served in this capacity since I founded the company in 1994. My duties outside of those regularly associated with running a company include directly overseeing creation and development of video games for the Playstation game console,

Playstation 2 game console and the Playstation 3 game console.

2. Insomniac Games is headquartered in Burbank, California and is an independent video game developer employing approximately 150 people. Over the past 11 years Insomniac has created and developed games for the Playstation game console and the Playstation 2 game console, most notably the *Spyro the Dragon* series on the Playstation and the *Ratchet and Clank* series on Playstation 2. The games Insomniac has created have sold close to 19 million copies worldwide to date. The company is currently developing another *Ratchet* video game for the Playstation 2 to be released in 2005 and an untitled Playstation 3 video game to be released in 2006.

3. Even though I am President and CEO of Insomniac, I am heavily involved in the design of our games, serving as creative director and executive producer for most of our titles. I am also the chairman of the Academy of Interactive Arts and Sciences ("AIAS") which was founded to recognize artistic and technical excellence in computer and video games. This excellence is recognized at the Interactive Achievement Awards hosted every year by the AIAS. This event is roughly the equivalent of its counterparts in the motion picture, television and recording industries. These peer-based awards are given in a wide variety of categories, some based on game content and others on craft (such as Outstanding Achievement in Sound/Music and Outstanding Achievement in Character or Story Development.)

4. The Academy and other organizations within the video game industry like the International Game Developers Association ("IGDA") of which I am also a member, serve to remind people that computer and video games constitute artistic expression. Today's video games have storylines, characters, art, animation, sound effects and music that rival motion pictures and other forms of entertainment in terms of quality and complexity. As do movie directors and book authors, game creators not only strive to entertain their audiences but to communicate messages and ideas including a variety of political, social and moral commentary. For example, *Tom Clancy's Rainbow Six 3*, a game discussed in this declaration, communicates the same patriotic ideals and outlook on US national security put forth in Tom Clancy's novel *Rainbow Six*.

5. Because of my current positions and because of my experience as an active member of the video gaming community I have extensive knowledge of the video game industry including knowledge of how computer and video games are developed, published and distributed. Throughout my life I have also been an avid player of computer and video games. In my lifetime I estimate that I have played over 1,000 computer and video games and that I have spent thousands of hours playing computer and video games. I am familiar with the design, storylines, character development, and expressive elements of a wide range of computer and video games. In particular, I am familiar with the following games, which

I understand have been submitted to the Court along with a videotape of representative game play:

Medal of Honor: Frontline

Resident Evil 4

Jade Empire

God of War

Full Spectrum Warrior

Tom Clancy's Rainbow Six 3

THE STATUTE

6. On October 7, 2005 California enacted into law Chapter 638, Statutes of 2005 (Ca. 2005) (the "Act"). The law is due to take effect on January 1, 2006.

7. I have reviewed the Act, including the Act's restrictions on "violent video games," and the numerous terms used by the Act to attempt to define what games are covered. The overall definition is so ambiguous that video game creators will have a very difficult time understanding what is and what isn't permitted under the law. Many of today's games rated T by the Entertainment Software Rating Board ("ESRB") might be interpreted to fall under these ambiguous terms including *Medal of Honor: Frontline*, a game named in this declaration.

8. A general problem with the definition of "violent video games" is that it is inclusive but not

exclusive, as it uses the word "includes" to modify the specific examples of behavior covered by the definition. Thus, the definition is left open-ended and does not confine the range of depictions that trigger the "violent video game" label. As a result, game creators are put in a position where they are being asked to work within boundaries that have not been clearly defined. For example, in some games it is possible to inflict "harm" on characters other than "killing, maiming, dismembering, or sexually assaulting," and it is unclear how this would be treated under the Act.

9. "Violent video games" are defined by the Act to include those games that appeal to the "deviant or morbid interest of minors". This term creates confusion because there is no common or accepted understanding of this term, and game creators and others will not be able to know at what point an interest becomes "morbid" or "deviant". It is particularly difficult to understand what constitutes "a deviant or morbid interest" because each individual is unique in his or her level of interest in any topic.

10. The Act further defines "violent video games" to include games that "enabl[e] the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim." Many of these terms, even those that are further defined by the Act, are extremely ambiguous and cannot be easily applied, particularly

in the video games context, in which the characters are not actual beings.

11. For example, the Act covers serious virtual injuries to "images of human beings or characters with substantially human characteristics." It will be impossible for individuals to apply this term consistently to many of today's games. Many games feature characters that are humanoid – for example, zombies, mythological creatures, mutants, and humanoids that transform into other beings. Other games feature characters that appear to be human but possess magical or other powers that humans do not possess. People are certain to reach differing and conflicting conclusions about whether certain games include injuries to "images of human beings" or to "characters with substantially human characteristics."

12. The Act defines "cruel" as "that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim." It is unclear what is covered by this definition of "cruel." In most games, whether rated E, E10+, T or M, players often engage in physical combat with virtual characters. For instance most so-called "fighting games", almost all of which are rated T, feature locks, holds, arm and leg breaks, or strikes that could be considered to involve "inflict[ing] a high degree of pain," and therefore "cruel" especially if and when an opponent is dazed or stunned. In addition, this definition of "cruel" relies on whether the player "intends to virtually inflict a high degree of pain." It is impossible to know what

individual players of a game "intend" while playing the game. Game developers are left to guess whether their games will be viewed as "cruel," and may have to restrict their content because this term can be so widely interpreted.

13. The Act defines "depraved" as "that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim." This definition contains terms that are not capable of clear application, particularly in the video game context in which no real harm is ever inflicted, such as "relishes the virtual killing" or "shows indifference to the suffering of the victim." Many T-rated games, such as *Medal of Honor: Frontline*, feature combat in which characters may be killed by one blow or many. Game creators will be left guessing as to how many blows to an enemy will mean that a player "relishes the virtual killing or shows indifference to the suffering of the victim." Furthermore, many of today's games allow players to take very different approaches to succeeding. Some players may choose to confront enemies in combat with as much force as possible, whereas other players may choose to take a stealthy approach and avoid confrontation if at all possible. Because game designers often seek to allow players freedom in choosing their own unique paths through games, it would be impossible to predict how frequently, if at all, individual players "relish the virtual killing" or "show indifference to the suffering of the victim." This

makes the term "depraved" even more difficult to apply to video games.

14. The Act defines "heinous" as "shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings." In addition to the other definitional problems that I describe in this declaration, it is unclear what is covered by the definition's use of the subjective term "shockingly atrocious." Game creators cannot know in advance whether their content will be considered – by retailers, consumers, or state authorities – to be "shockingly atrocious." This uncertainly [sic] may cause game creators to restrict their expression to steer clear of violating the Act.

15. Another ambiguous part of the Act is the definition of "serious physical abuse," which the Act defines as "a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing." The definition of "serious physical abuse" raises more questions than it answers, due to the use of ambiguous terms such as "significant or considerable amount of injury or damage," "substantial risk of death," "extreme physical

pain," "substantial disfigurement," and "substantial impairment." In addition, this definition does not readily apply to the video games context, in which the characters are not real and thus are not susceptible of "damage," "risk," and "impairment" in functioning in the way that actual, real-world beings are. It will thus be difficult or impossible to determine if virtual characters meet the descriptions involved in this definition. For example, how can the state of a virtual character's consciousness be determined, particularly because that character was never actually conscious to begin with? The problems with this definition of "serious physical abuse" are increased by requiring that the player "specifically intend the abuse." It is impossible to know what individual players of a game "intend" while playing the game. Game developers will thus be left to guess whether their games will be viewed involving "serious physical abuse," and may restrict their content because this term can be so widely interpreted.

16. The Act also includes a vague definition of "torture," to include "mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim." This definition suffers from the same vague and confusing language as used to define "serious physical abuse," as it requires an impossible determination of whether virtual victims are "conscious" and whether a player

acts with "specific intent." Similarly, it will be difficult, if not impossible, to determine whether virtual victims have suffered "severe mental or physical pain or suffering," not only because that phrase is vague and capable of broad application, but also because video game characters are not real and thus are not capable of suffering as real beings are.

17. Finally, the Act states that "[p]ertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim." This provision contributes further to the confusion that the Act will create. The terms "gratuitous violence," "needless mutilation," and "helplessness of the victim" are themselves subjective and unclear, and there is no way to predict how these terms will be applied. In addition, and as noted above, many of today's video games allow players to take very different approaches to succeeding. Players often can choose whether to inflict multiple blows, a single blow, or no blow at all to get past an enemy. Because many game designers creates [sic] games in which players are free to choose their own paths, it would be impossible to predict how frequently, if at all, individual players commit "gratuitous violence" and "needless mutilation." Because this provision has no ready meaning in the video game context, it is likely to cause me and other game creators to alter our creative

choices in order to avoid the risk of falling within the Act's terms.

18. My concern as a game developer is that there is no predictable or settled interpretation of the ambiguous definitions in this Act. This means that the games my company and I create could be considered covered by this Act. If we have no way of truly understanding how people will apply these terms, it is very difficult for us to freely design games without fearing that the statute will apply to our games.

19. As a result of the ambiguous nature of the definitions within this Act and the fact they can be so widely interpreted, I believe that this Act will result in many games rated by the ESRB as potentially suitable for teenagers and children being considered "violent video games". Indeed, the definition if applied broadly would cover many video games presently available for commercial sale or rental, including games rated "T". For example I believe the following games may fall under the provisions of this statute: *Terminator 3: The Redemption* (T), *Minority Report* (T) and *Medal of Honor: Frontline* (T).

20. As a game developer, I worry that because the government can fine individuals for misinterpreting the Act, retailers, distributors, and publishers will act extremely conservatively to avoid being fined. For many games this will result in a decreased demand at retail. The reduced demand is likely to create a domino effect where distributors choose not to distribute certain categories of games and publishers

respond by curtailing development of games that may possibly fall under the Act's prohibitions. This will require that game developers and creators alter and/or restrict their creative expression within the games they make.

21. From my perspective as a game designer and developer, I feel that this Act severely infringes on the rights of every developer in my company to freely express him or herself under the First Amendment of the U.S. Constitution. Government-mandated fines for ambiguously defined "violent video games" will mean that our designers will have to restrict the kinds of storylines and gameplay we include in our games. This is a restriction not shared by any other entertainment medium.

22. Furthermore, this Act creates an incredibly negative and unwarranted stigma for games which feature violence *less* graphic than seen in today's feature films and other media. Not only does this Act create a double standard for a creative medium equivalent in relevance to film, books and television, but it clearly ignores the artistic merit, relevance and sophistication of today's video games by essentially treating an ambiguously defined subset of games similarly to pornography and controlled substances such as alcohol and cigarettes.

POTENTIAL APPLICATION OF THE ACT TO SPECIFIC GAMES

Medal of Honor: Frontline

23. *Medal of Honor: Frontline* is a video game developed and published by Electronic Arts. The ESRB gave *Medal of Honor: Frontline* a rating of "Teen" or "T", meaning that it may be suitable for ages 13 and older. Electronic Arts publishes the game for Microsoft's Xbox console, Sony's Playstation 2 console, Nintendo's Gamecube control.

24. This game puts the player in the shoes of Lieutenant James Patterson, a transport pilot turned soldier. Patterson is a part of the American forces landing in Normandy on D-Day during World War II.

25. The game begins with a harrowing segment where Patterson must survive the Normandy landing and help his fellow soldiers gain control of the beach and surrounding areas. This opening sequence in the game is very similar to the opening scene of *Saving Private Ryan* except that the player is actually playing through the scene, running across the sand, taking cover and eventually storming the bunkers occupied by German soldiers.

26. After the Normandy landing, Patterson is enlisted in the intelligence gathering efforts of the Office of Strategic Services (OSS). He is sent on reconnaissance missions and eventually tasked with destroying a U-boat shipyard. During this particular mission Patterson recovers secret German documents,

one of which outlines German plans for an experimental jet bomber. The OSS determines that if the Nazis successfully construct the bomber, the tide of war will turn against the Allies.

27. Patterson is then sent into an occupied town to meet with an informant who helps locate the head of the bomber project, a Nazi Baron. Patterson finds the Baron aboard a train which he learns later is destined for the bomber facility. But when Patterson confronts the Baron, the Baron manages to escape. Now knowing the location of the bomber construction facility Patterson must make his way to the district of Gotha.

28. Patterson infiltrates the aircraft research facility in Gotha. Once he locates the bomber he calls in an allied airstrike. But again, he must face the Baron and his soldiers. Patterson ultimately defeats the Baron and escapes with the bomber, thus ensuring it will never be used against Allied targets.

29. It is very difficult to attempt to apply the Act's ambiguous terms, such as "intends to virtually inflict a high degree of pain" and "gratuitous violence," to this game. Every player approaches the combat scenarios in the game differently. As a result, some players would experience violent acts much less frequently than others, and players will vary in the amount of violence they use to accomplish their objectives. Which player experiences would be used to apply the Act's vague metrics?

Resident Evil 4

30. *Resident Evil 4* is a video game developed by Capcom Production Studio 4 and published by Capcom. The ESRB gave *Resident Evil 4* a rating of "Mature" or "M", meaning that it may be suitable for ages 17 and older. Capcom publishes the game for Nintendo's Gamecube.

31. *Resident Evil 4* continues a saga begun in earlier *Resident Evil* games. In previous games a sinister corporation called Umbrella had manufactured a virus which turned humans into zombies and mutants. We learn in the beginning of *Resident Evil 4* that the United States government has issued a suspension decree to Umbrella, crashing its stock and driving it out of business.

32. The main character in the game is a government agent named Leon Kennedy. At the start of the game he is tasked with rescuing Ashley, the kidnapped daughter of the American president. Leon follows clues to a small rural village in Spain and begins his search.

33. To summarize: the player eventually discovers that a character named Osmund Saddler has discovered an ancient parasite called La Plagas. This parasite when injected into humans will turn them into zombies or transform them into even more vicious and powerful monsters. The catch is that Saddler, himself a mutant, can exert his will over those that are infected and use them for his own nefarious purposes. Saddler himself has not kidnapped Ashley,

rather an old enemy of Leon's has kidnapped her to curry favor with Saddler so that *he* can steal Las Plagas (an attempt which is later thwarted). Saddler's intent is to use Ashley to extort money from the United States government. But this is not the main focus of Saddler's actions as the player will later find out.

34. Several hours into the game, the player rescues Ashley but his attempts to return her to the United States are hindered by Saddler and his army of zombies and mutants. The player, while doing his best to protect Ashley uncovers more and more layers of Saddler's complex scheme to manufacture and spread Las Plagas for his own personal gain. Before he is able to return Ashley to the United States Leon must confront and kill Saddler. When the player confronts Saddler in a climactic battle Saddler transforms into a monstrous being – something that in no way resembles a human. On the player's victory the main games ends and Leon returns Ashley to the United States.

35. Throughout the game, the player is constantly subjected to plot twists, mysteries to be solved and evolving relationships between the main characters. While the game is linear (in that there is no branching storyline) the player has to solve puzzles and manage a complex inventory to have any hope of succeeding.

36. The player's character *may* be interpreted as injuring and killing "images of human beings" or

"characters with substantially human characteristics," though that is not clear. The majority of the enemies in the game are zombies and mutants infected by Las Plagas. These characters have corpses which dissolve a few seconds after dropping to the ground. There are a few instances where there appear to be chainsaw-wielding humans whose corpses do not disappear. Their heads are completely covered by canvas sacks making it impossible to tell what they really are. There are also what appear to be humans who attack the player at various points of the game who also have corpses that do not disappear. But they act and look exactly like the zombies and mutants who populate most of the game's areas. The inference is that these people have also been infected by Las Plagas and are in the process of becoming full-fledged zombies but that the infection is not far enough along to have fully converted them.

37. While some players may be able to avoid confrontation with most of the enemies in this game, other players will succeed through killing the majority of the zombies and mutants he or she encounters. Yet enemy encounters do not happen consistently – there are frequent stretches of exploration in between combat sequences. Because players may play through the game at different speeds and have different styles of play, it would be impossible to determine if players are engaging in acts of violence that would be covered by the Act's various definitions of "violent video games," such as whether "the player relishes the virtual killing or shows indifference to the suffering of

the victim," or "appeals to the deviant or morbid interest of minors."

Jade Empire

38. *Jade Empire* is a video game developed by Bioware Corporation and published by Microsoft Corporation. The ESRB gave *Jade Empire* a rating of "Mature" or "M", meaning that it may be suitable for ages 17 and older. Microsoft publishes the game for its Xbox console.

39. The story of *Jade Empire* is complex and has different paths which the player may choose to follow. There are many opportunities in the game for the player to choose between good, neutral and evil actions that will change the course of the story, change the way other characters in the game react to the player's character and change the items and skills available to the player.

40. The story itself is heavily influenced by Chinese mythology and wuxia (martial-chivalric stories). It takes place in a mythical kingdom called the Jade Empire which is ruled by Emperor Sun and his younger brothers Prince Li and Prince Kin. Before the game begins the kingdom suffers a terrible drought and the Emperor, seeking to end the drought obtains the heart of the Water Dragon, Goddess of Life. For whoever possesses the heart of the Water Dragon gains immense power and becomes immortal. While the Emperor indeed ends the drought he is corrupted by the power he has obtained and decides

to become a god. His brothers Li and Kin attempt to stop him but the Emperor is too powerful. He turns Kin into a demonic slave named Death's Hand while Li flees and travels to the edge of the empire disguising himself as a benevolent martial arts master.

41. With the Goddess of Life unable to function, the gates to the underworld are closed preventing the spirits of the dead from being reincarnated in the afterlife. The empire begins to fill with the spirits of the dead (ghosts) who begin to go mad and attack the living. Even worse, to further strengthen his hold on the land, Emperor Sun builds an army of immortal golems powered by the enslaved souls of the dead.

42. The player's character begins as a student of Prince Li, now disguised as Master Li. Master Li trains the player to fight the spirits, bandits and demons and enlists the player in his own evil quest to steal the heart of the Water Dragon from his brother, though the player doesn't realize it at first. Throughout the game the player's character develops new skills, acquires many new items, gains followers and uncovers more and more of the back story. Much of what the player learns and acquires is a result of thousands of choices he must make throughout his travels. But ultimately he ends up battling and defeating Emperor Sun near the end of the game.

43. When the Emperor falls, Master Li obtains the heart of the Water Dragon and inherits its immense powers. Unfortunately for the player it is at this point that he discovers Master Li is just as evil

as his brother. Master Li kills the player's character sending him to the spirit realm as a ghost. When the player wakes up in the spirit realm he finds that to return to the land of the living he must first unlock the gates to the Underworld. Eventually after a series of adventures as a spirit the player does return as a mortal and has a final showdown with Master Li, now Emperor Li. When the player defeats the new Emperor he has two choices – one to rule the world with the evil Emperor the other to restore the world to a balanced state.

44. During the game the player's character fights and kills human bandits, ghosts, humanoid golems and demons of all types – some humanoid, some animal-like. The player himself becomes a spirit three quarters of the way through the game. Furthermore, since many of the humans in the game use magic spells, magical fighting abilities and even transform into other creatures, it is unclear whether this game involves "harm" to "images of human beings" or to "characters with substantially human characteristics."

45. This game also features long stretches of exploration and many instances of exposition where the player is learning about the background of the land and the other characters. Depending on a player's style of play, combat may occur frequently or infrequently, and combat may vary in its intensity. In other words, the player may choose to avoid some combat sequences or jump into every confrontation. Because of this open-ended game design it would be

impossible to determine whether or not the game satisfies the Act's vague definitions of "violent video games," such as whether a player "specifically intend[s]" to inflict "serious physical abuse," including "extreme physical pain" and "substantial impairment of the function of a bodily member, organ, or mental faculty."

God of War

46. *God of War* is a video game developed and published by Sony Computer Entertainment America. The ESRB gave *God of War* a rating of "Mature" or "M", meaning that it may be suitable for ages 17 and older. Sony Computer Entertainment America publishes the game for Sony's Playstation 2 game console.

47. *God of War* takes place in ancient Greece. In this game the Greek gods of legend are real and interact with humans. The player's character is Kratos, a Spartan warrior who has taken on the task to kill the titular *God of War* Ares by opening Pandora's box. Along the way, he is provided assistance by Athena, Zeus, Artemis, Poseidon and Hades.

48. At the beginning of the game in a foreshadowing of future events, the player sees Kratos hurling himself off of a cliff for unknown reasons. Time shifts to three weeks before this event and a complex story unfolds in a non-linear fashion. The player finds out bits and pieces of Kratos' history

through movies which play at the end of most game play segments.

49. The player eventually learns that Kratos at one time was a brutal but effective Spartan commander. Ignoring his wife and child, he led his army on countless conquests until he met his match against a barbarian army which was threatening Sparta itself. Kratos' army was being badly defeated until he called on the god Ares for help. Ares arrived and helped Kratos. Seizing an opportunity to gain greater power Kratos and his army began to serve the will of Ares. Under orders from Ares, Kratos and his army attacked a small village. Kratos and his men slaughtered all of the villagers but to his horror, Kratos realized that two of the victims of his rampage were his own wife and daughter. After this Kratos rejected Ares and vowed to seek forgiveness from the other gods for his crimes as well as to exact revenge on Ares for his deception.

50. We learn all of this in flashbacks throughout the game. But as the player begins his actual quests, we see Kratos struggling with his inner demons. In many of the game's movies, Kratos is plagued by nightmares of his wife and child's deaths and nothing he does will erase their memories. Because of this he becomes singularly focused on eliminating Ares in the hopes of convincing the goddess Athena to aid him. During the game the player fights countless demons and other humanoid creatures who are terrorizing the human populace as he seeks

revenge on Ares. He battles through ancient Athens and even journeys to Hades in his quest.

51. When Kratos finally succeeds in killing Ares it is a hollow victory. We learn that Athens will be rebuilt but that Kratos' nightmares will never cease. At this point, in the post-battle movies Kratos climbs a massive cliff and jumps to his death, bringing the story full circle to the beginning of the game. But the story doesn't end with Kratos' death. Athena rescues Kratos and offers him god status and the throne of Ares. Kratos accepts and also finds out that he is actually the son of Zeus.

52. Throughout the game, the [sic] Kratos executes combinations of physical attacks and magical attacks against enemies. While the game is primarily focused on combat, the player's character has an opportunity to find special items which increase his maximum health and magic. The game requires well thought out strategies in terms of using different combinations of physical and magical attacks effectively. Furthermore, the game is filled with logic puzzles which demand that players observe their environments carefully and experiment with different ways to traverse the environments. These logic puzzles generally do not involve combat and are non-violent.

53. Many characters in this game *resemble* humans but it is unclear whether they will be interpreted to be "images of human beings" or to "characters with substantially human characteristics." Most characters are derived from Greek

mythology. For instance, many of the characters in the game are well known gods or persona from Greek mythology who look like humans but are immortal or have god-like powers. Furthermore, some enemies have humanoid bodies with wings, some are shuffling zombies, others are skeletal warriors.

54. While combat occurs with regularity in this game, people will likely disagree whether the game content satisfies the Act's many definitions of "violent video games," such as "shockingly atrocious" or involving a player's specific intent "to virtually inflict severe mental or physical pain or suffering upon the victim." There are many story sequences and traversal segments that help to create a variety of challenges and to flesh out Kratos' tragic tale. As a result, it is very difficult to know whether or not this game would satisfy anyone's interpretation of the Act's definitions.

Full Spectrum Warrior

55. *Full Spectrum Warrior* is a video game developed by Pandemic Studios and published by THQ Corporation. The ESRB gave *Full Spectrum Warrior* a rating of "Mature" or "M", meaning that it may be suitable for ages 17 and older. THQ publishes the game for Microsoft's Xbox console, Sony's Playstation 2 and personal computers.

56. The game follows three squads of infantry troops through a series of mission fighting insurgents in a fictitious Middle Eastern city called Zekistan.

Each squad has four members, a team leader, a rifleman, a grenadier and an automatic rifleman. These squads are not faceless soldiers – they have real personalities that emerge in their verbal responses to orders and in their repartee with each other. The squads work as a unit, covering each other, moving in formation.

57. As a player you never take the place of any of the soldiers in combat. Instead you are a virtual commander giving your squads orders to move, take cover, provide covering fire and then fire on positions. The player gives commands to his squads and the squads carry them out. The main focus of the game is on coordinating squads in an attempt to safely find the most strategic cover, outflank, and then defeat enemies.

58. There is a comprehensive training level at the beginning of the game which familiarizes players with necessary terms and tactics. Throughout the game, players are faced with more and more complex situations and must develop their abilities to command their squads effectively and choose the strategies that will minimize allied casualties. Furthermore, the player has to be aware of the different capabilities of each of his squad members and use them at the correct times. For instance, if a squad is pinned down by heavy enemy fire, the player can command his team leader to drop smoke grenades for a screen and then have his automatic rifleman provide covering fire while the team moves to a safer position, one by one.

59. The combat sequences in this game are spaced fairly far apart from each other and players are not forced to move quickly into each scenario, though they may if they wish. In addition, much of the game involves setting up squads in flanking positions, scouting areas for potential threats and then, when in combat, responding in a measured, strategic fashion. Acting with disregard for one's troops' safety will result in allied casualties and ultimately cause the player to lose the game. It is therefore impossible to determine whether any particular player will engage in the "violence" described by the Act's various definitions of "violent video games," such as "serious physical abuse" performed with specific intent.

Tom Clancy's Rainbow Six 3

60. Tom Clancy's *Rainbow Six 3* is a video game developed by Ubisoft Montreal and published by Ubisoft. The ESRB gave *Rainbow Six 3* a rating of "Mature" or "M", meaning that it may be suitable for ages 17 and older. Ubisoft publishes the game for Microsoft's Xbox console, Sony's Playstation 2, Nintendo's Gamecube, and mobile phones.

61. The story in *Rainbow Six 3* is related to that of the book *Rainbow Six* by Tom Clancy. In fact, the game's storyline was approved by Tom Clancy himself. In the game, as in the book, Rainbow Six is a shadow organization covertly supported by western governments. It is a secret anti-terrorist organization

comprised mainly of American ex-special forces soldiers mixed with a few specialists from other nations. In the game, the player assumes the role of team leader, Ding Chavez, and gives orders to the rest of Chavez's four person squad.

62. The game takes place in 2007 as OPEC launches an oil embargo against the United States. But Venezuela breaks the embargo and begins shipping oil to the United States. Terrorists who have apparently been counting on the embargo to weaken America's influence in the Middle East begin striking targets in America, South America and Europe. Rainbow Six is called in by the United Nations to stop the terrorists.

63. Juan Crespo, a Venezuelan philanthropist and pro-United States businessman bound for the presidency of Venezuela becomes the apparent target of the terrorists and the player's character must rescue him or his associates during two of the games' fourteen missions. Later in the game Crespo is elected president of Venezuela and we discover that he is actually behind the terrorist activities around the world. The player finds out that once Crespo became president, he had planned to stop the oil shipments to the United States and sell it on the black market, generating huge personal profits. Furthermore through his connections in the Middle East Crespo intended to cast the blame for the terrorist attacks on Saudi Arabia creating a war between the United States and the Saudis. Assuming that the war would devastate one or both countries, Venezuela, a major

oil producer, would become even more powerful. During the later missions in the game, the player and his team must continue to disrupt the terrorist activities, and track down and then kill Crespo.

64. *Rainbow Six 3* is a realistic tactical simulation in that the player has to think through each situation to succeed. Because team members can be killed or incapacitated by a single bullet, they cannot simply run into a room with guns blazing (unless the player has no interest in winning the game). The player must command his team members to covertly move to locations, open doors with varying levels of aggressiveness, and secure hostages among other things, by either using the command system accessed through the joypad or by simply issuing verbal commands into a headset. The commands used are fairly complex and usually include a series of orders which must be executed in sequence such as "open, flash and clear." This means "open the door, deploy a flash grenade and clear the room of hostiles." Since many of the situations presented to the player involve rooms or areas with multiple entrances, to be effective the player has to make sure that all team members are acting in concert – bursting in from different directions simultaneously to gain the advantage of surprise.

65. While many of the missions do involve killing or incapacitating terrorists, the objectives of the missions themselves are varied. Most of the missions have hostage rescue as the main goal. In these missions, killing a hostage or allowing a hostage to be

killed will cause the player to fail. Other missions involve defusing bombs or preventing nerve gas from being deployed. Losing team members during missions makes the game even more difficult so players have to be very careful to protect their squad mates by collecting as much data as possible about their surroundings and issuing intelligent commands.

66. Depending on the skill of the player and the choices that the player makes, he may engage in violent acts frequently or infrequently, and with varying amounts of force. Players often have the choice to either incapacitate or kill enemies. For example, with the right equipment and tactics, skilled players may be able to succeed in the game by terminating only a handful of terrorists with minimal force. For this reason, like previous games mentioned, the Act's vague definitions of "violent video games" (such as "gratuitous violence" and "intends to virtually inflict a high degree of pain") are impossible to apply to this game, particularly because every player has a different experience and makes different choices as he or she plays through the game.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 18, 2005.

/s/ Ted C. Price
Ted C. Price

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, v.	CASE NO. C 05 4188 DECLARATION OF DOUGLAS LOWENSTEIN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Filed Oct. 19, 2005)

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL LOCKYER, in his official capacity as Attorney General of the State of California; GEORGE KENNEDY, in his official capacity as Santa Clara County District Attorney, RICHARD DOYLE, in his official capacity as City Attorney for the City of San Jose, and ANN MILLER RAVEL, in her official capacity as County Counsel for the County of Santa Clara,

Defendants.

DECLARATION OF DOUGLAS LOWENSTEIN

Pursuant to 28 U.S.C. § 1746, I, Douglas Lowenstein, under penalty of perjury state as follows:

1. I am currently employed as President of the Entertainment Software Association ("ESA"). I have been the President of the ESA (formerly known as the Interactive Digital Software Association) since June of 1994.

2. The ESA is the only U.S. trade association exclusively dedicated to serve and promote the

business and public affairs interests of companies that publish entertainment software used for video game consoles (such as Nintendo GameCube, Microsoft Xbox, and Sony Playstation 2), personal computers, wireless, and the Internet. One such interest that the ESA promotes is these companies' right to publish and distribute works of expression that are protected under the First Amendment to the United States Constitution and similar provisions of the constitutions of the various States. The ESA's membership includes a number of entities that distribute and/or supply video games and related software to owners and operators of sales and rental outlets within the State of California. Twenty of ESA's members have facilities in California, accounting for nearly 10,000 employees.

3. As a result of my duties as President of the ESA, I have personal knowledge of the facts stated in this declaration.

The ESRB Rating System

4. The Entertainment Software Rating Board ("ESRB") is a self-regulatory body established by the ESA to independently rate the content of entertainment software for all platforms.

5. In 1994, the ESRB created a rating system for computer and video games. In a September 2000 report, the Federal Trade Commission ("FTC") called the ESRB rating system the "most comprehensive" of industry-wide media rating systems. *See* http://www.

ftc.gov/reports/violence/vioreport.pdf ("FTC Report") at 37. Senator Joe Lieberman has called the ESRB system a model for other entertainment industries to follow.

6. The ESRB rating system was created as part of the industry's commitment to empower parents and other consumers to make informed decisions based on the general content and nature of games that they may buy, rent, or play. The rating system was designed to provide credible, reliable, and easily understood information about games to consumers. Like the movie rating system, the ESRB rating system is entirely voluntary; neither the ESA nor the ESRB requires video game publishers to submit their games to the ESRB for review, even though nearly all such publishers do so. The ESA is not, and has never been, involved directly or indirectly in the issuance of ratings by the ESRB, or in the ESRB's interpretations of its own rating guidelines. The ESRB is funded in part by fees that it charges companies, which submit products to the ESRB for ratings.

7. The purpose of the ESRB rating system is to give parents and consumers information about the content of interactive entertainment software products so that they can make informed purchase and rental decisions. For any given game, the rating system offers both: (i) an actual rating in one of six categories for age appropriateness of content; and (ii) short descriptive phrases called "content descriptors" that give additional information about a game's content. A copy of the ESRB's rating system, including

both the rating categories and the glossary of content descriptors, is attached as Exhibit A.

8. Under the ESRB system, games designated "EC" (Early Childhood) contain content that may be suitable for users age 3 and older, games designated "E" (Everyone) contain content that may be suitable for users age 6 and older, games designated "E10+" (Everyone Ten and Older) contain content that may be suitable for users age 10 and older, games designated "T" (Teen) contain content that may be suitable for users age 13 and older, games designated "M" (Mature) contain content that may be suitable for users age 17 and older, and games designated "AO" (Adults Only) contain content that the ESRB suggests should only be played by users 18 and older.

9. The ESRB rating system is dynamic, and is responsive to changes in the marketplace and to feedback from parents and customers. For example, the ESRB recently amended its rating system to add the new "E10+" rating, after consultations with academics and child development experts.

10. The ESRB also assists video game publishers and retailers in educating parents and other consumers about video games. Among other things, the ESRB makes available to video game publishers standardized graphics for video game packaging, including the trademarked ESRB rating symbols and content descriptors, as well as labels alerting consumers to "check the ratings." These ESRB-distributed labeling templates are widely used by

video game publishers. ESRB has created designs and specifications for these materials based on its years of experience, and these materials reflect both the need to fully and accurately inform consumers about the rating system and the specific presentation needs of publishers. These standardized materials, as used and adapted by video game publishers and retailers, represent the video game industry's collective message of how best to inform and describe the ESRB system to parents and other customers. The value of these materials as an educational tool for parents is particularly important, as the FTC has found that parents are involved in 83% of video game purchases for minors. *See* FTC Report at 42.

The California Statute

11. In my capacity as President of the ESA, I have remained informed about the issues and processes concerning the recently enacted Chapter 638, Statutes of 2005 (Ca. 2005) (the "Act"), which was enacted into law on October 7, 2005. The Act is due to take effect on January 1, 2006.

12. The Act seeks to censor expression in the video game medium because of the perceived effect of this expression on minors under the age of 18. Specifically, the Act makes illegal, and imposes penalties for, the rental or sale of "violent" video games to those under the age of 18. "Violent" video games are defined as those "in which the range of options available to a player includes killing, maiming,

dismembering, or sexually assaulting an image of a human being" if the actions fall "within one of two descriptions": either the game must "appeal to a deviant or morbid interest of minors" or it must enable "the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel or depraved in that it involves torture or serious physical abuse to the victim." Act, § 1746. Violation of the Act subjects the offender to a $1,000 fine. Act, § 1746.3.

13. Some of the content displayed by the video games created, published, distributed, and/or made available to the public by the ESA's members may be deemed by law enforcement officials in the State of California to meet the statutory definitions of "violent" video games. Should the Act take effect, some retail establishments will likely sell or rent fewer copies of certain games because those games can no longer be sold or rented to minors under the Act, while other retailers may choose not to stock some games altogether – for adults or children – for fear of being subjected to the penalty for selling games that may be deemed covered by the Act to individuals under age 18. In either case, because retailers will restrict the sale of ESA members' products in light of the Act, the Act will prevent the expression of ESA members from reaching a wide range of willing recipients.

14. The Act also requires that "[e]ach violent video game that is imported into or distributed in

California for retail sale shall be labeled with a solid white '18' outlined in black. The '18' shall have dimensions of no less than 2 inches by 2 inches" and must be placed on the face of the video game package." Act, § 1746.2. Failure to label a "violent" video game subjects a manufacturer or distributor to a $1,000 penalty. Act, § 1746.3.

15. The Act's labeling requirement will place significant burdens on ESA members and the sales of their products, and will result in consumer confusion. As video game publishers, ESA members use ESRB ratings and content descriptors, and the corresponding artwork, on their game packaging to inform customers about the rating system. A large black and white label that says only "18" would fail to provide the information contained in the existing rating system, and as a result will be confusing to customers. Moreover, the large "18" label may obstruct important information on the game packaging itself, including information about the game's ESRB rating and other legal information. Instead of educating consumers about the content of the game – as the ESRB ratings already do – the labels mandated by the Act will primarily serve to stigmatize ESA members' games.

16. Furthermore, the Act's labeling requirement applies to any game that qualifies under the Act's definition of "violent" video game, even if the game has received an ESRB rating of "EC," "E," E10+," and "T." In other words, the Act requires an "18" label to be placed on any game showing "violence" within the meaning of the Act, including many "T" and "E10+"

games, even though the ESRB system would recommend that these games are suitable for young people. Thus, the Act's labeling provision is likely to have a stigmatizing and chilling effect not only on "AO" and "M" games, but on other games as well, because some retailers may refuse to stock any game they deem "violent," out of concern that games with the "18" label will trigger scrutiny from law enforcement officials. Likewise, the Act's lack of clear guidance – and threat of substantial penalties – will cause manufacturers and publishers to steer far clear of the Act's prohibitions by labeling "18" any game that might conceivably be considered "violent" under the Act, even if under the ESRB system, some of the prohibited games would be recommended as being suitable for kids over 10 (for "E10+ games) or for teens 13 and older (for "'T'" games).

17. The Act will require ESA's members to review every video game they manufacture for distribution in California (essentially all of their games) to attempt to determine which video game titles must be labeled under the Act's definition of "violent video games." The Act's complicated and vague terms will make this task nearly impossible. For example, under the Act those who make and distribute video games must determine if a video game "appeals to a deviant or morbid interest of minors," "is patently offensive to prevailing standards in the community as to what is suitable for minors." These determinations are wholly subjective, and there are no standards available to guide manufacturers and distributors about what is

considered "suitable" for minors. Likewise, it will be impossible for manufacturers to determine which video games contain content that some law enforcement official in California might consider "especially heinous, cruel, or depraved."

18. There are no standards to guide these assessments (which make no sense in the context of video games), and as a result video game manufacturers and distributors will reach widely different conclusions about what games need to be labeled under the Act. It is likely that many video game manufacturers and publishers will take the most conservative view of the Act's prohibitions – for fear of violating the Act – and as a result a broad range of our members' expression will be impermissibly censored.

19. Applying the Act's definition of "violent" video games will be particularly difficult, if not impossible, given the nature of video games. For example, a game is defined in the Act as "violent" if it includes the ability to "virtually inflict serious injury upon images of human beings or characters with substantially human characteristics." Act, § 1746. In a medium characterized by animation and fantasy, the meaning of the term "substantially human characteristics" is far from clear. Many video game characters are more or less mythological, often possessed with "powers" not possessed by humans. Likewise, determining whether a video game shows scenes of "mental abuse" of a "virtual victim," and ascertaining the "intent" of the individual video game

player would be impossible. Because every person plays a video game differently, how would manufacturers and distributors determine the "intent" of the player? Moreover, video games often contain more than 50 hours of game play, much of which is non-linear or accessible only to advanced game players. Thus, unlike a movie, which can be viewed in its entirety by a retailer or distributor, most video games are not susceptible of such review.

The Existence of Less Restrictive Alternatives

20. Anticipating the Act's impact on the ESA members' First Amendment rights, the ESA attempted to work with the Legislature and the Governor prior to the passage of the Act to implement less speech-restrictive, constitutional means of achieving the Legislature's goals.

21. To this end, on May 3, 2005, Gail Markels, representing the ESA, testified about the Act's constitutional flaws before the Assembly Entertainment, Sports, Tourism, and Internet Media Committee. Ms. Markels also explained that the ESRB ratings system provides a reliable, independent guide for parents and consumers to determine whether they find particular video games suitable for children. Educating parents and the public about the ESRB rating system would be an alternative means of achieving the Legislature's goals, for, as the FTC has found, parents are involved in 83% of video game purchases for

minors. *See* FTC Report at 42. In addition, Ms. Markels explained that the use of technological solutions that allow parents to restrict access based on ratings offered another less restrictive alternative to the Act. In addition, other representatives of the ESA testified about the same topics before the Assembly and Senate Judiciary Committees.

22. Through meetings, letters, and telephone calls, the ESA and its members communicated a similar message to Governor Schwarzenegger. We explained why the Act was unconstitutional, and we explained at length the comprehensive operation of the ESRB ratings system. We offered to work with the Governor and other State officials to help educate consumers about the ESRB ratings system as a less speech-restrictive alternative to the Act.

23. Both the Legislature and the Governor rejected these offers to work together with the ESA and members of the video game industry, and refused to consider less speech-restrictive alternatives to the Act's absolute prohibitions. Although informed of the Act's constitutional failings, the Legislature and the Governor nonetheless chose to enact the Act into law, rather than to explore less speech-restrictive means of achieving their goal of preventing certain computer and video games from being viewed by minors.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 17, 2005.

/s/ Douglas Lowenstein
Douglas Lowenstein

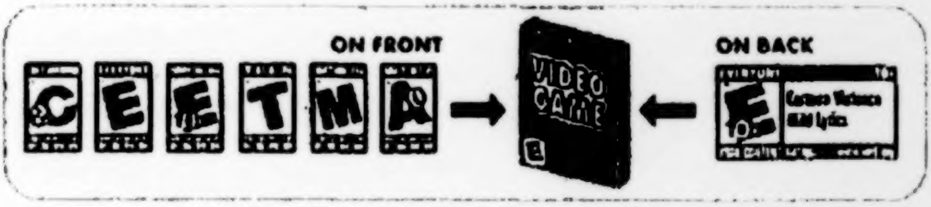
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title Omitted In Printing]

ESRB Game Ratings & Content Descriptors

The Entertainment Software Rating Board (ESRB) ratings are designed to provide information about video and computer game content, so you can make informed purchase decisions. ESRB ratings have two parts: **rating symbols** suggest age appropriateness for the game, and **content descriptors** indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern.

To take full advantage of the ESRB rating system, it's important to check both the **rating symbol** (on the front of the game box) and the **content descriptors** (on the back of the game box).



Titles rated **EC – (Early Childhood)** have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.

Titles rated **E (Everyone)** have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.

Titles rated **E10+ (Everyone 10 and older)** have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language and/or minimal suggestive themes.

Titles rated **T (Teen)** have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood, and/or infrequent use of strong language.

Titles rated **M (Mature)** have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content and/or strong language.

Titles rated **AO (Adults Only)** have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.

Titles listed as **RP (Rating Pending)** – have been submitted to the ESRB and are awaiting final rating. (This symbol appears only in advertising prior to a game's release.)

ESRB Content Descriptors

- **Alcohol Reference** – Reference to and/or images of alcoholic beverages
- **Animated Blood** – Discolored and/or unrealistic depictions of blood
- **Blood** – Depictions of blood
- **Blood and Gore** – Depictions of blood or the mutilation of body parts
- **Cartoon Violence** – Violent actions involving cartoon-like situations and characters. May include violence where a character is unharmed after the action has been inflicted
- **Comic Mischief** – Depictions or dialogue involving slapstick or suggestive humor
- **Crude Humor** – Depictions or dialogue involving vulgar antics, including "bathroom" humor
- **Drug Reference** – Reference to and/or images of illegal drugs
- **Edutainment** – Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product

- **Fantasy Violence** – violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life
- **Informational** – Overall content of product contains data, facts, resource information, reference materials or instructional text
- **Intense Violence** – Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death
- **Language** – Mild to moderate use of profanity
- **Lyrics** – Mild references to profanity, sexuality, violence, alcohol, or drug use in music
- **Mature Humor** – Depictions or dialogue involving "adult" humor, including sexual references
- **Mild Violence** – mild scenes depicting characters in unsafe and/or violent situations
- **Nudity** – Graphic or prolonged depictions of nudity
- **Partial Nudity** – Brief and/or mild depictions of nudity
- **Real Gambling** – Player can gamble, including betting or wagering real cash or currency

- **Sexual Themes** – Mild to moderate sexual references and/or depictions. May include partial nudity
- **Sexual Violence** – Depictions of rape or other sexual acts
- **Simulated Gambling** – Player can gamble without betting or wagering real cash or currency
- **Some Adult Assistance May Be Needed** – Intended for very young ages
- **Strong Language** – Explicit and/or frequent use of profanity
- **Strong Lyrics** – Explicit and/or frequent references to profanity, sex, violence, alcohol, or drug use in music
- **Strong Sexual Content** – Graphic references to and/or depictions of sexual behavior, possibly including nudity
- **Suggestive Themes** – Mild provocative references or materials
- **Tobacco Reference** – Reference to and/or images of tobacco products
- **Use of Drugs** – The consumption or use of illegal drugs
- **Use of Alcohol** – The consumption of alcoholic beverages
- **Use of Tobacco** – The consumption of tobacco products

- **Violence** – Scenes involving aggressive conflict

Additionally, online games that include user-generated content (e.g., chat, maps, skins) carry the notice ***"Game Experience May Change During Online Play"*** to warn consumers that content created by players of the game has not been rated by the ESRB.

ESRB Helps Parents Choose the Right Games for Their Families

The ESRB rating system is designed to give parents the information they need to evaluate a computer or video game before making a purchasing decision. The ratings are not meant to recommend which games consumers should buy or rent or to serve as the only basis for choosing a product. Rather, parents should use the ESRB ratings in conjunction with their own tastes and standards and their individual knowledge about what's best for their kids.

ESRB recommends that parents learn about games before making a purchasing decision. Game reviews printed in newspapers and publisher web sites can be excellent sources of information. To search for games that are appropriate based on age categories and content, use our online ratings search feature.

ESRB also urges parents to talk with their children about their favorite games. Playing the games with your children helps stimulate those discussions, and

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Attorneys for Defendants
Governor Arnold Schwarzenegger and
Attorney General Bill Lockyer

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

VIDEO SOFTWARE DEALERS and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, v. **ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California;**	CASE NO. C 05 4188 RMW RS **DECLARATION OF ADAM KEIGWIN** (Filed Nov. 10, 2005)

BILL LOCKYER, in his official capacity as Attorney General of the State of California; et al.,

Defendants.

I, ADAM KEIGWIN, declare as follows:

1. I have personal knowledge of the following and if asked to testify thereto could do so competently. I am presently employed as a Special Assistant to Assembly Member Leland Yee. I have held this employment since October of 2003. As part of my employment I regularly attend committee hearings on bills authored by or of interest to Assembly Member Yee. I also handle all communication and media matters for Assembly Member Yee.

2. I was personally present on February 19, 2005, at the Assembly Judiciary Committee hearing on AB 450. At the request of Assembly Member Yee, the video tape titled "Video Game Violence Sampler TRT: 5min.," [sic] which I provided to the Committee on behalf of Assembly Member Yee, was played for the members present at the hearing.

3. On or about October 25, 2005, Zackery Morazzini personally appeared at Assembly Member Yee's office at the State Capitol where I am employed. I personally delivered to Mr. Morazzini a true and correct copy of the video tape played at the February 19, 2005, Assembly Judiciary Committee hearing on

AB 450, titled ":Video Game Violence Sampler TRT: 5min."

I declare under penalty of perjury that the foregoing is true and correct, executed this 10 day of November, 2005, at San Francisco, California.

/s/ Adam Keigwin
ADAM KEIGWIN

BILL LOCKYER
Attorney General of the State of California
LOUIS R. MAURO
Senior Assistant Attorney General
CHRISTOPHER E. KRUEGER
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Attorneys for Defendants
Governor Arnold Schwarzenegger and
Attorney General Bill Lockyer

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

VIDEO SOFTWARE DEALERS and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, v. **ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California;**	CASE NO. C 05 4188 RMW RS **DECLARATION OF ZACKERY P. MORAZZINI** (Filed Nov. 10, 2005)

BILL LOCKYER, in his official capacity as Attorney General of the State of California; et al.,

Defendants.

I, ZACKERY P. MORAZZINI, declare as follows:

1. I am an attorney at law, duly admitted to all courts of the State of California and before the United States District Court for the Northern District of California, and am one of the attorneys of record for Governor Arnold Schwarzenegger and Attorney General Bill Lockyer, named as defendants in this action. I have personal knowledge of the following and if asked to testify thereto could do so competently.

2. On or about October 25, 2005, I obtained a copy of a video tape, titled ":Video Game Violence Sampler TRT: 5min.," containing clips of various video games from Adam J. Keigwin of Assembly Member Leland Yee's office at the State Capitol. See Declaration of Adam Keigwin, filed, concurrently herewith. A true and correct copy of said tape is being lodged herewith as Exhibit A.

3. Between the dates of November 3 through November 4, 2005, I personally traveled to the Senate Judiciary Committee office, Assembly Judiciary Committee office, and the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media office. I obtained the committee files for AB 1179 and AB 450 from each individual office. I personally

copied, or caused to have copied in my presence, materials relevant to the present proceedings obtained from the following files, true and correct copies of which are bates stamped and included in Appendices A-C, as follows:

- Appendix A consists of material copied from the Assembly Judiciary Committee file on AB 450;
- Appendix B consists of material copied from the Senate Judiciary Committee file on AB 450;
- Appendix C consists of material copied from the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media file on AB 450.

4. The following materials had missing pages in the original legislative files, apparently due to photocopying errors, likely due to the double sided originals copied. Therefore, copies of these materials in their entirety are included in Appendix D, as follows:

- Assembly Judiciary Committee file on AB 450, Gentile, et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, Journal of Adolescence 27 (2004) 5-22;
- Senate Judiciary Committee file on AB 450, Uhlmann & Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, Journal of Adolescence, 27 (2004) 41-52;

5. Material obtained from the Assembly Judiciary Committee file on AB 450 shows that the Legislature was referred to additional articles and studies relevant to the issues presented in this matter. See Appendix A, A014, “”Violent Video Game Bibliography.” True and correct copies of relevant materials cited therein are included in Appendix E.

I declare under penalty of perjury that the foregoing is true and correct, executed this 10th day of November, 2005, at Sacramento, California.

/s/ Zackery P. Morazzini
ZACKERY P. MORAZZINI

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title Omitted In Printing]

ASSEMBLY JUDICIARY COMMITTEE MANDATORY INFORMATION WORKSHEET

*** * * * IMPORTANT NOTE * * * ***

THIS FORM MUST BE FULLY COMPLETED AND HAND-DELIVERED TO THE COMMITTEE NO LATER THAN SEVEN (7) CALENDAR DAYS AFTER IT IS INITIALLY DELIVERED TO THE AUTHOR'S OFFICE. IF THE BILL HAS BEEN SET FOR HEARING, IT SHALL CONSTITUTE AN AUTHOR'S RESET IF A SATISFACTORY WORKSHEET OR OTHER REQUESTED INFORMATION HAS NOT BEEN TIMELY RECEIVED BY THE COMMITTEE.

ALL SUBSTANTIVE AUTHOR'S AMENDMENTS MUST BE HAND-DELIVERED TO THE COMMITTEE IN LEGISLATIVE COUNSEL FORM (ORIGINAL AND SIX COPIES) WITHIN SEVEN (7) CALENDAR DAYS PRIOR TO THE HEARING. FAILURE TO DO SO MAY RESULT IN AN AUTHOR'S RESET.

THE COMMITTEE RECORDS THE DATE THIS WORKSHEET IS DELIVERED, THE DATE IT IS RETURNED, AND THE DATE THE COMMITTEE RECEIVES AMENDMENTS.

PLEASE RETURN COMPLETED WORKSHEETS TO THE COMMITTEE BY EMAIL TO ROSE.

CERECERES@ASM.CA.GOV. PLEASE ALSO HAND-DELIVER TWO (2) COPIES OF THIS WORKSHEET AND ANY SUPPORTING DOCUMENTS TO THE COMMITTEE.

ASSEMBLY JUDICIARY COMMITTEE,
1020 N Street (LOB), Room 104

Bill Number: AB 450 **Author: Yee**
Author's staff person: **phone:** **e-mail:**

1. What do you see as the key issue(s) raised by the bill.

   type response here

2. Please provide a statement of the author's purpose for the bill, which may be used in the Committee's analysis, including *in detail* the problem or deficiency in the current law that the bill seeks to remedy, and how the bill resolves the problem.

   type response here

3. Who is the sponsor of the bill? If there is no sponsor, what person or entity requested that the bill be introduced? Please provide the name and telephone number of any sponsor or other person who may be contacted by the Committee for information regarding the bill.

   Girl Scout Councils of California (916) 443-1064 – Rhonda Gruska, Government Relations Director

   Common Sense Media, Jim Steyer, Executive Director

American Academy of Pediatrics, California Chapter 510-559-8383, Kris Calvin, Executive Director

4. Please show the results of an Inquiry search regarding each similar and/or related bill (for example, same key words and/or code section that has been introduced in this legislative session, or in any prior legislative session covered by the Inquiry system. (When using the Bill Search function in Inquiry, be sure to check the "all versions" button in the dialog box that appears after you choose the "word" search criterion) Please include the bill number and year, a summary of the bill's contents, and the disposition of each bill.

   type response here

5. Please identify and summarize all similar or related pending federal legislation (see http://thomas.loc.gov/home/thomas2.html) and any bills or existing laws you are aware of in other states.

   type response here

6. Please summarize and show the results (by citation) of a computer search regarding all existing California statutes (http://www.leginfo.ca.gov/calaw.html) and all existing federal statutes (http://www4.law.cornell.edu/uscode/) relevant to this bill. Please also indicate any relevant court decisions.

   No existing statues [sic]. *Relevant court decisions, see attached hard copies.*

7. Have there been any informational hearings on the subject matter of the bill? If so, when? Please

attach all information distributed by the Committee that held the hearing.

Similar bill, AB 1792, heard in Arts & Entertainment Committee last year.

8. Please describe all amendments the author currently wishes to make before this bill is heard in Committee. (Please recall that amendments must be hand-delivered to the Committee in Leg Counsel form at least 7 calendar days before the bill is to be heard.)

   See attached.

9. Please summarize any studies, reports, statistics or other evidence showing that the problem exists and that the bill will properly address the problem. Please also attach copies of all such evidence and/or state where such material is available for reference by Committee counsel.

Children are Playing Mature-Rated Games: *Mature (M) -rated games, those labeled as appropriate for those 17 years of age and older, are the fastest growing segment of the video game industry. In fact, the best selling games of the past year glorify and reward extreme violence. Content analyses show that a majority of games contain some violent content, and about half of those include violence that would result in serious injuries or death in real life (Children Now, 2001; Dietz, 1998; Dill, et. al. in press). According to a 2004 survey by the National Institute on Media and the Family, 87% of boys play M-rated games, 78% list an M-rated game among their favorites (Walsh, et.al.*

2004) and 40% of those who play Mature-rated games are under 18.

Violent Video Games Have a Negative Impact on Youth: *Since teens are wiring the circuits for self control, responsibility and relationships they will carry with them into adulthood, they are more impressionable than we thought. Active participation by youth in playing violent video games has a greater impact than watching television. Youth choose actions where they are rewarded for causing violence to another character. Repetition greatly increases learning and also causes youth to identify with the aggressor in the game. Dozens of studies on violent video games, including an analysis of 54 independent samples with 4,262 participants, show five major effects: playing violent games leads to increased physiological arousal, increased aggressive thoughts, increased aggressive feelings, increased aggressive behaviors, and decreased pro-social or helping behaviors (Anderson, 2004; Anderson, et. al. 2004; Anderson & Bushman, 2001, Uhlmann & Swanson, 2004). These studies include experimental studies (that show playing violent games actually causes increases in aggression), correlational studies (where long-term relations between game play and real-world aggression can be shown), and longitudinal studies (where changes in children's aggressive behaviors can be demonstrated). Furthermore, students who played more violent video games had greater involvement in physical fights (Gentile, 2004), became desensitized to violence, and developed pro-violence attitudes and increased tolerance of violence*

(Funk, 2004). The American Academy of Pediatrics Policy Statement on Media Violence stated that playing violent video games accounts for a 13% to 22% increase in adolescents' violent behavior. When considering the negative impact violent video games have on youth, the evidence is strong: playing violent video games has more effect on increased youth aggression than second-hand smoke has on causing cancer, or lead exposure links to decreased IQ (Anderson, 2004).

Children Have Access to Violent, Mature-Rated Games: *Recent studies show that the voluntary rating and enforcement system implemented by self-regulatory associations or entertainment producers have had limited success on decreasing youth access to Mature (M) rated video games. In a phone survey of clerks at forty-six stores in 12 states, only 76% of respondents say they understand the ratings they are supposed to enforce and only half of the stores reported training employees in the use of the ratings (Walsh, 2004). In many of the stores that reported they have training, further questioning revealed the "training" only included installing cash register prompts. Eight-nine* [sic] *percent (89%) of the stores surveyed said they now have policies restricting the sale of M-rated games to those under seventeen (Walsh, 2004). Despite this, clerks still sell these video games to under-aged youth. During 2004, the National institute on Media and the Family had children between the ages of seven and fourteen attempt to purchase M-rated games in thirty-five stores. Youth succeeded 34% of the time. While the overall purchase rate was 34%,* *boys as young as seven were able to buy M-rated games 50% of the time. A nationwide undercover survey of stores completed by the Federal Trade Commission in 2003 corroborated these findings. In this study, 69% of the unaccompanied 13 to 16-year-olds purchased M-rated games and only 24% of the cashiers asked the youth's age.*

Video Games and the First Amendment: *The First Amendment protects individual freedoms including the freedom of speech, except when content is deemed harmful to minors. Federal courts have repeatedly recognized that the state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors. Pornography, guns, tobacco and alcohol are all individual freedoms for adults, but can be regulated for children because of their potentially harmful effects. In a review of recent first amendment courts* [sic] *cases related to video games, Amar and Brownstein (2004) note that "in more recent cases evaluating laws that prevent both adults and children from obtaining access to proscribed materials, the Court accepts as a given that the state's goal of preventing children from obtaining expressive materials that might be harmful to them is a compelling state interest." The authors concluded that, "the First Amendment doesn't necessarily foreclose sensible regulation in this area."*

Furthermore, in May 2003, the State of Washington passed a law fining retailers for knowingly renting or selling computer or video games to children under the age of 17, in which there are graphic depictions of *violence against law enforcement officials. The Video Software Dealers Association claimed that the law violated the First Amendment. The courts agreed, stated that as crafted, the law was both too vague and too specific to stand strict scrutiny. First, the definition was so expansive, that even unintentional violence could prohibit a minor from having access to a video game. Likewise, focusing only on games with violence against police officers made the law too narrowly tailored. The Judge in the case, Judge Robert Lasnick of the U.S. District Court of Seattle, Washington, said that in order to pass strict scrutiny, future legislation that attempts to regulate video games needs to address: depraved or extreme acts of violence that violate community norms; and depictions of extreme violence against all innocent victims, regardless of their viewpoint or status. (U.S. District Court, 2004). He had three other main recommendations (see table below).*

US District Judge's Recommendations	***How AB450 Conforms to Recommendations***
1. show there is a compelling state interest to limit speech of minors and that the law that is passed is narrowly tailored to achieve that interest;	*• The studies provide clear evidence that violent video games increase aggressive behaviors, thoughts, and attitudes, as well as decreases in emotional empathy and pro-social helping behaviors, thereby jeopardizing children's psychological health.*

2. *show that the psychological well-being of youth is in genuine jeopardy and that the law is narrowly tailored to address that issue; and* 3. *show substantial evidence as to the harmful effect's playing violent video games have on youth.*	• *The legislation focuses on games that contain violence that is "heinous, atrocious, and cruel."* • *The legislation focuses on games where the violence is perpetrated against any human or those with human-like characteristics.*

Research has clearly demonstrated a link between violent video games and several negative outcomes for youth playing these games, thereby creating a state interest. By decreasing access to video games in which children are virtually committing criminal acts of bodily injury or murder in a manner particularly torturous or cruel, the bill is narrowly tailored. Together this effectively addresses judicial concerns with First Amendment issues.

Research references – all articles are available upon request – extended bibliography of additional articles on violent video games is also attached

Amar and Brownstein (2004). Can States Constitutionally Regulate Video Games, As California is Considering Doing? in Modern Practice, Find Law's Law Practice and Technology Magazine. http://writ.findlaw.com/commentary/20040430_brownstein.html

Anderson, C.A. (2004). *An update on the effects of violent video games Journal of Adolescence, 27,* 113-122.*

Anderson, C. A. (2004). *Violence in the media. Its effects on children.* An edited transcript of a seminar presented on September 11, 2003, in Melbourne Australia. Published by Young Media Australia (Glenelg, South Australia) and the Victorian Parenting Centre (Melbourne, Victoria).

Anderson, C. A., & Bushman, B. J. (2001). Effects of violent video games on aggressive behavior, aggressive cognition, aggressive affect, physiological arousal, and prosocial behavior: A meta-analytic review of the scientific literature. *Psychological Science, 12,* 353-359.*

Anderson, C. A., Carnagey, N. L., Flanagan, M., Benjamin, A. J., Eubanks, J., & Valentine, J. C. (2004). *Violent video games: Specific effects of violent content on aggressive thoughts and behavior. Advances in Experimental Social Psychology, 36,* 199-249.

Anderson, C.A., & Dill, K. E. (2000). *Video games and aggressive thoughts, feelings, and behavior in the laboratory and in life. Journal of Personality and Social Psychology,* 78, 772-790.*

Anderson, C. A. Gentile, D. A., & Buckley, K. E. (under review). Violent video game effect on children and adolescents: Further developments and tests of the general aggression model.

Children Now. (2001). Fair play? Violence, gender and race in video games. Los Angeles, CA: Children Now.

Dietz, T. L. (1998). An examination of violence and gender role portrayals in video games: Implications for gender socialization and aggressive behavior. Sex Roles, 38, 425-442.

Dill, K. E., Gentile, D. A., Richter, W. A., & Dill, J. C. (in press). Violence, sex, race, and age in popular video games: A content analysis. In (E. Cole & D.J. Henderson, Eds.) *Featuring females: Feminist analyses of the media*. Washington, DC: American Psychological Association.

Funk et. al. (2004). Violence exposure in real-life, video games, television, movies, and the internet: is there desensitization? Journal of Adolescence (27)

Funk, J.B., Hagan, J., & Schimming, J. (1999) Children and electronic games: A comparison of parent and child perceptions of children's habits and preferences in a United States sample. Psychological Reports, 95, 883-888.

Gentile, Lynch, Linder and Walsh (2004). The effects of violent video game habits on adolescent hostility, aggressive behaviors, and school performance. Journal of Adolescence, 27, 5-22.

Saunders (2003) Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns. Law Review (1:51)

Uhlmann and Swanson (2004) Exposure to violent video games increases automatic aggressiveness. Journal of Adolescence (27)

Video Software Dealers Association vs Norm Maleng United States District Court Western District of

Washington at Seattle (2004). Order granting Plaintiff's Motion for Summary Judgment and Granting in Part Defendant's Cross-Motion at www.mediacoalition.org/legal/Maleng/lasnicksummaryjudgment.pdf.

Walsh, D Gentile, D., Gieske, J. Walsh, M. & Chasco, E (2004). Mediawise Video Game Report Card. National Institute on Media and the Family. www.medifamily.org

10. Please list all groups, agencies or persons that have contacted you in support or in opposition to the bill. Please attach copies of all letters of support and opposition.

    type response here

11. Please describe any concerns that you anticipate may be raised in opposition to your bill, and state your response to those concerns.

Concerns about the violating the First Amendment rights of minors. As noted above under Question 9, the bill is narrowly tailored so that it would pass strict scrutiny by the courts:

Video Games and the First Amendment: *the First Amendment protects individual freedoms including the freedom of speech, except when content is deemed harmful to minors. Federal courts have repeatedly recognized that the state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors. Pornography, guns, tobacco and alcohol are all individual freedoms for adults, but can be regulated for children because of* *their potentially harmful effects. In a review of recent first amendment courts* [sic] *cases related to video games,* [*Amar*] *and Brownstein (2004) note that "in more recent cases evaluating laws that prevent both adults and children from obtaining access to proscribed materials, the Court accepts as a given that the state's goal of preventing children from obtaining expressive materials that might be harmful to them is a compelling state interest." The authors concluded that, "the First Amendment doesn't necessarily foreclose sensible regulation in this area."*

Furthermore, in May 2003, the State of Washington passed a law fining retailers for knowingly renting or selling computer or video games to children under the age of 17, in which there are graphic depictions of violence against law enforcement officials. The Video Software Dealers Association claimed that the law violated the First Amendment. The courts agreed, stated that as crafted, the law was both too vague and too specific to stand strict scrutiny. First, the definition was so expansive that even unintentional violence could prohibit a minor from having access to a video game. Likewise, focusing only on games with violence against police officers made the law too narrowly tailored. The Judge in the case, Judge Robert Lasnick of the U.S. District Court of Seattle, Washington, said that in order to pass strict scrutiny, future legislation that attempts to regulate video games needs to address: depraved or extreme acts of violence that violate community norms; and depictions of extreme violence against all innocent victims, regardless of *their viewpoint or status. (US. District Court, 2004). He had three other main recommendations (see table below).*

US District Judge's Recommendations	***How AB450 Conforms to Recommendations***
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Research has clearly demonstrated a link between violent video games and several negative outcomes for youth playing these games, thereby creating a state interest. By decreasing access to video games in which *children are virtually committing criminal acts of bodily injury or murder in a manner particularly torturous or cruel, the bill is narrowly tailored. Together this effectively addresses judicial concerns with First Amendment issues.*

12. Please list the name, organization and telephone number of all witnesses that you anticipate will testify in support or opposition to the bill. (Please note that the Committee limits the number of testifying witnesses to 2 per side. Additional witnesses may identify themselves for the record.)

    type response here

    PLEASE REMEMBER TO EMAIL THIS COMPLETED WORKSHEET, AND ALSO DROP OFF 2 HARD COPIES TO THE COMMITTEE. TYPE AS DETAILED RESPONSES AS POSSIBLE. THANK YOU VERY MUCH FOR YOUR ASSISTANCE.

Additional articles on violent video games (* Copy available)

Anderson, C.A. (2003). *Video games and aggressive behavior*. In D. Ravitch and J.P. Viteritti (eds.), *Kids' Stuff: Marketing Sex and Violence to America's Children* (pp. 143-167). Baltimore, MD: Johns Hopkins University Press.*

Anderson, C.A. (2002). *FAQs on Violent Video Games and Other Media Violence*. Department of Psychology Iowa State University. Downloaded from http://www.psychology.iastate.edu/faculty/VideoGameFAQs.html*

Anderson, C. A. (2002). *FAQs on violent video games and other media violence: Part I, II. Small Screen*, 170, September, pp. 1-2, 7-8.

Anderson, C.A. (2002). *Violent video games and aggressive thoughts, feelings, and behaviors*. (pp. 101-119). Chapter in *Children in the Digital Age*, Sandra L. Calvert, Amy B. Jordan, & Rodney R. Cocking (Eds.). Westport, Connecticut: Praeger.*

Anderson, C.A. (2000). *Violent Video Games Increase Aggression and Violence*. U.S. Senate Committee on Commerce, Science, and Transportation hearing on "The Impact of Interactive Violence on Children." Tuesday, March 21, 2000.*

Anderson, C.A., Berkowitz, L., Donnerstein, E., Huesmann, R.L., Johnson, J., Linz, D., Malamuth, N., & Wartella, E. (2003). *The influence of media violence on youth. Psychological Science in the Public Interest*, *4*, 81-110.*

Anderson, C.A., & Bushman, B.J. (2002) *Media violence and the American public revisited*. R. Cocking (Eds.). Westport, Connecticut: Praeger.*

Anderson, C.A., & Bushman, B.J. (2002). *The effects of media violence on society. Science*, 295, 2377-2378.*

Anderson, C. A., & Foed, C. M. (1986). *Affect of the game player: Short term effects on highly and mildly aggressive video games. Personality and Social Psychology Bulletin*, 12, 390-402.*

Anderson, C.A., Funk, J.B., & Griffiths, M.D. (2004). *Contemporary issues in adolescent video game* *playing: Brief overview and introduction to the special issue. Journal of Adolescence*, 27, 1-3.*

Anderson, C.A., & Murphy, C.R. (2003). *Violent video games and aggressive behavior in young women. Aggressive Behavior, 29*, 423-429.*

Bartholow, B.D., & Anderson, C.A. (2002). *Effects of violent video games on aggressive behavior: Potential sex differences. Journal of Experimental Social Psychology*, 38, 283-290.*

Berkey, C.S., Rockett, H. R. Field, A. E., Gillman, M. W., Frasier, A. L., Camargo, C. A., Jr., & Colditz, G. A. (2002). *Activity, dietary intake, and weight changes in a longitudinal study of preadolescent and adolescent boys and girls, Pediatrics*, 105(4), E56.

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Summary of AB450 and Violent Video Games Research

AB450 (Yee) would prohibit the sale or rental of violent video games to those 16 years of age and under and establishes fines for those establishments who violate this. Video games that contain violence which is heinous, atrocious and cruel and is committed upon human characters or those who have human characteristics, would also be labeled, "This game may not be sold to anyone under 17 years of age." This legislation is necessary because: 1) children are playing violent video games; 2) violent video games have been proven to be harmful to children's physical, mental and emotional well being; and 3) children currently have free access to purchase or rent violent, "M-rated" games that are not recommended for their age level.

Children are Playing Mature-Rated Games

Mature (M) -rated games, those labeled as appropriate for those 17 years of age and older, are the fastest growing segment of the video game industry. In fact, the best selling games of the past year glorify and reward extreme violence. Content analyses show that a majority of games contain some violent content, and about half of those include violence that would result in serious injuries or death in real life (Children Now, 2001; Dietz, 1998; Dill, Gentile, Richter, & Dill, in press).

According to a 2004 survey by the National Institute on Media and the Family, 87% of boys play M-rated games, 78% list an M-rated game among their favorites (Walsh, et.al. 2004) and 40% of those who play Mature-rated games are under 18.

Violent Video Games Have a Negative Impact on Youth

Since teens are wiring the circuits for self control, responsibility and relationships they will carry with them into adulthood, they are more impressionable than we thought. Active participation by youth in playing violent video games has a greater impact than watching television. Youth choose actions where they are rewarded for causing violence to another character. Repetition greatly increases learning and also causes youth to identify with the aggressor in the game.

Dozens of studies on violent video games show five major effects. Playing violent games leads to increased physiological arousal, increased aggressive thoughts, increased aggressive feelings, increased aggressive behaviors, and decreased pro-social or helping behaviors (Anderson, 2004; Anderson & Bushman, 2001). These studies include experimental studies (that show playing violent games actually *causes* increases in aggression), correlational studies (where long-term relations between game play and real-world aggression can be shown), and longitudinal studies (where changes in children's aggressive behaviors can be demonstrated).

The American Academy of Pediatrics Policy Statement on Media Violence stated that playing violent video games accounts for a 13% to 22% increase in adolescents' violent behavior. When considering the negative impact violent video games have on youth, the evidence is strong: playing violent video games has more effect on increased youth aggression than second-hand smoke has on causing cancer, or lead exposure links to decreased IQ.

Children Have Access to Violent, Mature-Rated Games

Recent studies show that the voluntary rating and enforcement system implemented by self-regulatory associations or entertainment producers have had limited success on decreasing youth have access to Mature (M) rated video games. In a phone survey of clerks at forty-six stores in 12 states, only 76% of respondents say they understand the ratings they are supposed to enforce and only half of the stores reported training employees in the use of the ratings (Walsh, 2004). In many of the stores that reported they have training, further questioning revealed the "training" only included installing cash register prompts in many stores.

Eight-nine percent (89%) of the stores surveyed said they now had policies restricting the sale of M-rated games to those under seventeen (Walsh, 2004). Despite this, clerks still sell these video games to under-aged youth. During 2004, the National Institute on Media and the Family had children between the ages of seven and fourteen attempt to purchase M-rated games in thirty-five stores. Youth succeeded 34% of the time. While the overall purchase rate was 34%, boys as young as seven were able to buy M-rated games 50% of the time. A nationwide undercover survey of stores completed by the Federal Trade Commission in 2003, corroborated these findings. In this study, 69% of the unaccompanied 13 to 16-year-olds purchased M-rated games and only 24% of the cashiers asked the youth's age.

Video Games and the First Amendment

The First Amendment protects individual freedoms including the freedom of speech, except when content is deemed harmful to minors. Federal courts have repeatedly recognized that the state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors. Pornography, guns, tobacco and alcohol are all individual freedoms for adults, but can be regulated for children because of their potentially harmful effects.

In a review of recent first amendment courts [sic] cases related to video games, Amar and Brownstein (2004) note that "in more recent cases evaluating laws that prevent both adults and children from obtaining access to proscribed materials, the Court accepts as a given that the state's goal of preventing children from obtaining expressive materials that might be harmful to them is a compelling state interest." The authors concluded that, "the First Amendment doesn't necessarily foreclose sensible regulation in this area."

In May 2003, the State of Washington passed a law fining retailers for knowingly renting or selling computer or video games to children under the age of 17, in which there are graphic depictions of violence against law enforcement officials. The Video Software Dealers Association claimed that the law violated the First Amendment. The courts agreed, stated that as crafted, the law was both too vague and too specific to stand strict scrutiny. First the definition was so expansive that even unintentional violence could prohibit a minor from having access to a video game. Likewise focusing only on games with violence against police officers made the law too narrowly tailored.

The judge in the case, Judge Robert Lasnick of the U.S. District Court of Seattle, Washington, said that in order to pass strict scrutiny, future legislation that attempts to regulate video games needs to address: depraved or extreme acts of violence that violate community norms; and depictions of extreme violence against all innocent victims, regardless of their viewpoint or status. (U.S. District Court, 2004). He had three other main recommendations (see table below).

US District Judge's Recommendations	**How AB450 Conforms to Recommendations**
1. show there is a compelling state interest to limit speech of minors and that the law that is passed is narrowly tailored to achieve that interest; 2. show that the psychological well-being of youth is in genuine jeopardy and that the law is narrowly tailored to address that issue; and	• The studies provide clear evidence that violent video games increase aggressive behaviors, thoughts, and attitudes, as well as decreases in emotional empathy and pro-social helping behaviors, thereby jeopardizing children's psychological health.

3. show substantial evidence as to the harmful effect's playing violent video games have on youth.	• The legislation focuses on games that contain violence that is "heinous, atrocious, and cruel." • The legislation focuses on games where the violence is perpetrated against any human or those with human-like characteristics.

Research has clearly demonstrated a link between violent video games and several negative outcomes for youth playing these games, thereby creating a state interest. By decreasing access to video games in which children are virtually committing criminal acts of bodily injury or murder in a manner particularly torturous or cruel, the bill is narrowly tailored. Together this effectively addresses judicial concerns with First Amendment issues.

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Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life

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ABSTRACT

Two studies examined violent video game effects on aggression-related variables. Study 1 found that real-life violent video game play was positively related to aggressive behavior and delinquency. The relation was stronger for individuals who are characteristically aggressive and for men. Academic achievement was negatively related to overall amount of time spent playing video games. In Study 2, laboratory exposure to a graphically violent video game increased aggressive thoughts and behavior. In both studies, men had a more hostile view of the world than did women. The results from both studies

are consistent with the General Affective Aggression Model, which predicts that exposure to violent video games will increase aggressive behavior in both the short term (e.g., laboratory aggression) and the long term (e.g., delinquency).

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On April 20, 1999, Eric Harris and Dylan Klebold launched an assault on Columbine High School in

Littleton, Colorado, murdering 13 and wounding 23 before turning the guns on themselves. Although it is impossible to know exactly what caused these teens to attack their own classmates and teachers, a number of factors probably were involved. One possible contributing factor is violent video games. Harris and Klebold enjoyed playing the bloody, shoot-'em-up video game Doom, a game licensed by the U.S. military to train soldiers to effectively kill. The Simon Wiesenthal Center, which tracks Internet hate groups, found in its archives a copy of Harris' web site with a version of Doom that he had customized. In his version there are two shooters, each with extra weapons and unlimited ammunition, and the other people in the game can't fight back. For a class project, Harris and Klebold made a videotape that was similar to their customized version of Doom. In the video, Harris and Klebold dress in trench coats, carry guns, and kill school athletes. They acted out their videotaped performance in real life less than a year later. An investigator associated with the Wiesenthal Center said Harris and Klebold were "playing out their game in God mode" (Pooley, 1999, p. 32).

Entertainment media affects our lives. What behaviors children and adults consider appropriate comes, in part, from the lessons we learn from television and the movies (e.g., *Huesmann & Miller, 1994*). There are good theoretical reasons to expect that violent video games will have similar, and possibly larger, effects on aggression. The empirical literature on the effects of exposure to video game violence is sparse, however, in part because of its relatively recent emergence in modern U.S. society. About 25 years ago, when video games first appeared, popular games were simple and apparently harmless. In the 1970s, Atari introduced a game called Pong that was a simple video version of the game ping pong. In the 1980s, arcade games like Pac-Man became dominant. In Pac-Man, a yellow orb with a mouth raced around the screen chomping up ghosts and goblins. At this point, some eyebrows were raised questioning whether young people should play such "violent" games. In the 1990s the face of video games changed dramatically. The most popular video game of 1993 was Mortal Kombat (*Elmer-Dewitt, 1993*). This game features realistically rendered humanoid characters engaging in battle. As the name of the game implies, the goal of the player in Mortal Kombat is to kill any opponent he faces. Unfortunately, such violent games now dominate the market. *Dietz (1998)* sampled 33 popular Sega and Nintendo games and found that nearly 80% of the games were violent in nature. Interestingly, she also found that 21% of these games portrayed violence towards women.

The research to date on video game effects is sparse and weak in a number of ways. Indeed, one reviewer (and many video game creators) has espoused the belief that "video game playing may be a useful means of coping with pent-up and aggressive energies" (*Emes, 1997*, p. 413). In brief, what is needed is basic theory-guided research on the effects of playing violent video games. Such research would also contribute to the field's understanding of media violence effects in general.

THEORETICAL APPROACH

General Affective Aggression Model (GAAM): Short-Term Effects of Video Game Violence and Aggressive Personality

GAAM: Overview

There are several reasons for expecting exposure to violent video games to increase aggressive behavior in both the short run (i.e., within 20 minutes of game play) and over long periods of time (i.e., repeated exposure over a period of years). Our theoretical approach is the GAAM, which has emerged from our work on a variety of aggression-related domains (*Anderson, Anderson, & Deuser, 1996; Anderson, Deuser, & DeNeve, 1995; Anderson, Anderson, Dill, & Deuser, 1998; Dill, Anderson, Anderson, & Deuser, 1997; Lindsay & Anderson, in press*). The model integrates existing theory and data concerning the learning, development, instigation, and expression of human aggression. It does so by noting that the enactment of aggression is largely based on knowledge structures (e.g., scripts, schemas) created by social learning processes. Thus, GAAM incorporates the theoretical insights of much previous work, especially Bandura's social learning theory (e.g., *Bandura, 1971, 1973; Bandura, Ross, & Ross, 1961, 1963*), Berkowitz's Cognitive Neoassociationist Model

(Berkowitz, 1984, 1990, 1993), the social information-processing model of Dodge and his colleagues (e.g., *Dodge & Crick, 1990; Crick & Dodge, 1994*), *Geen's (1990)* affective aggression model, Huesmann's social-cognitive model of media violence effects *(Huesmann, 1986)*, and *Zillmann's (1983)* excitation transfer model.

Figure 1 presents the basic GAAM structure with examples relevant to this article. The focus of this version of GAAM is on short-term effects of video game violence. In brief, GAAM describes a multistage process by which personological (e.g., aggressive personality) and situational (e.g., video game play and provocation) input variables lead to aggressive behavior. They do so by influencing several related internal states and the outcomes of automatic and controlled appraisal (or decision) processes.

GAAM: Input Variables and Internal States

Both kinds of input variables – personological and situational – can influence the present internal state of the person – cognitive, affective, and arousal variables. For example, people who score high on measures of aggressive personality have highly accessible knowledge structures for aggression-related information. They think aggressive thoughts more frequently than do those individuals who score low on aggressive personality measures, and have social perception schemas that lead to hostile perception, expectation, and attributional biases (e.g., *Anderson, 1997; Crick & Dodge, 1994; Dill, Anderson, Anderson, & Deuser, 1997).*

Situational input variables can also influence the current accessibility of aggression-related knowledge structures. Being insulted may cause a person to think of how to return the insult in a harmful way (a behavioral script). More central to the present research, we believe that playing a violent video game also can increase the accessibility of aggressive cognitions by semantic priming processes. We know from related research that merely seeing a picture of a gun or other weapon can increase the accessibility of aggressive thoughts (e.g., *Anderson et al., 1996; Anderson, Benjamin, & Bartholow, 1998*). Presumedly, this process accounts for the "weapons effect" first reported by *Berkowitz and LePage (1967)*, and reviewed by *Carlson, Marcus-Newhall, and Miller (1990)*. However, there is presently no empirical evidence on whether playing a violent video game increases accessibility of aggressive thoughts.

Both kinds of input variables influence a person's current affective state, such as aggression-related feelings of anger or hostility. Some people feel angry a lot of the time. Some situations can make anybody angry. We do not, however, expect that playing violent video games will routinely increase feelings of anger, compared with playing a nonviolent game. To be sure, playing a frustrating game is likely to increase anger. Violent content by itself, however, in the absence of another provocation, is likely to have little direct impact on affect. We deliberately chose to use a pair of violent and nonviolent games that are equally well liked for Study 2. In effect, this choice closes off this particular route to aggression, allowing a cleaner test of the more critical hypothesis that violent content itself can increase aggression.

The present state of arousal can also be affected by both personological and situational variables. Some people are chronically aroused, and numerous situational variables, including playing certain video games, can temporarily increase arousal. As *Zillmann (1983)* and others have shown, unexplained arousal can lead to a search for environmental cues to which the arousal can be attributed. Salient cues, such as a provocateur, can lead to the misattribution of arousal that was actually caused by playing a violent video game (for instance) to anger at the salient provoking person, which in turn could increase the likelihood of an aggressive behavioral attack. As with the affect state, this arousal effect is not specific to violent video games, but could occur with any game that happens to be very exciting. For this reason, in Study 2 we chose to use violent and nonviolent video games that do not differentially increase physiological indicators of arousal, thus closing off this alternative route to aggression as well.

One additional aspect of GAAM deserves mention. In *Figure 1* the three internal state variables are interconnected by dashed lines. This illustrates a key part of GAAM and the earlier models on which it is based, most obviously *Berkowitz's (1984)* CNA model. Cognition, affect, and arousal are seen as highly interrelated aspects of one's current internal state. Activating one tends to activate the other two. Such cross-modality priming helps explain how strong activation of one type of state (e.g., remembering a humiliating public insult received last week) can produce corresponding changes in the other states (e.g., reinstatement of anger and increased arousal).

In sum, short-term violent video game increases in aggression are expected by GAAM whenever exposure to violent media primes aggressive thoughts, increases hostile feelings, or increases arousal (all else being equal). However, because neither hostile feelings nor high arousal are specific effects of violent media, they must be controlled (experimentally or statistically) to allow an adequate test of the hypothesis that violent content per se can increase aggressive behavior in a short-term setting. For this reason, our experimental manipulation of type of video game in Study 2 used games chosen to differ primarily in violent content but to be similar in how well our participants would like them and in their likely effect on physiological indicators of arousal.

GAAM, Appraisal, and Aggressive Behavior

The appraisal processes of GAAM are not investigated in the present studies, so a brief summary of these processes will suffice. Automatic appraisals (called "immediate appraisal" in earlier versions of GAAM) are evaluations of the present environment and internal state that are made on-line, very quickly, with little or no awareness. When slapped in the face people will automatically "judge" that the present environment is threatening and that they are angry and/or scared, what is commonly referred to as the emotional part of the "fight or flight" response (e.g., *Berkowitz, 1993*). *Berkowitz's (1993)* CNA model also posits that such automatic appraisals include the behavioral aspects of fight or flight, a notion that is entirely consistent with GAAM.

Controlled reappraisals are somewhat slower and require more cognitive resources than do automatic appraisals. In some situations, in which there is little time for reappraisal for instance, a relevant behavior is chosen and performed before reappraisal takes place. However, reappraisal does often occur, as when one carefully considers why a provoking individual behaved in a particular way before deciding how to respond. Although we've presented appraisal and reappraisal as a dichotomy, in keeping with recent thinking in cognitive psychology it would be more accurate to view appraisal processes as existing along a continuum with *completely automatic* and *completely controlled* as the endpoints (e.g., *Bargh, 1994*).

Whether an aggressive behavior is emitted depends on what behavioral scripts have been activated by the various input variables and the appraisal processes. Well-learned scripts come to mind relatively easily and quickly and can be emitted fairly automatically. People who score high on aggressive personality have a relatively well-developed and easily accessible array of aggression scripts that are easily activated by relatively minor provocation (e.g., *Anderson, Benjamin, & Bartholow, 1998*). Furthermore, aggressive people have social perception schemata that bias the interpretation of observed events in aggression-enhancing ways. They perceive more violence than is really there, and they expect people to solve problems with aggressive means (e.g., *Dill et al., 1997*). We believe that video game violence also primes aggressive thought, including aggressive scripts. GAAM therefore explicitly predicts short-term effects of both aggressive personality and playing a violent video game on aggression after provocation.

GAAM: Long-Term Effects of Video Game Violence

Long-term media violence effects on aggression result from the development, overlearning, and reinforcement of aggression-related knowledge structures. *Figure 2* illustrates this process and identifies five types of such knowledge structures that have received attention in other aggression-related contexts. Each time people play violent video games, they rehearse aggressive scripts that teach and reinforce vigilance for enemies (i.e., hostile perception bias), aggressive action against others, expectations that others will behave aggressively, positive attitudes toward use of violence, and beliefs that violent solutions are effective and appropriate. Furthermore, repeated exposure to graphic scenes of violence is likely to be desensitizing. In essence, the creation and automatization of these aggression-related knowledge structures and the desensitization effects change the individual's personality. Long-term video game players can become more aggressive in outlook, perceptual biases, attitudes, beliefs, and behavior than they were before the repeated exposure or would have become without such exposure.

Theoretically, these long-term changes in aggressive personality operate in the immediate situation through both types of input variables described in GAAM: person and situation variables. The link to person variables is obvious – the person is now more aggressive in outlook and propensity. Less obvious is how long-term effects of repeated exposure to violent video games can change situational variables. However, Huesmann and colleagues (*Huesmann, 1994*) have developed a clear model of the social and academic effects of exposure to television violence. As a person becomes more aggressive, the social environment responds. The types of people who are willing to interact with them, the types of interactions that are held, and the types of situations made available to the person all change. Interactions with teachers, parents, and nonaggressive peers are likely to degenerate, whereas interactions with other "deviant" peers may well increase. For these reasons, we expect to find a positive correlation between a person's level of exposure to violent video games and their aggressive behavior. Study 1 was designed to test this notion.

RESEARCH ON VIDEO GAME VIOLENCE

Although much research has examined the effects of exposure to movie and television violence (see *Huesmann, 1994*, for a review), and although popular press commentaries about possible effects of video games abound, the empirical literature on video game violence is sparse (see *Dill & Dill, 1998; Emes, 1997*). To what extent do the existing video game studies support or contradict the GAAM-based predictions?

Video Games and Aggression: Correlational Work

Four correlational studies have examined the relation between video game playing habits and real-world aggressive behavior. Across the four studies, the ages of participants ranged from 4th graders to 12th graders. Measures of aggression included self, teacher, and peer reports. Three of the studies (*Dominick, 1984; Fling et al., 1992; Lin & Lepper, 1987*) yielded reliable positive correlations between video game playing and aggression. The fourth (*Van Schie & Wiegman, 1997*) correlation did not differ from zero. But, none of the studies distinguished between violent and nonviolent video games. Thus, none test the hypothesis that violent video games are uniquely associated with increased aggression.

Video Games and Aggression: Experimental Work

The extant experimental studies of video games and aggression have yielded weak evidence also. Four studies found at least some support for the hypothesis that violent video game content can increase aggression (*Cooper & Mackie, 1986; Irwin & Gross, 1995; Schutte, Malouff, Post-Gorden, & Rodasta, 1988; Silvern & Williamson, 1987*). However, none of these studies can rule out the possibility that key variables such as excitement, difficulty, or enjoyment created the observed increase in aggression. In our experience with video games and in the movie literature (*Bushman, 1995*), violent materials tend to be more exciting than nonviolent materials, so the observed effects could have been the result of higher excitement levels induced by the violent games.

Two additional experimental studies of violent video games and aggression found no effect of violence (*Graybill, Strawniak, Hunter, & O'Leary, 1987; Winkel, Novak, & Hopson, 1987*). Interestingly, of the six video game studies reviewed here, only the *Graybill et al. (1987)* study used games pretested and selected to be similar on a number of dimensions (e.g., difficulty, excitement, enjoyment). In sum, there is little experimental evidence that the violent content of video games can increase aggression in the immediate situation.

Video Games, Aggressive Affect, and Cognition

Two studies have examined the effect of video game violence on aggressive cognition. *Calvert and Tan (1994)* randomly assigned male and female undergraduates to a condition in which they either played or observed a violent virtual-reality game or to a no-game control condition. Postgame aggressive thoughts were assessed with a thought-listing procedure. Aggressive thoughts were highest for violent game players. Although this supports our GAAM view of video game effects, we hesitate to claim strong support because it is possible that this effect resulted from the greater excitement or arousal engendered by playing the game, rather than the violent content of the game. More recently, *Kirsh (1998)* showed that 3rd- and 4th-grade children assigned to play a violent video game gave more hostile interpretations for a subsequent ambiguous provocation story than did children assigned to play a nonviolent game. This also supports GAAM.

Five experiments have investigated the effects of video game violence on aggressive affect. One study showed increases in aggressive affect after violent video game play (*Ballard & Weist, 1996*). Another (*Anderson & Ford, 1986*) yielded mixed results. Three others (*Nelson & Carlson, 1985; Scott, 1995; Calvert & Tan, 1994*) showed little support for the hypothesis that short-term exposure to violent video games increases hostile affect. There are methodological shortcomings in many of these studies, which, when combined with the mixed results, suggest that there is little evidence that short-term exposure to violent video games increases aggression-related affect.

Summary

Four main hypotheses concerning video game violence and aggression emerge from a careful consideration of GAAM. First, consideration of social-cognitive learning processes and social dynamics leads to the prediction that exposure to violent video games over a long period of time should be positively correlated with aggression in naturalistic settings.

Second, GAAM predicts that short-term exposure to video game violence will lead to increases in aggressive behavior. Third, GAAM also predicts that people who score high on aggressive personality measures will behave more aggressively when provoked than will low trait aggression individuals. Fourth, GAAM predicts that short-term exposure to video game violence will lead to increases in aggressive cognition and that this effect mediates the short-term violent content/aggressive behavior relation, at least to some extent.

THE PRESENT RESEARCH

Our literature review revealed that the few published studies to date have not adequately tested the video game hypotheses. Thus, we conducted two studies of video game violence effects, one correlational, the other experimental. Our goal was to begin laying a firm empirical foundation for understanding video game violence effects, while at the same time providing further tests of the GAAM formulation and broadening our understanding of media violence effects in general. We chose two different methodologies that have strengths that complement each other and surmount each others' weaknesses – a correlational study and an experiment were conducted.

In Study 1, we measured both the amount of exposure to video game violence and the amount of time participants had played video games in prior time periods regardless of content. These video game measures and several individual difference measures were used as predictors of self-reported aggressive behavior and delinquency. We used a college student population, in part because they are old enough for long-term effects of playing violent video games to have had a measurable impact on real-world aggression. Study 1 also included a measure of academic achievement (grade point average [GPA]), mainly because prior longitudinal work on media violence effects on children has demonstrated a negative relation between exposure to violent media and later academic performance (e.g., *Huesmann, 1986; Huesmann & Miller, 1994*).

In Study 2 we randomly assigned participants to play either a violent or a nonviolent video game; the two games were matched (by means of pretesting) on several key dimensions. Subsequently, these participants played a competitive reaction time game in which they could punish their opponent by delivering a noxious blast of white noise. This constituted our laboratory measure of aggression. We also assessed the effects of the video games on both hostile thoughts and hostile feelings to see whether either (or both) served as mediators of the violent video game effect on aggressive behavior.

Both studies examined the additive and interactive effects of the individual difference variable of trait aggressiveness, one indicator of what we have called Aggressive Personality. This variable has yielded interesting effects in several media violence studies (e.g., *Anderson, 1997; Bushman, 1995; Dill et al., 1997*). Finally, both studies also included a measure of world view as a dependent variable (e.g., *Gerbner, Gross, Morgan, & Signiorelli, 1980*). These researchers posited that exposure to media violence creates an exaggerated picture of the world as a violent, unsafe place. As yet, this proposition has not been tested in the video game violence literature.

STUDY 1: CORRELATION TESTS OF VIDEO GAME VIOLENCE EFFECTS

Method

Participants

Two hundred twenty-seven (78 male, 149 female) undergraduates from introductory psychology courses at a large Midwestern university participated in small groups. All members of these classes were given the option of participating in psychological research or doing an alternative project for course credit. Students choosing to participate in research are recruited by means of a research participation sign-up board that lists ongoing research.

Design and Procedures

A correlational design was used to examine the relationship between long-term exposure to violent video games and several outcome variables, namely aggressive behavior, delinquency, academic achievement, and world view. We also collected data on two individual difference variables related to aggression (trait aggression, irritability) to examine the potential interactive effects of individual differences in aggression on the above outcomes. Gender of participant was also recorded so that we would be able to examine interactions with the aggression-related individual difference variables for each of the outcome variables. Data were collected in group questionnaire sessions, with the exception of the academic achievement variables, which were obtained from the university's registrar.

Materials

A self-report questionnaire was created to collect the individual difference data as well as the data on aggressive behavior, delinquency, and world view. There were six scales in total that made up the questionnaire. Each of these scales is described below. The two individual difference measures were the Caprara Irritability Scale (CIS; *Caprara et al., 1985*) and the Buss-Perry Aggression Questionnaire (AQ; *Buss & Perry, 1992*). The Delinquency Scale, which contained the aggressive behavior items, was also from a published scale (*Elliot, Huizinga, & Ageton,* *1985*). The measures of world view and of violent video game play were created for this study. A balanced Latin square design was used to create a total of six different forms of the questionnaire. These different forms were used to control for potential order effects.

Irritability

The CIS measures aggressive impulsivity or the proclivity toward quick and impulsive reactions to what the individual perceives as provocation or frustration. Agreement with statements such as, "I easily fly off the handle with those who don't listen or understand" and "I don't think I am a very tolerant person," indicates irritability. *Caprara (1982)* found that irritability predicted aggressive behavior in provoked individuals. Caprara reported a coefficient alpha for the irritability scale at .81 and a test-retest reliability of .83 (*Caprara et al., 1985*). The CIS contains 20 items that *Caprara et al., (1985)* labeled "irritability" items and 10 additional control items that might be thought of as "friendliness" items. In past research in our laboratory (e.g., *Dill et al., 1997*) we have reverse scored the 10 "control" items and found these items to be a viable predictor of irritability in their own right. Thus, the irritability composites we report are an average of 30 items, the 20 irritability items and the 10 "friendliness" items (reverse scored).

Trait Aggression

In 1992 Buss and Perry revised the Buss-Durkee (*Buss & Durkee, 1957*) aggression questionnaire. Buss and Perry's AQ (*Buss & Perry, 1992*) measures trait aggressiveness through four distinct subtraits, each represented by a subscale on the AQ. These subtraits are Physical and Verbal Aggression, Anger, and Hostility. Items such as "If somebody hits me, I hit back" represent physical aggressiveness, and items such as "I can't help getting into arguments when people disagree with me" represent verbal aggressiveness. Likewise, items such as "Some of my friends think I'm a hothead" and "At times I feel I have gotten a raw deal out of life" measure anger and hostility, respectively. *Buss and Perry (1992)* demonstrated a significant relationship between peer nominations of aggressiveness and scores on these four aggression subscales for male college students. They report a coefficient alpha for the AQ at .89 and a test-retest reliability at .80 (*Buss & Perry, 1992*). More recently, *Bushman and Wells (in press)* reported a positive relation between the Physical Aggression subscale and minutes penalized for aggressive hockey violations in high school students.

Delinquency

In the late 1970s, first the National Institute of Mental Health and then the National Institute for Juvenile Justice and Delinquency Prevention funded research on the epidemiology of delinquent behavior.

A series of longitudinal studies, which in part used a self-report measure of delinquency, were conducted, and these studies were collectively called the National Youth Survey (*Elliot, Huizinga, & Ageton, 1985*). The self-report delinquency measure that was created for the National Youth Survey is the one we use in the present study to measure delinquency. The format of the Delinquency Scale is a self-report of frequency of each of 45 specific behaviors over the last year. For example, an individual is asked to estimate how many times in the past year he or she has "purposely damaged or destroyed property belonging to a school." Of the 45 items, 7 pertain to illegal drug use (i.e., "How often in the last year have you used alcoholic beverages [beer, wine and hard liquor]?"). The multiple correlation ratio for the Delinquency Scale reported by *Elliot et al., (1985)* is .59. Using a model described in their book, *Explaining Delinquency and Drug Use* (*Elliot et al., 1985*), the authors demonstrated that their theoretical model explained 30-50% of the variance in the self-reported delinquency scores of males and 11-34% of the variance in the self-reported delinquency scores for females.

Aggressive behavior. The authors of the Delinquency Scale have sometimes analyzed their data by dividing the scale into subscales based on the severity of the delinquent crime (i.e., index offenses vs. minor delinquency) but not based on the type of delinquent act perpetrated (e.g., aggression vs. theft). However, for our purposes, we chose to form a subscale from the

10 items that were most clearly related to aggressive behavior. For example, participants were asked to estimate how many times in the past year they have "hit (or threatened to hit) other students" and "attacked someone with the idea of seriously hurting or killing him/her."

One of the 10 aggressive items was given a 0 by all participants (Item 27, "used force [strong-arm methods] to get money or things from other students") and was therefore dropped from the measure. Another item did not correlate well with the others (Item 20, "hit, or threatened to hit, one of your parents"), so it too was dropped. (Note that keeping these two items produces a few changes in higher order interactions but does not substantially change the main findings.) Furthermore, the standard deviations of the remaining items varied widely. To form a reliable index of aggressive behavior it was necessary to standardize each item before averaging across the eight items. Coefficient alpha for this index was .73. We hypothesized a positive relation between violent video game play and aggressive behavior.

Nonaggressive delinquency. Two of the remaining 35 items were also given 0s by all participants (items 4 and 13, "stolen [or tried to steal] a motor vehicle, such as a car or motorcycle" and "been paid for having sexual relations with someone") and were also dropped. The item standardization procedure as outlined for the aggressive delinquency behavior measure was used for this 33-item nonaggressive delinquency measure. It yielded an alpha coefficient of .89. We also hypothesized that violent video game play would be positively related to nonaggressive delinquency, though we expected it to be somewhat weaker than the video game link to aggressive delinquency. We expected this because many of these "nonaggressive" items have at least some aggression component to them, at least on occasion. For example, "purposely damaged or destroyed property belonging to your parents or other family members" may well be an indirect act of aggression, an attempt to harm someone by destroying something they value. In addition, some violent video games also model a total disregard for property rights of others or for other societal norms.

Video Game Questionnaire

We constructed our video game questionnaire to enable the creation of two composite indexes, one focusing on exposure to video game violence, and the other focusing on amount of time spent playing video games in general, regardless of type of content.

Video game violence. Participants were asked to name their five favorite video games. After naming each game, participants responded on scales anchored at 1 and 7, rating how often they played the game and how violent the content and graphics of the game were. Responses of 1 were labeled *rarely, little or no violent content*, and *little or no violent graphics*, respectively. Responses of 7 were labeled *often, extremely violent content*, and *extremely violent* *graphics*, respectively. The "how-often" scales also included the verbal anchor *occasionally* under the scale midpoint (4). For each participant, we computed a violence exposure score for each of their five favorite games by summing the violent content and violent graphics ratings and multiplying this by the how-often rating. These five video game violence exposure scores were averaged to provide an overall index of exposure to video game violence. Coefficient alpha was .86.

Participants were also asked, "Which of the following categories best describes this game?" for each of their five favorite games. The six categories were education, fighting with hands, sports, fighting with weapons, fantasy, and skill.

To help them remember their favorite games, participants were provided with a video game list. This list, which we compiled, contained the names of all video games that were currently for sale at a local computer store. It should be noted that participants were allowed to indicate that they had never played video games. Several individuals in our sample listed fewer than five favorite video games, but over 90% of our sample reported having at least one favorite video game.

Time spent on video games. After completing the questions relating to their favorite video games, participants were asked four questions regarding their general video game play across four different time periods. First they were asked to estimate the number of hours per week they have played video games "in recent months." They were not constrained as to the number of hours they could report. Next they were asked to estimate the number of hours per week they played video games "during the 11th and 12th grades," "during the 9th and 10th grades," and "during the 7th and 8th grades." A video game playing composite was formed by averaging the amount of time participants reported playing video games across the four time periods. Because participants were predominantly traditional-aged college underclassmen, this measure constituted a general video game playing estimate over approximately 5-6 years, from junior high to early college. The coefficient alpha for this general time spent playing video games variable was .84.

World View

Gerbner et al. (1980) were interested in the difference between light television viewers' and heavy television viewers' perceptions of the world. They asked participants to estimate the chance that they would be personally involved in crime and compared this with actual crime statistics. They also asked participants whether women are more likely to be victims of crime and whether neighborhoods are safe.

We chose to create our own World View Scale by making a set of questions that taps these general ideas. One reason for constructing a new measure was to not constrain the crime estimates to be compared with actual crime estimates at any one time. A comparison of the perceived likelihood of a crime can simply be made between those exposed to media violence and those not exposed, rather than to a continuously changing statistic. We constructed two sets of questions.

Crime likelihood. The first four questions on our Crime Opinion Survey, asked participants to estimate the percentage likelihood of a person experiencing each of four different crimes at least once in their lifetime. The questions read, "What do you think the chances are that any one person will be robbed by someone with a weapon in their lifetime? What do you think the chances are that any one person will be physically assaulted by a stranger in their lifetime? What do you think the chances are that any one woman will be raped in her lifetime? What do you think the chances are that any one person will be murdered?" Participants were asked to answer each of these four questions with a percentage and to assume that each question referred to current crime frequencies in the United States. Coefficient alpha for this "crime" perception measure was .86.

Safety feelings. In the last two questions participants were asked to indicate the extent to which they would feel safe walking alone in two different settings. These questions read, "How safe would you feel walking alone at night in an average suburban setting?" and "How safe would you feel walking alone at night on campus?" Participants responded on 7-point scales ranging from 1 (*not at all*) to 7 (*extremely*). Coefficient alpha for this "safety" measure was .82.

Academic Achievement

The academic achievement variable was the cumulative college GPA for each student. These were supplied by the university's registrar.

Results

Preliminary Analysis

Formation of Individual Difference Composites

Correlational analysis on the individual difference measures of aggression indicated no problem items (e.g., items that were negatively correlated with the scale) on either of the two scales. Coefficient alphas indicated that each of the two scales was internally reliable. Alphas were .88 for the CIS and .90 for the AQ. The CIS and AQ were strongly correlated (r = .81, $p < .001$). Past research in our lab has revealed that the CIS and the AQ load on the same latent Aggressive Personality factor (*Dill et al., 1997*). Therefore, we formed a single aggressive personality score by averaging the CIS and AQ scores.

Centering

When testing for interaction and main effects simultaneously in regression models with correlated predictors, it is recommended that continuous independent variables be centered to reduce multicollinearity problems (*Aiken & West, 1991*). We standardized all three continuous independent variables used in the various regression analyses to follow (i.e., video game violence, aggressive personality, and time in general spent on video games) to facilitate comparisons among them.

Descriptive Results

Most of the participants were traditional freshmen and sophomores. The mean age was 18.5 years. The oldest participants were two 25-year-olds and two 24-year-olds. Data from the video game questionnaire provided information about their playing habits. Overall, participants reported playing video games progressively less from junior high school to college. Participants reported playing video games an average of 5.45 hours per week while in junior high school, 3.69 hours per week in early high school, and 2.68 hours per week late in high school. Presently, the students reported playing video games an average of 2.14 hours per week.

Of the 227 students surveyed, 207 (91%) reported that they currently played video games. Of the 9% who do not play video games, 18 students, or 90% of the non-video game players, were women. Thus 88% of the female college students and 97% of the male college students surveyed were video game players. Participants were asked to list up to five favorite games. The mean number of games listed was 4.03.

Over 69% listed five games, the maximum number allowed.

The most popular game listed was Super Mario Brothers, which was a favorite of 109 students or about 50% of the sample. The second most played game was Tetris, a favorite of 93 students or about 43% of the sample. The third favorite game among our college students was Mortal Kombat, which was named by 58 students or 27% of the sample.

Super Mario Brothers and Mortal Kombat both involve considerable violence in the sense that the player typically spends a considerable amount of time destroying other creatures. However, Super Mario Brothers is a cartoon-like game designed for kids, and is not classified as violent by many people. Mortal Kombat is one of the most graphically violent games available. Tetris is a totally nonviolent game. Super Mario Brothers was included free with purchase of the Nintendo system for some time, which may account for part of its popularity. So, one could see this list of the top three games as being fairly positive (if one views Super Mario Brothers as harmless) or as being not so positive.

Of the 911 game classifications made by the participants, 21% were in the fighting category. However, a number of classifications of clearly violent/aggressive games were to one of the other categories. For instance, one person who listed Mortal Kombat as a favorite game classified it as a "sports" game. If these suspect classifications are added to the fighting category, the percentage of violent/aggressive games jumped to almost 33%. If Super Mario Brothers is counted as an aggressive game (even when the participant put it in another category), the percentage jumps to 44%.

It is important to keep in mind that our participant population consisted of those who had been admitted to a large state university. The preferences of their junior high and high school peers who did not get into college might be quite different.

Main Analyses

Zero-Order Correlations

Table 1 presents the zero-order correlations between the key continuous independent and dependent variables. One male student failed to complete (or start) the AQ, so his data were dropped from all regression analyses. *Table 1* reveals confirmation of both main hypotheses derived from GAAM: Aggressive delinquent behavior was positively related to both trait aggressiveness and exposure to video game violence (*rs* = .36 and .46, respectively). Nonaggressive delinquent behavior was also positively related to both trait aggressiveness and exposure to video game violence (*rs* = .33 and .31, respectively). Furthermore, exposure to video game violence was positively related to aggressive personality (*r* = .22).

It is interesting to note that exposure to video game violence was more strongly correlated with aggressive delinquent behavior than with nonaggressive delinquent behavior, $t(223) = 2.64$, $p < .05$. It is important to keep in mind that nonaggressive delinquent behavior includes some behaviors that are frequently (but not always) performed with the intent to harm another person.

Point biserial correlations involving gender of participant revealed that gender was strongly related to a number of the variables, especially perceived safety ($r = .68$), video game violence ($r = .43$), and time spent playing video games ($r = .35$). Males felt more safe, played more violent video games, and played more video games in general than did females.

Time spent playing video games in general was also positively related to both types of delinquent behaviors ($rs = .20$ and $.15$, respectively) but less strongly than was exposure to video game violence. Another interesting finding to emerge from data shown in *Table 1* concerns GPA. Video game violence was negatively, but not significantly, related to GPA ($r = -.08$), but time spent playing video games in general was significantly and negatively correlated ($r = -.20$) with GPA. A number of additional interesting correlations can be seen in *Table 1*, but the overall patterns are best understood by the more complex analyses to follow.

Aggressive Behavior

Destructive Testing. Our primary goal in Study 1 was to examine the relation between long-term exposure to violent video games and real-life aggressive behavior. Our first set of analyses used a destructive testing approach (*Anderson & Anderson, 1996*). In the destructive testing approach, one determines whether a specific predicted relation exists. If so, one enters competitive variables into the regression model to determine whether these competitors break the target relation or not. Of primary interest is not whether the initial target link can be broken (i.e., made nonsignificant), because the assumption is that even strong causal links between measured variables can eventually be broken by adding more correlated competitors into the model. Rather, the focus is on how durable the link appears given the theoretical and empirical strength of the competitor variables used to test the target link.

Our first model predicted aggressive behavior with exposure to video game violence (VGV). In three subsequent regressions, we added general video game playing time (Time), aggressive personality (AP), and gender of participant as predictors, keeping all prior predictors in the model. For each of these four regressions, we report the slope relating VGV to aggressive behavior, the unique percentage of variance accounted for by the video game playing measure, and the t value testing the video game playing effect against 0. In *Table 2* the results for the destructive testing of the links between VGV and three dependent variables are displayed, beginning with the one most relevant to this section – aggressive delinquent behavior.

As can be seen in the first three rows of *Table 2*, the VGV-aggressive behavior link was not broken in any of the destructive tests. In all cases, VGV was positively and significantly related to aggressive behavior, both statistically (all p s < .001) and in terms of percentage of total variance explained, which ranged from over 21% (when VGV was the only predictor) to 13% (when all three competitor variables were first partialed out). Thus, the link between VGV and aggressive behavior is quite strong indeed.

In the final destructive test, the only predictor other than VGV to attain statistical significance was AP (b = .156,t (220) = 4.51,p < .001). It accounted for about 7% of the total variance in aggressive behavior. The fact that Time did not “break” the VGV effect and that it didn’t contribute significantly to the prediction of aggressive behavior in the final (or any) destructive tests suggests that violent video game play is the most important video game predictor of aggressive behavior.

Moderation by individual differences. Our second set of analyses was designed to examine the potential moderating effects of individual differences in aggression on aggressive behavior. Mixed-model hierarchical regression analyses tested a model in which self-reported aggressive delinquent behavior was predicted by violent video game play, AP, and gender of participant. Recall that the continuous variable predictors (VGV, AP) were standardized prior to these analyses.

All higher order interactions were tested. We used the conventional alpha of .05 for main and two-way interactions. However, because of the large number of unpredicted three-way interactions, we used a more conservative .01 alpha to help guard against Type I errors.

Results showed the predicted main effect of violent video game play on aggression, $F(1, 222) = 42.88, p < .0001$, $MSE = .252$. Greater exposure to violent video games predicted greater aggressive behavior, $b = .246$. There was also a main effect of AP on aggressive behavior, $F(1, 222) = 21.08$, $p < .0001$, $MSE = .252$, such that high trait aggressive individuals reported more instances of aggressive behavior than did low trait aggressive individuals, $b = .159$. The main effect of gender of participant did not approach significance ($F < 1$). The R^2 for this main effects model was .284.

One of the two-way interactions was significant. The VGV × AP interaction was quite large, accounting for 24% of the variance, $F(1, 219) = 125.09$, $p < .0001$, $MSE = .147$. As can be seen in *Figure 3*, this huge interaction resulted from the fact that the VGV effect on aggression occurred primarily among participants with high AP scores. Neither of the other two-way interactions approached significance (p s > .20). The R^2 for this main effects and two-way interactions model was .588.

The three-way VGV × AP × Gender interaction was also significant and is illustrated in *Figure 4*, $F(1, 218) = 8.30$, $p < .005$, $MSE = .142$. It accounted for less than 2% of the variance in aggressive behavior, but is readily interpretable. For high AP participants there was a positive relation between VGV and aggression, but this was much stronger for men than women. For low AP people, however, there was little effect of VGV on aggression regardless of gender. (We created *Figures 3* and *4* by doing a median split on AP then calculating the VGV – aggressive behavior regression lines for high and low AP participants separately.) The full model yielded an R^2 of .603.

Nonaggressive Delinquency

Destructive testing. Table 2 also contains the destructive testing results for the nonaggressive delinquency measure. As noted earlier, the VGV effect was considerably smaller on nonaggressive delinquency than on aggressive behavior (compare also the percentage variance results in *Table 2*). Nonetheless, VGV consistently accounted for a significant unique portion of variation in nonaggressive delinquency. Those who reported more VGV exposure also reported higher levels of nonaggressive delinquency, all $ps < .001$, even when all three competitor variables were in the model. The percentage variation uniquely attributable to VGV ranged from almost 10% (when VGV was the only predictor) to a bit over 5%.

As with aggressive behavior, in the final destructive test the only predictor other than VGV to attain statistical significance was AP, $b = .137$, $t(222) = 4.41$, $p < .001$. It accounted for about 7% of the total variance in nonaggressive delinquency. Once again, the fact that Time did not break the VGV effect and that it didn't contribute significantly to the prediction of aggressive behavior in the final (or any) destructive tests suggests that violent video game play is the most important video game predictor of both nonaggressive delinquency and aggressive behavior.

Moderation by individual differences. The hierarchical regression analyses on the full 3-factor model yielded similar results. The R^2 for the main effects model was .172. There were significant main effects of VGV, $F(1, 222) = 14.32$, $p < .001$, $MSE = .203$, and AP, $F(1, 222) = 19.46$, $p < .001$, $MSE = .203$. The gender main effect did not approach significance ($F < 1$). VGV and AP were both positively related to nonaggressive delinquency, bs = .128 and .137, respectively.

There was also a substantial VGV × AP interaction, $F(1, 219) = 33.27$, $p < .001$, $MSE = .176$, such that the VGV effect was stronger for participants high in AP than for participants low in AP. This effect accounted for over 10% of the variation in nonaggressive delinquency. This interaction is presented in *Figure 5*. None of the other interactions was significant. The R^2 for the full model with all main effects and two-way interactions was .297.

World View: Feeling Safe

Destructive testing. Data shown in *Table 1* indicated that all four predictors – VGV, AP, Gender, and Time

– were positively correlated with feelings of safety. Destructive testing revealed that the link between VGV and safety feelings survived the addition of the Time and AP factors, but did not survive the addition of Gender to the model (see *Table 2*).

Moderation by individual differences. The hierarchical regression results showed that gender differences accounted for a large portion of the variance in safety feelings. In the model containing VGV, AP, and gender, the only significant effect was the main effect of gender, F (1, 222) = 135.92, $p < .001$, MSE = 1.43. The R^2 for the main effect model was .471; for the full model it was .483.

In the model containing Time (instead of the VGV predictor) only the Gender and Time main effects were significant, F(1, 222) = 153.25 and 4.24, $ps <$ .001 and .05, respectively, MSE = 1.44. The R^2 for the main effect model was .468; for the full model it was .481. As expected, women reported feeling significantly less safe than did men (e.g., adjusted means for the VGV model were 3.38 and 5.55 for female and male participants, respectively).

World View: Crime Opinions

The zero-order correlations (*Table 1*) showed that only gender of participant reliably correlated with crime likelihood estimates. Therefore, there was no link to video game playing experience to subject to destructive testing. Men gave lower estimates of crime than did women, r (point biserial) = -.26.

Hierarchical regression analyses with VGV, AP, and Gender as predictor variables were again used to further investigate the crime estimate variable. These analyses yielded only a main effect of gender, $F(1, 222) = 16.04$, $p < .01$, $MSE = 358.86$, such that women rated violent crimes as more likely to occur than did men (adjusted Ms = 41.82 and 30.01, respectively). The R^2 for the main effects model was .072. None of the other effects reached statistical significance. A similar set of hierarchical analyses using Time instead of VGV yielded almost identical results. The only significant effect was the main effect of gender, $F(1, 222) = 13.14$, $p < .001$, $MSE = 361.04$. The R^2 for the full model was .089.

Academic Achievement: GPA

Destructive testing. Results shown in *Table 1* revealed a significant negative correlation between GPA and Time ($r = -.20$). Our destructive testing of this small relation consisted of adding VGV, AP, and Gender as competitor variables, in that order. The results are displayed in *Table 2*. Though the magnitude of the GPA – Time relation was weakened by the addition of these variables, the link did not break. By itself, Time accounted for nearly 4% of the variance in GPA, $b = -.13$, $t(224) = 3.00$, $p < .01$. With all three competitors in the model, Time accounted for nearly 2% of GPA variance, $b = -.10$, $t(221) = 2.09$, $p < .05$.

Moderation by individual differences. Hierarchical regression analyses yielded only one statistically significant effect. Time was significantly related to GPA, $F(1, 222) = 4.17$, $p < .05$, $MSE = .41$, such that more Time predicted lower GPAs ($b = -.093$). The R^2 for the main effects model was .063; for the full model it was .078.

Discussion

Taken together, these results paint an interesting picture. Violent video game play and aggressive personality separately and jointly accounted for major portions of both aggressive behavior and non-aggressive delinquency. Violent video game play was also shown to be a superior predictor of both types of delinquency compared with time spent playing all types of video games. This is also consistent with our GAAM formulation and suggests that future research (unlike most past work) needs to distinguish between these types of video games.

The positive association between violent video games and aggressive personality is consistent with a developmental model in which extensive exposure to violent video games (and other violent media) contributes to the creation of an aggressive personality. The cross-sectional nature of this study does not allow a strong test of this causal hypothesis, but a zero or negative correlation would have disconfirmed the hypothesis, so the test is a legitimate one.

We also found that for university students, total time spent in the recent past on video games has a potential detrimental effect on grades. Interestingly, *Huesmann's (1986)* theory and data on TV violence suggest that violent video game exposure should be related to decrements in academic achievement because of the disruption of progress in school that is associated with increases in aggressive behavior engendered by media violence exposure. One plausible reason why this relationship was not observed in the present data may involve the nature of our population. College students are preselected on the basis of high school achievement and standardized test scores. Those with serious decrements in intellectual functioning or serious aggressive behavior problems are not as frequently represented in college samples as would be the case in a high school sample. Future research should examine the relationship between violent video game play and academic achievement in a high-school-aged sample.

In sum, Study 1 indicates that concern about the deleterious effects of violent video games on delinquent behavior, aggressive and nonaggressive, is legitimate. Playing violent video games often may well cause increases in delinquent behaviors, both aggressive and nonaggressive. However, the correlational nature of Study 1 means that causal statements are risky at best. It could be that the obtained video game violence links to aggressive and nonaggressive delinquency are wholly due to the fact that highly aggressive individuals are especially attracted to violent video games. Longitudinal work along the lines of Eron and Huesmann's work on TV violence (e.g., *Eron, Huesmann, Dubow, Romanoff, & Yarmel, 1987)* would be very informative.

Study 1 was informative in that it measured video game experience, aggressive personality, and delinquent behavior in real life. Its focus was on potentially negative consequences of long-term exposure to video game violence. Study 2 focused on short-term effects of video game violence. An experimental methodology was also used to more clearly address the causality issue. If the GAAM view of video game effects is correct, then we should be able to detect violent video game effects on short-term aggression and on aggressive cognitions using an experimental design and games chosen to differ primarily in the amount of violent content.

STUDY 2: EXPERIMENTAL TEST OF VIDEO GAME VIOLENCE EFFECTS

Pilot Study

The pilot study was conducted to choose video games for use in the main experiment. Our goal was to control for possible differences between nonviolent and violent video games on other dimensions that may be relevant to aggressive behavior, most notably enjoyment, frustration level, and physiological arousal. The current pilot study addressed these issues.

Video Games

The video game Wolfenstein 3D was selected to be pilot tested because of its blatant violent content, realism, and human characters. In Wolfenstein 3D the human hero can choose from an array of weaponry including a revolver, a knife, automatic weapons, and a flame thrower. The hero's goal is to use these weapons to kill Nazi guards in Castle Wolfenstein to advance through a number of levels; the ultimate goal is to kill Adolph Hitler. The graphics of this game are very violent; a successful player will see multiple bloody murders and hear victims scream and groan. The play control is easy and intuitive and the 3D setting is realistic. We also chose the violent game Marathon for pilot testing. Marathon is set up in the same basic format as Wolfenstein 3D except that the locale is an alien spaceship and the enemies are humanoid aliens with green blood.[1]

The nonviolent games chosen for the pilot study were Myst and Tetrix. Myst is an award-winning interactive adventure game that was specifically designed to be nonviolent in nature. It shares the 3D "walk through" format of Wolfenstein 3D and Marathon. Tetrix (which is comparable to Tetris) is an engaging, fast-paced, thinking game in which players attempt to align colorful geometric figures as they fall down a computer scree

Method

Thirty-two (18 female, 14 male) participants were recruited from the introductory psychology participant pool of a large Midwestern university and participated for partial course credit. Participants were run individually by a female experimenter. Participants were informed that we were choosing video games for use in a future study and that they would be asked a variety of questions about each of four games. We measured blood pressure and heart rate several times during the study. Games were presented in one of four counterbalanced orders to control for order effects.

After each game, the experimenter took the physiological measures, had the participant complete a "Video Game Rating Sheet" and asked the participant for any advice on changing the instructions or controls of the video game. On the Video Game Rating Sheet participants indicated, on 7-point unipolar scales, how difficult, enjoyable, frustrating, and exciting the games were as well as how fast the action was and how violent the content and graphics of the game were. These items were drawn from those used by *Anderson and Ford (1986)*. After participating, participants were debriefed and given experimental credit.

Results

The goal of the pilot study was to select a pair of games that differed primarily in amount of violence. The goal was best achieved by pairing of Myst and Wolfenstein 3D. These two games did not produce differences in systolic blood pressure, diastolic blood pressure, heart rate, or mean arterial pressure (all *ps* > .3). There were also no differences on ratings of game difficulty, enjoyment, frustration, and action speed (all *ps* > .05). However, Wolfenstein 3D was rated as more exciting than Myst (*M*s = 4.81 and 3.40, respectively), *F*(1, 27) = 10.46, *p* < .01. Further analyses revealed that this was true only for the male participants, *F*(1, 10) = 12.08, *p* < .01, and not for the female participants, *F*(1, 14) = 2.50, *p* > .13.

Myst and Wolfenstein 3D matched well, but because of the rated difference in excitement level, we decided to include the same Video Game Rating Sheet in the main experiment for use as a statistical control.

Main Experiment

Overview

Two hundred ten (104 female, 106 male) undergraduates from a large Midwestern university participated for partial credit in their introductory psychology course. In this experiment we examined the effects of violent video game play on aggressive thought, affect, and behavior and on world view. We also examined the interactive effects of gender and trait irritability on these variables. The design is thus a 2 (violent video game vs. nonviolent video game) × 2 (high irritability vs. low irritability) × 2 (male vs. female) between-subjects factorial design.

To give participants ample playing experience with the assigned video game, we arranged for them to come to the laboratory for two separate sessions.

Each participant played the assigned video game a total of three times. In the first experimental session, participants played the game, completed the affective and world view measures, played the game again, then completed the cognitive measure. During the next session, participants played the game one last time and completed the behavioral measure. All participants had been preselected by their trait irritability score.

Method and Procedure

Preselection of Participants

The CIS (*Caprara et al., 1985*) was administered to the introductory psychology participant pool during mass testing questionnaire sessions several weeks before the experiment was begun. The full 30-item scale was used. Participants scoring in the bottom fourth of the distribution were considered to have low irritability and participants scoring in the top fourth of the distribution were considered to have high irritability. Participants both low and high in irritability were recruited by telephone and participated for course credit. Note that this Trait Irritability Scale was a part of what we called our Aggressive Personality index in Study 1 but that we will refer to it in Study 2 as Trait Irritability (TI).

Laboratory Session 1

All instructions for starting or stopping video game play or computerized dependent measures took place over an intercom. The main reason for the intercom-based instructions was so the participant was always reminded that there was another participant present. In fact, even in cases in which the second cubicle was empty, the experimenter play-acted as if the second participant were actually there – entering the second cubicle and speaking the same instructions aloud to the nonexistent partner.

For the first session, participants were scheduled in pairs to come into the laboratory for 1 hour. Upon arriving at the laboratory, each participant was escorted to a cubicle that contained an intercom and a chair facing a color Macintosh computer equipped with a voice key (MacRecorder) and a pair of headphones. A female experimenter asked each participant to read and sign a consent form, to read a brief overview of the study, and to familiarize themselves with instructions that explained how to play the video game to which they were assigned (either Myst or Wolfenstein 3D). The experimenter then informed the participant that she would contact them when she was ready to begin and closed the door to the participant's cubicle.

Cover story. The overview informed participants that they would be taking part in a study called "The Learning Curve," which was purported to investigate how people learn and develop skills at motor tasks like video games and how these skills affect other tasks such as cognitive tasks and other motor tasks. Participants were also told that their video game play was being recorded to examine skill development. To make this believable, a VCR was set up near their computer, with wires running from the VCR to the computer. The two-session format was consistent with this motor skills development cover story as well.

Game play No. 1. After participants had read the cover story and had familiarized themselves with a written set of video game instructions, the experimenter entered the participant's cubicle and engaged the video game software. She reviewed the video game controls and asked for any questions about how to play the game. Then she asked the participant to wait until she gave the signal to begin, which would take place over the intercom system. At the appropriate time, the experimenter asked participants to put on a pair of headphones and play the video game. She informed them that she would stop them in 15 min.

Ratings. After 15 min of video game play, the experimenter stopped participants and saved their video game file on the computer. This was to keep up the cover story that the experimenters were interested in the player's video game performance. She then started a computer program that collected the affective data. The affective measure was the State Hostility Scale developed by Anderson and colleagues (*Anderson, 1997; Anderson et al., 1995, 1996*). In this scale participants are asked to indicate their level of agreement to 35 statements such as "I feel angry" and "I feel mean." Participants respond on 5-point scales anchored at 1 (*strongly disagree*), 2 (*disagree*), 3 (*neither agree nor disagree*), 4 (*agree*), and 5 (*strongly agree*). Some of the items are positive as stated (e.g., "I feel friendly") and thus were reverse scored for data analysis. Recent work by Anderson and colleagues (e.g., *Anderson, 1997; Anderson et al., 1995, 1996*) has shown that acute situational variables such as pain, provocation, violent movie clips, and uncomfortably cold and hot temperatures increase State Hostility scores.

Following the State Hostility Scale, the computer presented the same video game rating items that had been used in the pilot study, including the rating of how exciting the game was. Next, participants completed the same world view measure used in Study 1.

Game play No. 2. The computer program that collected the state hostility, video game, and world view data concluded with instructions for the participants to crack the door to their cubicle when they were finished. The experimenter then entered the participant's cubicle, stored the data on the computer, and restarted the video game software. The experimenter then asked the participant to wait until signaled to begin another 15-min video game playing session. When both participants were ready, the experimenter again signaled the participants by means of an intercom to put on their headphones and begin playing the video game. She informed them that she would stop them in 15 min. At that time, the experimenter returned and saved the participant's video game playing session. She then started the computer program that would collect the cognitive data.

The cognitive measure of aggressive thinking was the reading reaction time task used by Anderson and colleagues (*Anderson, 1997; Anderson et al., 1996; Anderson, Benjamin, & Bartholow, 1998*). This task presents aggressive words (e.g., murder) and three types of control words individually on a computer screen. The participant's task is to read each word aloud as quickly as possible. The three types of control words are anxiety words (e.g., humiliated), escape words (e.g., leave), and control words (e.g., consider). There are 24 words in each category. Each word is presented twice, for a total of 192 trials, with 48 trials for each word type. The four word lists have been equated for word length. The word "resign," which was used in previous studies as a control word, was later deemed an escape word. Thus, for this study, "resign" was replaced by "report."

Each word is presented on the computer screen in Times 12 font, with a period separating the letters of the word. The computer records the reaction time to each word. Words were presented in the same random order for each participant.

When participants finished, the experimenter reminded them of the time they were scheduled to return for the final portion of the study, thanked them for their time, and allowed them to leave. No debriefing information was given at this time.

Laboratory Session 2

Approximately 1 week later, participants returned to the laboratory to complete the final phases of the study. Participants came alone, but the procedures discussed earlier were carried out in this second session as well, so that participants would believe there was another participant in the second cubicle.

Video game play. The experimenter seated the participant in a cubicle, started the video game software, and asked if there were any questions about how to play the game. Then the experimenter asked the participant to wait until everyone was ready to begin. At that point, the experimenter said that she would give verbal instructions over the intercom for them to proceed with playing the game, as she had done in the first session.

Aggressive behavior. After 15 min, the experimenter entered the participant's cubicle, saved the video game file, and started the competitive reaction time task on the computer. In the competitive reaction time task, the participant's goal is to push a button faster than his or her opponent. If participants lose this race, they receive a noise blast at a level supposedly set by the opponent (actually set by the computer). Aggressive behavior is operationally defined as the intensity and duration of noise blasts the participant chooses to deliver to the opponent.

The competitive reaction time task used in this study was the same basic computer program used by *Bushman (1995)* and by *Dorr and Anderson (1995)*. It is based on the Taylor Competitive Reaction Time task, which is a widely used and externally valid measure of aggressive behavior (see *Anderson & Bushman, 1997*; *Anderson, Lindsay, & Bushman, 1999*; *Bushman & Anderson, 1998*; *Carlson, Marcus-Newhall, & Miller, 1989*; *Giancola & Chermack, 1998*).

We used 25 competitive reaction time trials; the participant won 13 and lost 12. The pattern of wins and losses was the same for each participant. Prior to each trial the participant set noise intensity and duration levels. Intensity was set by clicking on a scale that ranged from 0 to 10. Duration was set by holding down a "Ready" button and was measured in milliseconds. After each trial the participants were shown on their computer screen the noise levels supposedly set by their opponent. For this experiment, the noise blast intensities supposedly set by the opponent were designed to appear in a random pattern. Specifically, three noise blasts of intensity Levels 2, 3, 4, 6, 7, 8, and 9, and four noise blasts of Level 5 were randomly assigned to the 25 trials. A noise blast at Level 1 corresponded to 55 decibels, a noise blast at Level 2 corresponded to 60 decibels, and the decibels increased by five for each subsequent noise blast level to a maximum of 100 decibels for a noise blast at Level 10. Similarly, the duration of noise blasts the participant received were determined by the computer, were in a random pattern, and were the same for each participant. The durations varied from 0.5 seconds to 1.75 seconds.

Pilot testing and prior use of this competitive reaction time game had revealed that participants frequently did not understand how to vary the duration of noise supposedly to be delivered to their opponent. We therefore modified this version and the instructions to highlight the noise duration aspects of the game.

As the competitive reaction time program begins, participants are asked to read a set of instructions from the computer screen. Because it was crucial to the validity of our results that participants understand the task, the experimenter also read participants a set of standardized instructions by means of an intercom. The instructions read,

> We are now ready to do the competitive reaction time task. You will set a noise level that your opponent will hear if they lose. You will do this by clicking on the noise level bar at your right. Where you click on the bar determines how loud the noise is. How long you hold down on the bar determines how long your opponent will hear the noise. (PAUSE.) After you set the noise level and duration, click the "Ready" button. (PAUSE.) Wait for the yellow box to appear. This is a warning that the tone is about to sound. As soon as you hear the tone, click your mouse as fast as you can. (PAUSE.) If you lose, you will hear the noise your opponent has set for you. If you win, your opponent will hear the noise you have set for them. Either way, you will see which noise level your opponent set for you. You will do this several times. (PAUSE.) If you have questions, please open

> your door now. (PAUSE.) We are now ready to begin. Please make sure you have your headphones on now and click on the arrow which says, "Begin Experiment" in the upper right hand corner of your screen. Please begin now, and open your door when you are finished.

Debriefing. When the participant opened the cubicle door, the experimenter entered the cubicle, gave the participant a debriefing statement that explained the procedures and hypotheses of the study and debunked the cover story, and gave the participant full experimental credit. After answering any questions, the experimenter thanked and dismissed the participant.

Results

Video Game Questions

Recall that pilot testing had revealed a significant difference in the excitement level of the game (based on self-report data but not on the physiological data) between Myst and Wolfenstein 3D. We included game excitement as a covariate in all the models that follow because of the pilot study results, but it was not a significant predictor in any of the models. We also measured game difficulty and frustration level. Game frustration was a significant covariate in the model with state hostility as the dependent variable. Game difficulty was a significant covariate in the model predicting reading reaction time. However, the addition of these covariates to the overall model did not appreciably alter the effects of most interest.

State Hostility

The 35 items on the State Hostility Scale (*Anderson, 1997*) were averaged into a composite. The coefficient alpha calculated for the entire scale was .96. Correlational analyses indicated that one item, "I feel willful," was slightly negatively correlated with the rest of the scale items. This was not surprising as this particular item had been problematic in past research. This item was deleted, although deleting the item did not appreciably alter the effects presented.

A 2 (game type) × 2 (gender) × 2 (trait irritability) between-subjects analysis of variance (ANOVA) was performed with State Hostility as the dependent variable and with Game Excitement as a covariate. The R^2 for this model was .17. Results indicated significant main effects of irritability, $F(1, 201) = 29.98$, $p < .0001$, $MSE = .40$, and of gender, $F(1, 201) = 4.73$, $p < .05$, $MSE = .40$. As expected, those higher in TI reported more state hostility ($M = 2.52$) than those lower in TI ($M = 2.05$). Women reported more hostility ($M = 2.38$) than men ($M = 2.19$). The game type effect as well as all two- and three-way interactions between the independent variables were nonsignificant (all $ps > .05$).

Crime and Safety Ratings

For both the crime and the safety rating indexes, the only significant effect was gender of participant. Women gave higher estimates of violent crime likelihood than did men (*M* s = 37.16 and 25.82, respectively), $F(1, 200) = 21.75$, $p < .001$, $MSE = 313$, $R^2 = .14$. However, women reported lower feelings of safety than did men (*M*s = 3.63 and 5.69, respectively), $F(1, 201) = 152.92$, $p < .001$, $MSE = 1.45$, $R^2 = .44$. None of the other effects approached significance.

Accessibility of Aggressive Thoughts

Data preparation. Each participant responded to a total of 192 reading reaction time trials. These 192 were made up of 2 sets of 24 trials for each of the four types of words (aggressive, control, escape, and anxiety). We followed the data cleaning procedure used by *Anderson (1997)*, which involves identifying outliers according to *Tukey's (1977)* exploratory data techniques. Low and high outliers were changed to missing values. Low outliers (defined here as trials below 275 ms) may occur because of noise other than the participant's reading of the word, such as a door being slammed in an adjacent hallway. High outliers (defined here as trials above 875 ms) may occur because of a lack of attention by the participant or a failure to pronounce the word loud enough to trigger the voice key. Out of 40,320 data points, 2,391 (about 6%) were removed as outliers. In addition, three participants did not have reading reaction time data because of computer malfunctions. Thus, all the reading reaction time analyses are based on 207 participants.

Main analyses. Following the analysis procedure outlined by *Anderson (1997)*, the first step was to see if reaction times to the three control word types (control, anxiety, and escape) were differentially affected by the video game manipulations. A repeated measures ANOVA on the three control word types did not produce a significant control word type by game type interaction, $F(2, 197) = 2.82, p > .05$. Therefore, reaction times to the three types of control words (control, anxiety, and escape) were combined into a composite. A new variable was then formed in which the average reaction time to aggressive words was subtracted from the average reaction time to control words. This new variable is the Aggression Accessibility Index. People with relatively high scores have relatively greater access to aggressive thoughts.

A 2 (game type) × 2 (gender) × 2 (trait irritability) between-subjects ANOVA was performed on Aggression Accessibility with Game Excitement as a covariate. Results yielded the predicted main effect of game type, $F(1, 198) = 31.35$, $p < .0001$, $MSE = 246.05$. Aggression Accessibility scores were higher for those who had played the violent video game ($M = 5.54$) than for those who had played the nonviolent video game ($M =- 6.69$). In other words, the violent video game primed aggressive thoughts. This result suggests one potential way in which playing violent video games might increase aggressive behavior – by priming aggressive knowledge structures.

There was also a main effect of gender, $F(1, 198) = 13.47$, $p < .001$, $MSE = 246.05$, such that Aggression Accessibility scores were higher for men ($M = 3.45$) than for women ($M = -4.60$). The TI effect, as well as the two- and three-way interactions were all non-significant ($ps > .05$). The R^2 for this model was .20.

The lack of a TI effect on aggression accessibility scores is puzzling. It has been found in several previous studies, with the same task as well as with a different lexical decision task (e.g., *Anderson, 1997*; *Bushman, 1995*; *Lindsay & Anderson, in press*). One possibility is that playing a highly violent versus a very mellow and nonviolent game for two 15-min periods of time was sufficient to temporarily override the usual differences between people high and low in irritability in relative accessibility of aggressive thoughts.

Aggressive Behavior

Prior to each trial in the competitive reaction time task, participants set the noise duration and intensity levels that supposedly would be delivered to their opponents if the participant won the trial. Data from three participants were lost because of computer failure. Eleven additional participants from Session 1 failed to show for this second session, leaving a total of 196 participants.

Data preparation. As is common with latency data, the duration settings were positively skewed and there was a systematic relation between group means and standard deviations. A log transformation was therefore applied to the duration data (*Tukey, 1977*).

Four aggression measures were constructed on the basis of the noise settings (duration or intensity) after both win and lose trials. We reasoned that retaliatory motives would be heightened after losing a trial (and therefore after receiving a noise blast from one's opponent), whereas winning a trial should reduce (at least temporarily) such motives. In other words, it may take both the cognitive priming of aggressive thoughts by violent video games and an immediate provocation (noise blast) by an opponent to trigger higher levels of aggression. Similarly, the emphasis placed in the instructions on how to control noise duration settings was expected to increase participants' use of this aggressive behavior, compared with what we've seen in previous work in our lab.

Both of these expectations were borne out. Indeed, our emphasis on the noise duration controls apparently interfered with participants' ability or willingness to use the intensity control. There were no statistically significant effects of any of the independent variables – gender, TI, video game type – on either the win or lose noise intensity settings. Therefore they will not be discussed further.

Duration: Aggression after "win" trials. For the trials after participants had just won and had not received but had supposedly delivered a noise blast, the only significant effect was a main effect of gender, F (1, 187) = 8.17, $p < .01$, $MSE = .28$. Women ($M = 6.89$) delivered longer noise blasts than men ($M = 6.65$). The R^2 for this model is .08.

Duration: Aggression after "lose" trials. Duration of noise settings after lose trials yielded significant main effects of gender, TI, and game type. Just as on win trials, women delivered longer noise blasts after loss trials than did men, Ms = 6.86 and 6.59, respectively, $F(1, 187) = 12.84$, $p < .001$, $MSE = .27$. High irritability participants delivered longer noise blasts than did low irritability participants, Ms = 6.84 and 6.65, respectively, $F(1, 187) = 4.43$, $p < .05$, $MSE = .27$.

Most importantly, participants who had played Wolfenstein 3D delivered significantly longer noise blasts after lose trials than those who had played the nonviolent game Myst (M s = 6.81 and 6.65), $F(1, 187) = 4.82$, $p < .05$, $MSE = .27$. In other words, playing a violent video game increased the aggressiveness of participants after they had been provoked by their opponent's noise blast. In *Figure 6* we illustrate both the irritability and the video game main effects. As can be seen, these two effects were about the same size, both were in the small to medium range.

There was also an Irritability × Gender interaction, $F(1, 187) = 7.04$, $p < .01$, $MSE = .27$, such that high trait irritability increased aggression by men (Ms = 6.75 and 6.47 for men high and low in irritability) but not by women (*M*s = 6.84 and 6.85 for women high and low in irritability). The R^2 for this model is .14. Because this unexpected finding has not been reported previously in the literature we eschew speculation until it reappears in future studies.

Mediational Analyses

Playing the violent video game increased accessibility of aggressive thoughts and aggressive behavior but did not reliably increase state hostility. These findings suggest that VGV takes a cognitive and not an affective path to increasing aggressive behavior in short-term settings. To further test this idea we entered State Hostility as a covariate in the overall model relating video game violence to noise duration settings after the loss trials. The presence of State Hostility in the model did not eliminate the significance of the video game effect, $F(1, 186) = 4.43$, $p < .05$, $MSE = .26$, $R^2 = .15$. We performed the same covariance analysis with Aggression Accessibility as the covariate instead of State Hostility. Consistent with a mediation hypothesis, the video game effect was reduced to marginal significance, $F(1, 186) = 3.08$, $p < .08$, $MSE = .26$, $R^2 = .15$.[7]

GENERAL DISCUSSION

Aggressive Behavior Effects

The present research demonstrated that in both a correlational investigation using self-reports of real-world aggressive behaviors and an experimental investigation using a standard, objective laboratory measure of aggression, violent video game play was positively related to increases in aggressive behavior. In the laboratory, college students who played a violent video game behaved more aggressively toward an opponent than did students who had played a nonviolent video game. Outside the laboratory, students who reported playing more violent video games over a period of years also engaged in more aggressive behavior in their own lives. Both types of studies – correlational-real delinquent behaviors and experimental-laboratory aggressive behaviors have their strengths and weaknesses. The convergence of findings across such disparate methods lends considerable strength to the main hypothesis that exposure to violent video games can increase aggressive behavior.

Though the existence of a violent video game effect cannot be unequivocally established on the basis of one pair of studies, this particular pair adds considerable support to prior work, both empirical and theoretical. When combined with what is known about other types of media violence effects, most notably TV violence (e.g., *Eron et al., 1987; Huesmann & Miller, 1994*), we believe that the present results confirm that parents, educators, and society in general should be concerned about the prevalence of violent video games in modern society, especially given recent advances in the realism of video game violence.

Trait Aggressiveness

One interesting difference between the results of the present two studies concerns the moderating effects of individual difference variables. The violent video game effect on aggressive behavior in Study 1 was moderated by individual differences in aggression such that the violent video game effect was stronger for those high in trait aggressiveness than for those low in trait aggressiveness. This moderating effect did not emerge in Study 2, though similar moderating effects have been found in other laboratory studies of media violence (e.g., *Bushman, 1995*). There are always several possible explanations for such discrepancies. One obvious possibility is that Study 1 used a composite of the CIS and the Buss-Perry AQ as the individual difference measure of aggressive personality, whereas Study 2 used only the CIS. To check on this possibility, we reanalyzed the Study 1 data using only the CIS, and found essentially the same results. For example, the Violent Video Game × CIS Score interaction in Study 1 was still highly significant, $F(1, 219) = 130.58$, $p < .001$, $MSE = .145$. It is also interesting to note that Irwin and Gross (1995) found no moderating effect of trait impulsivity on the violent video game effect they observed in their study of 7- and 8-year-old boys.

The fact that in Study 2 the video game effect and the trait irritability effect were of similar magnitude argues against the possibility that the video game manipulation simply overwhelmed individual differences in this setting. This suggests a third possibility:

The AP × VGV interaction in Study 1 may reflect a long-term bidirectional causality effect in which frequent playing of violent video games increases aggressiveness, which in turn increases the desire and actual playing of even more violent video games. Such a cycle is not only plausible, but fits well with *Huesmann's (1986)* theorizing and data on TV violence effects.

Sex Differences

One additional behavioral result of Study 2 warrants comment: specifically, the finding that women displayed higher levels of state hostility and aggression than men. At first this result may seem very surprising given that men are generally seen as more aggressive than women. However, as *Bettencourt and Miller's (1996)* meta-analysis of provocation effects showed, gender differences vary considerably depending on setting and type of provocation. One possible explanation involves differences in liking for video games. In our participant population, men generally report playing more video games than women, as was seen in Study 1. Even a cursory examination of video game advertisements reveals a clearly male orientation. Thus, it is possible that both the higher reported level of state hostility and the higher level of aggression by women in Study 2 resulted from their being less familiar with video games or less happy at having to play them in this lab experiment. Furthermore, the ambiguous nature of the duration measure may well fit the aggressive style of women in our culture better than the style of men. In any case, what is most important to keep in mind is that exposure to the violent video game increased the aggression of both male and female participants.

Underlying Processes

The General Affective Aggression Model as well as the more domain-specific models on which it is based suggest that media violence effects occur through one of three routes: cognitive, affective, or arousal. In Study 2, games were selected to create equal arousal states as measured by heart rate and blood pressure. Furthermore, excitement ratings were used as a covariate to further ensure that this route was closed off in this investigation. The affective route was at least partially closed off by the selection of two games that were equally enjoyable and difficult. We then included measures of aggressive affect and cognition, and found that short-term VGV exposure increased the accessibility of aggression-related thoughts, but did not increase feelings of hostility. In the past, only one experimental investigation examined the effects of violent video game play on aggressive thoughts. *Calvert and Tan (1994)* found that participants listed more aggressive thoughts after playing a violent virtual-reality game. Thus, the current investigation supports and extends this very small literature on cognitive priming effects. This line of inquiry is especially important because it supports the various cognitive models of aggression on which GAAM is largely based (e.g., *Anderson et al., 1995; Berkowitz, 1984, 1990, 1993; Huesmann, 1986*).

Our findings do not rule out the possibility that under some circumstances violent video game effects on subsequent aggressive behavior might be mediated by increased feelings of hostility or by general arousal effects. Indeed, GAAM explicitly notes that thoughts, feelings, and arousal are intricately interconnected, sometimes to such an extent that they can't be disentangled.

The results of the current investigation suggest that short-term VGV effects may operate primarily through the cognitive, and not the affective, route to aggressive behavior (e.g., *Anderson et al., 1995*). This finding is consistent with *Huesmann's (1986)* social-cognitive theory of the development of aggressive reaction tendencies from media violence exposure. Thus, the danger in exposure to violent video games seems to be in the ideas they teach and not primarily in the emotions they incite in the player. The more realistic the violence, the more the player identifies with the aggressor. The more rewarding the video game, the greater potential for learning aggressive solutions to conflict situations.

Academic Achievement

We found that academic achievement (GPA) was not related to prior violent video game play in particular, but was related to long-term exposure to video games in general. Some past research has shown relations between video game play and decrements in academic achievement. For example, *Harris and Williams (1985)* reported a link between video game playing and lower English grades. However, other work has failed to find such a linkage. For example, *Creasey and Myers (1986)* found no long-term relationship between video game play and school activities, and *Van Schie and Wiegman (1997)* found a positive relation between general video game play and IQ.

As is the case in the video game literature in general, there is no definitive answer to the question of whether video games disrupt academic performance. There are enough hints of such an effect to warrant further investigation. That video game play in general, and not violent video game play, would produce decrements in academic achievement makes sense if the effect is based on time spent on such activities (rather than on academic activities) and not on a direct effect of the content of the games. *Huesmann (1986)* reasoned that the lessons taught by media violence can attenuate intellectual performance as well, through a series of inter- and intrapersonal processes, and has provided convincing evidence. However, the restricted range of academic achievement and of behavior problems in our college student sample raises the possibility that a less restricted sample may indeed show a unique violent video game effect on academic performance as well.

Unique Dangers of Violent Video Games

The present data indicate that concern about the potentially deleterious consequences of playing violent video games is not misplaced. Further consideration of some key characteristics of violent video games suggests that their dangers may well be greater than the dangers of violent television or violent movies. There are at least three reasons for this. The first concerns identification with the aggressor. When viewers are told to identify with a media aggressor, postviewing aggression is increased compared with measured aggression of those who were not instructed to identify with the aggressor (e.g., *Leyens & Picus, 1973*). In "first person" video games the player assumes the identity of the hero, and sometimes chooses a character whose persona the player then assumes. The player controls the action of this character and usually sees the video game world through that character's eyes. In other words, the main character is synonymous with the game player, potentially heightening the game's impact.

The second reason for concern involves the active participation involved in video games. Research on the catharsis hypothesis reveals that aggressive behavior usually increases later aggressive behavior (*Bushman, Baumeister, & Stack, in press*; *Geen & Quanty, 1977*; *Geen, Stonner, & Shope, 1975*). The active role of the video game player includes choosing to aggress and acting in an aggressive manner. This choice and action component of video games may well lead to the construction of a more complete aggressive script than would occur in the more passive role assumed in watching violent movies or TV shows.

A third reason to expect video games to have a bigger impact than TV or movies involves their addictive nature. The reinforcement characteristics of violent video games may also enhance the learning and performance of aggressive scripts. *Braun and Giroux (1989)* noted that video games are "the perfect paradigm for the induction of 'addictive' behavior" (p. 101). *Griffiths and Hunt (1998)* found that one in five adolescents can be classified as pathologically dependent on computer games. Video game "addiction" may stem, in part, from the rewards and punishments the game gives the player (*Braun & Giroux, 1989*; *Dill & Dill, 1998*; *Klein, 1984*), much like the reward structure of slot machines. When the choice and action components of video games (discussed above) is coupled with the games' reinforcing properties, a strong learning experience results. In a sense, violent video games provide a complete learning environment for aggression, with simultaneous exposure to modeling, reinforcement, and rehearsal of behaviors. This combination of learning strategies has been shown to be more powerful than any of these methods used singly (*Barton, 1981*; *Chambers & Ascione, 1987*; *Loftus & Loftus, 1983*).

Summary and Conclusions

Violent video games provide a forum for learning and practicing aggressive solutions to conflict situations. The effect of violent video games appears to be cognitive in nature. In the short term, playing a violent video game appears to affect aggression by priming aggressive thoughts. Longer-term effects are likely to be longer lasting as well, as the player learns and practices new aggression-related scripts that become more and more accessible for use when real-life conflict situations arise. If repeated exposure to violent video games does indeed lead to the creation and heightened accessibility of a variety of aggressive knowledge structures, thus effectively altering the person's basic personality structure, the consequent changes in everyday social interactions may also lead to consistent increases in aggressive affect. The active nature of the learning environment of the video game suggests that this medium is potentially more dangerous than the more heavily investigated TV and movie media. With the recent trend toward greater realism and more graphic violence in video games and the rising popularity of these games, consumers of violent video games (and parents of consumers) should be aware of these potential risks.

Recent events in the news, such as the link between teenage murderers in Colorado and violent video game play, have sparked public debate about video game violence effects. As the debate continues, video games are becoming more violent, more graphic, and more prevalent. As scientists, we should add new research to the currently small and imperfect literature on video game violence effects and clarify for society exactly what these risks entail. The General Affective Aggression Model has proved useful in organizing a wide array of research findings on human aggression and in generating testable propositions, including the present studies of video game violence. Additional short-term studies of the effects of violent video games are needed to further specify the characteristics of games and of game players that reduce and intensify the aggression-related outcomes. Longitudinal studies of exposure to violent video games are needed to test the proposition that such exposure can produce stable changes in personality, changes of the type seen in research on long-term exposure to other violent media.

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Footnotes

1 The data for study 2 were collected in 1997. Since then, video games have become even more graphically violent, and the graphics have become even more realistic.

2 One procedural aspect of Study 2 may have reduced the effects of the video games on the dependent variables. Specifically, any time lag between video game play and the collection of the dependent measures may allow the effects of the video game to dissipate somewhat. This may be one explanation for the lack of state hostility changes due to video game. We thank an anonymous reviewer for pointing this out. Future research should attempt to speak to these concerns.

Table 1
Zero-Order Correlations and Alphas: Study I

Variable	1	2	3	4	5	6	7	8	9
1. AB	(.73)	.54*	-.03	.24*	.46*	.36*	.20*	.20*	-.11
2. NAB	.54*	(.89)	-.08	.19*	.31*	.33*	.15	.15*	-.15*
3. Crime	-.03	-.08	(.86)	-.27*	-.05	-.07	-.26*	-.09	-.05
4. Safety	.24*	.19*	-.27	(.82)	.35*	.23*	.68*	.25*	-.05
5. VGV	.46*	.31*	-.05	.35*	(.86)	.22*	.43*	.28*	-.08
6. AP	.36*	.33*	-.07	.23*	.22*	—[a]	.19*	.16*	-.15*
7. Gender	.20*	.15*	-.26	.68*	.43*	.19*	—	.35*	-.18*
8. Time	.20*	.15*	-.09	.25*	.28*	.16*	.35*	(.84)	-.20*
9. GPA	-.11	-.15*	-.05	-.05	-.08	-.15*	-.18*	-.20*	—

Note. N = 226 for all correlations. Alphas are shown in parentheses on the diagonal. Dashes indicate single-item measures. AB = aggressive delinquent behavior; NAB = nonaggressive delinquent behavior; Crime = perception of general crime chances; Safety = perception of personal safety; VGV = long-term exposure to video game violence; AP = aggressive personality; Gender = point biserial correlations with women coded as 0, men as 1; Time = time spent playing video games; GPA = grade point average.

[a] AP was the average of the CIS and AQ scores, which had alphas of .88 and .90, respectively.

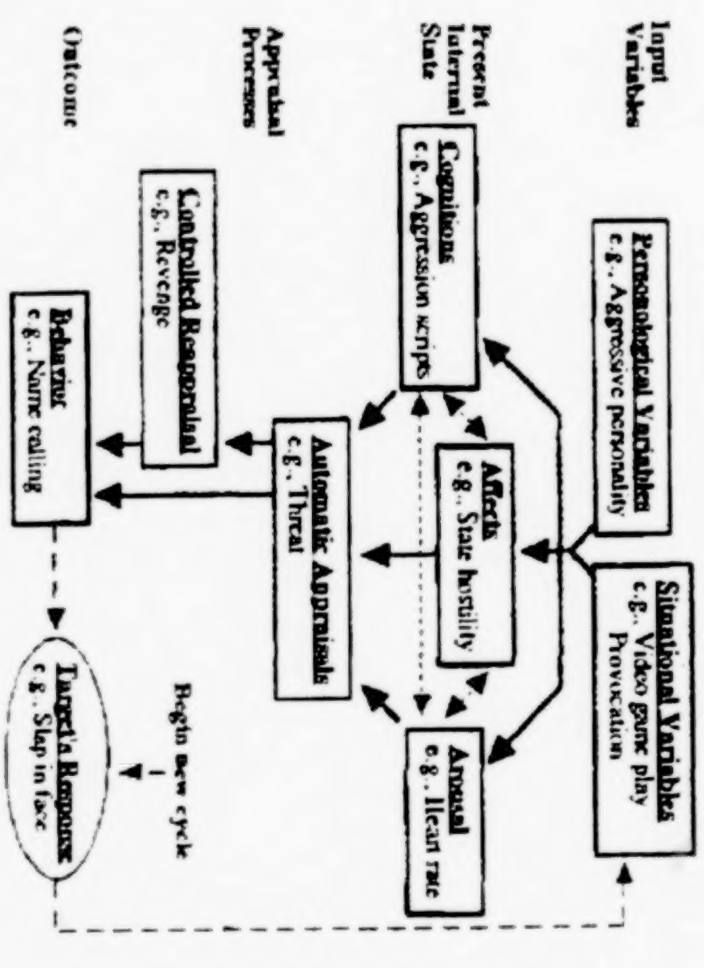
* $p < .05$

Table 2
Destructive Testing of Video Game Links to Aggressive Behavior, Nonaggressive Delinquency, Safety Feelings, and Grade Point Average: Slopes, Percentage Variance Accounted for, and t Tests of Links Between Video Game Playing and Key Dependent Variables

	Variables in the model			
Dependent variable/Target predictor	VGV	+ Time	+ AP	+ Gender
Aggressive behavior/Video game violence				
Video game violence slopes	.274	.262	.232	.241
Percentage variance explained by video game play	21.61	15.18	13.77	12.99
t value	7.86*	7.21*	6.54*	6.34*
Nonaggressive delinquency/Video game violence				
Video game violence slopes	.155	.146	.120	.124
Percentage variance explained by video game play	9.92	8.07	5.28	5.97
t value	4.97*	4.48*	3.76*	3.64*
Safety feelings/Video game violence				
Video game violence slopes	.573	.495	.450	.094
Percentage variance explained by video game play	12.28	8.48	6.72	0.26
t value	5.60*	4.70*	4.24*	1.04
	Time	+ VGV	+ AP	+ Gender
GPA/Time spent playing video games				
Time spent playing video games slopes	-.129	-.123	-.115	-.097
Percentage variance explained by video game play	3.85	3.25	2.80	1.84
t value	3.00*	2.75*	2.56*	2.09*
df	224	223	222	221

Note. VGV = video game violence; Time = time spent playing any type of video game; AP = aggressive personality; GPA = grade point average.

* $p < .05$.



Input Variables
Personological Variables
e.g., Aggressive personality
Situational Variables
e.g., Video game play
Provocation
Present Internal State
Cognitions
e.g., Aggression scripts
Affects
e.g., State hostility
Arousal
e.g., Heart rate
Appraisal Processes
Automatic Appraisals
e.g., Threat
Controlled Reappraisal
e.g., Revenge
Begin new cycle
Outcome
Behavior
e.g., Name calling
Target's Response
e.g., Slap in face

Figure 1. Single episode General Affective Aggression Model: Short-term effects of video game violence. Adapted from "Hot Temperatures, Hostile Affect, Hostile Cognition, and Arousal: Tests of a General Model of Affective Aggression," by C. A. Anderson, W. E. Deuser, and K. M. DeNeve, 1995, *Personality and Social Psychology Bulletin*, *21*, p. 436.

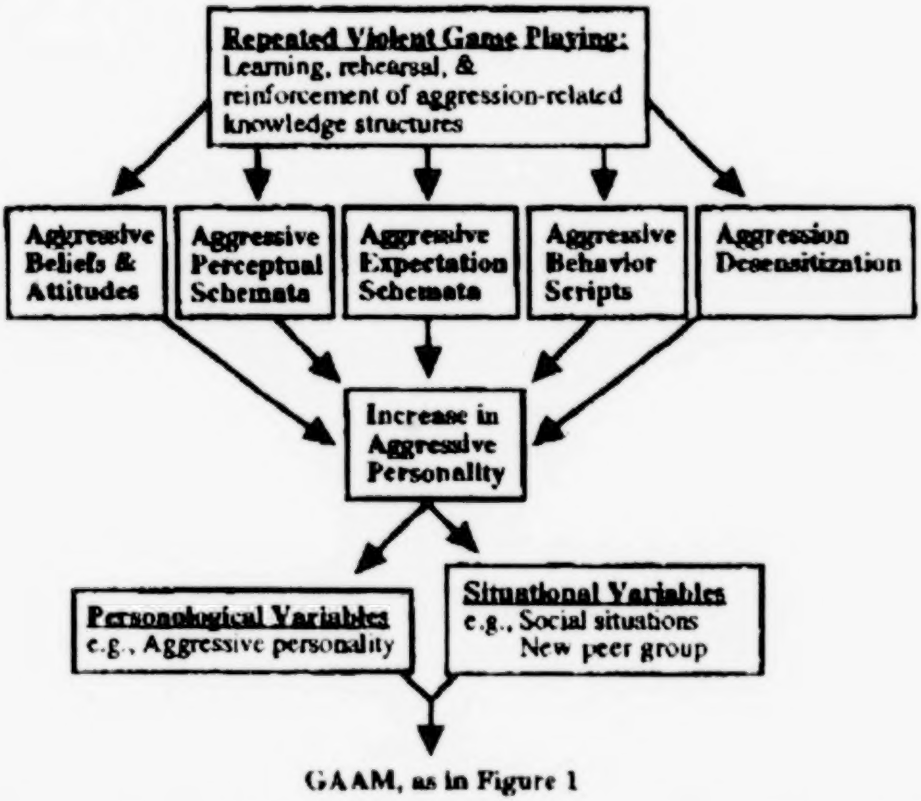

Repeated Violent Game Playing:
Learning, rehearsal, & reinforcement of aggression-related knowledge structures
Aggressive Beliefs & Attitudes
Aggressive Perceptual Schemata
Aggressive Expectation Schemata
Aggressive Behavior Scripts
Aggression Desensitization
Increase in Aggressive Personality
Personological Variables
e.g., Aggressive personality
Situational Variables
e.g., Social situations
New peer group
GAAM, as in Figure 1

Figure 2. Multiple episode General Affective Aggression Model (GAAM): Long-term effects of video game violence.

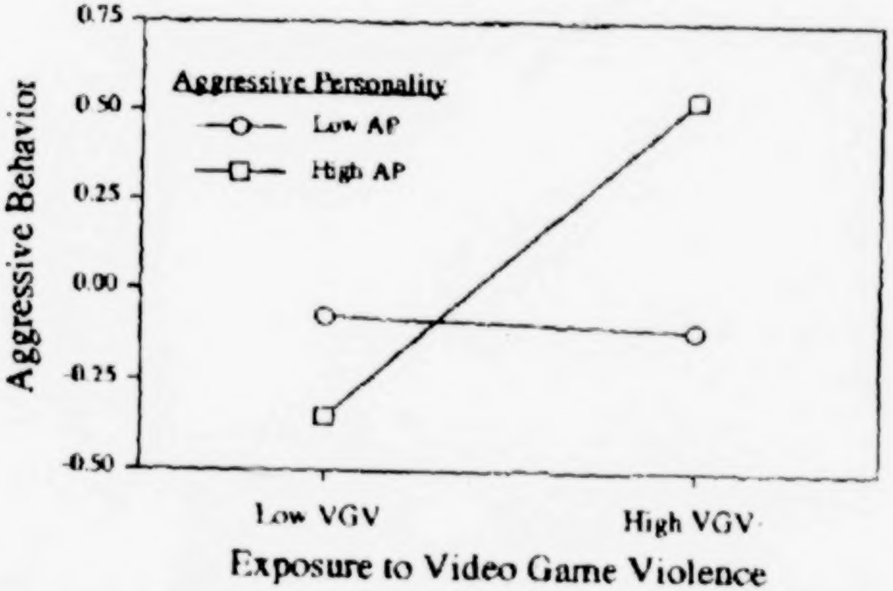


Figure 3. Effect of exposure to video game violence (VGV) on aggressive behavior as a function of aggressive personality (AP).

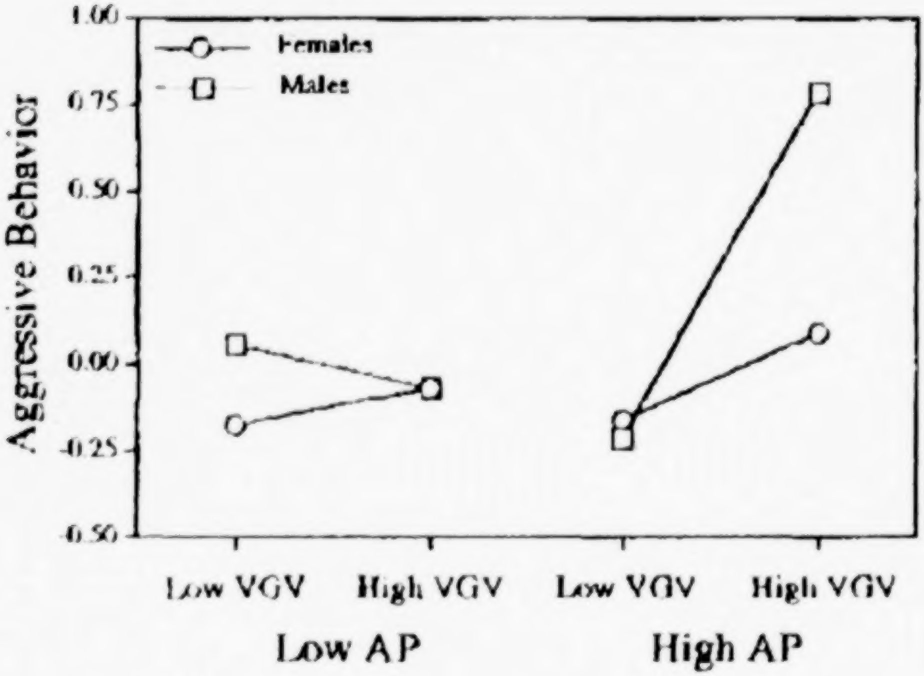


Figure 4. Effect of exposure to video game violence (VGV) on aggressive behavior as a function of aggressive personality (AP) and gender.

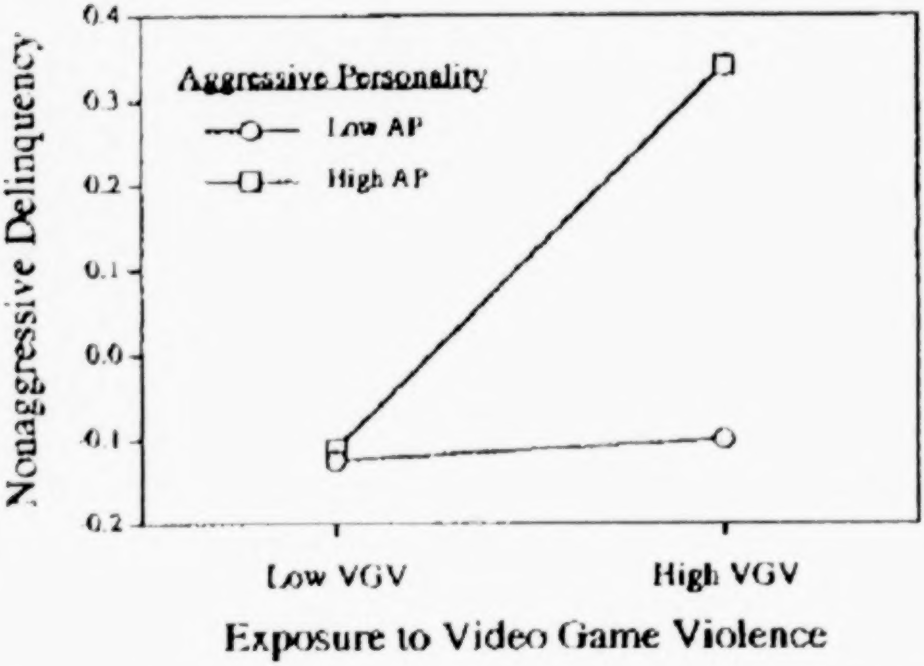


Figure 5. Effect of exposure to video game violence (VGV) on nonaggressive delinquency as a function of aggressive personality (AP).

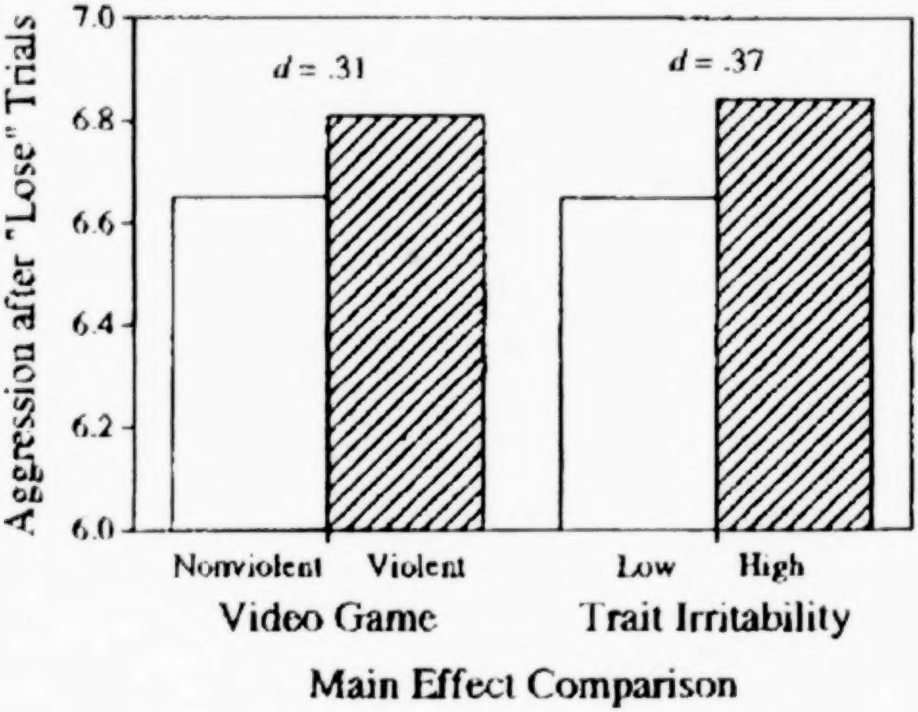


Figure 6. Main effects of video game and trait irritability on aggression (log duration) after "Lose" trials, Study 2.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title Omitted In Printing]

THE INFLUENCE OF MEDIA VIOLENCE ON YOUTH

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Summary – Research on violent television and films, video games, and music reveals unequivocal evidence that media violence increases the likelihood of aggressive and violent behavior in both immediate and long-term contexts. The effects appear larger for

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milder than for more severe forms of aggression, but the effects on severe forms of violence are also substantial (r = .13 to .32) when compared with effects of other violence risk factors or medical effects deemed important by the medical community (e.g., effect of aspirin on heart attacks). The research base is large; diverse in methods, samples, and media genres; and consistent in overall findings. The evidence is clearest within the most extensively researched domain, television and film violence. The growing body of videogame research yields essentially the same conclusions.

Short-term exposure increases the likelihood of physically and verbally aggressive behavior, aggressive thoughts, and aggressive emotions. Recent large-scale longitudinal studies provide converging evidence linking frequent exposure to violent media in childhood with aggression later in life, including physical assaults and spouse abuse. Because extremely violent criminal behaviors (e.g., forcible rape, aggravated assault, homicide) are rare, new longitudinal studies with larger samples are needed to estimate accurately how much habitual childhood exposure to media violence increases the risk for extreme violence.

Well-supported theory delineates why and when exposure to media violence increases aggression and violence. Media violence produces short-term increases by priming existing aggressive scripts and cognitions, increasing physiological arousal, and triggering an automatic tendency to imitate observed behaviors. Media violence produces long-term effects via several types of learning processes leading to the acquisition *of lasting (and automatically accessible) aggressive scripts, interpretational schemas, and aggression-supporting beliefs about social behavior, and by reducing individuals' normal negative emotional responses to violence (i.e., desensitization).*

Certain characteristics of viewers (e.g., identification with aggressive characters), social environments (e.g., parental influences), and media content (e.g., attractiveness of the perpetrator) can influence the degree to which media violence affects aggression, but there are some inconsistencies in research results. This research also suggests some avenues for preventive intervention (e.g., parental supervision, interpretation, and control of children's media use). However, extant research on moderators suggests that no one is wholly immune to the effects of media violence.

Recent surveys reveal an extensive presence of violence in modern media. Furthermore, many children and youth spend an inordinate amount of time consuming violent media. Although it is clear that reducing exposure to media violence will reduce aggression and violence, it is less clear what sorts of interventions will produce a reduction in exposure. The sparse research literature suggests that counter-attitudinal and parental-mediation interventions are likely to yield beneficial effects, but that media literacy interventions by themselves are unsuccessful.

Though the scientific debate over whether media violence increases aggression and violence is essentially over, several critical tasks remain. Additional *laboratory and field studies are needed for a better understanding of underlying psychological processes, which eventually should lead to more effective interventions. Large-scale longitudinal studies would help specify the magnitude of media-violence effects on the most severe types of violence. Meeting the larger societal challenge of providing children and youth with a much healthier media diet may prove to be more difficult and costly, especially if the scientific, news, public policy, and entertainment communities fail to educate the general public about the real risks of media-violence exposure to children and youth.*

For more than five decades, Americans have been concerned about the frequent depiction of violence in the mass media and the harm these portrayals might do to youth. Reflecting this concern, several major United States Government investigations and reports have examined the research on the association between youthful media consumers' exposure to television violence and their aggressive behavior – the 1954 Kefauver hearings, the 1969 National Commission on the Causes and Prevention of Violence, the 1972 Surgeon General's report *Television and Growing Up* (U.S. Surgeon General's Scientific Advisory Committee, 1972), and the 1982 National Institute of Mental Health (NIMH) report *Television and Behavior*. In 1972, U.S. Surgeon General Jesse Steinfeld testified before Congress that "the overwhelming consensus and the unanimous Scientific Advisory Committee's report indicates that televised violence, indeed, does have an adverse effect on certain members of our society" (Steinfeld, 1972, p. 26). The 1982 NIMH report reinforced this conclusion, and professional organizations took a similar position in viewing media violence as a serious threat to public health because it stimulates violent behavior by youth. By the early 1990s, most researchers in the field had arrived at a consensus that the effect of media violence on aggressive and violent behavior was real, causal, and significant.

A number of professional groups have also addressed the state of relevant research on media violence (e.g., Eron, Gentry, & Schlegel's, 1994, report for the American Psychological Association), as have other federal agencies (e.g., Federal Trade Commission, 2000). Indeed, six medical and public-health professional organizations held a Congressional Public Health Summit on July 26, 2000, and issued a Joint Statement on the Impact of Entertainment Violence on Children. This statement noted that "entertainment violence can lead to increases in aggressive attitudes, values, and behavior, particularly in children." The statement also concluded that the research points "overwhelmingly to a causal connection between media violence and aggressive behavior in some children" (Joint Statement, 2000, p. 1). The six signatory organizations were the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Medical Association, American Psychological Association, American Academy of Family Physicians, and American Psychiatric Association. These reports, coupled with mounting public concern, stimulated a search for ways to reduce the adverse effects of media violence, and were responsible, in part, for the passage of the Telecommunications Act of 1996, which mandated that new TV sets be manufactured with a V(for violence)-chip that permits parents to block objectionable content.

For a variety of reasons, it is now time for a new assessment of what is known scientifically about how media violence affects young people and what can be done to mitigate these adverse effects. The body of research on TV violence continues to grow, both in depth and in breadth. In addition, important changes are occurring in the landscape of entertainment-media use, and some of these changes have stimulated new areas of research. The rise of new media – particularly interactive media (such as video games and the Internet) – has introduced new ways children and youth can be exposed to violence. The roles of these new media in producing youthful violence should be considered in light of existing theory and new research. It is especially advisable to ascertain what contribution media violence makes to serious interpersonal physical violence among older children and adolescents given the current national concern about this problem.

It is also important to present this report because of the disparity between, on one side, the actual research findings and, on the other side, the intransigent assertions made by a number of vocal critics. That is, although research shows the adverse effects of media violence, and there is increasing consensus among researchers in this area about these effects, the critics continue to pronounce that media violence cannot be affecting youth (e.g., Fowles, 1999; Freedman, 1984, 2002; Rhodes, 2000). Also indicative of this difference in views, a recent statistical analysis of the media-violence research (Bushman & Anderson, 2001) demonstrated that although the scientific evidence has grown considerably stronger over the past three decades, recent news reports imply that the scientific evidence is weaker than did earlier news reports.

In this report, we do not deal directly with recent critiques of the field. A number of carefully reasoned essays already point out flaws in the critiques and explain why the proposition that media violence can have adverse effects on its audience is so strongly opposed by various interest groups (Bushman & Anderson, 2001; Hamilton, 1998; Huesmann, Eron, Berkowitz, & Chaffee, 1992; Huesmann & Moise, 1996; Huesmann & Taylor, 2003). Rather, our purpose is to summarize current scientific knowledge about five critical questions:

- What does research say about the relation – both short-term and long-term – between media violence and aggressive and violent behavior? (Overview of Empirical Research)
- How does media violence produce its effects on aggressive and violent behavior? (Theoretical Explanations)

- What characteristics of media violence are most influential, and who is most susceptible to such influences? (Research on Moderator Effects)
- How widespread and accessible is violence in the media (television, movies, music videos, video games, Internet)? (Research on Media Use and Content)
- How can individuals and society counteract the influence of media violence? (Research on Interventions)

We summarize our observations in the Discussion section, which also identifies crucial areas for additional research.

In reading through this monograph, a few important points should be kept in mind: First, researchers investigating the impact of media violence on youth have focused mostly on how it affects the viewer's *aggression*. Aggression is defined by psychologists as any behavior that is intended to harm another person. There are many forms of aggression. For example, *verbal aggression* usually refers to saying hurtful things to the victim. *Relational* or *indirect aggression* refers to behavior that is intended to harm the target person but is enacted outside of the target person's view (e.g., behind his or her back), such as telling lies to get the person in trouble or to harm his or her interpersonal relationships. The aggressive behaviors of greatest concern usually involve physical aggression. *Physical aggression* may range in severity from less serious acts, such as pushing or shoving, to more serious physical assaults and fighting, extending to violent acts that carry a significant risk of serious injury. There is no clear-cut consensus-based line separating "violence" from milder forms of physical aggression, nor is one needed to understand the research findings on media violence. We use the term *violence* to refer to the more extreme forms of physical aggression that have a significant risk of seriously injuring their victims.

Some studies have focused on the impact of media violence on *aggressive thinking*, including beliefs and attitudes that promote aggression. Other studies have focused on the influence of media violence on *aggressive emotions* – that is, on emotional reactions, such as anger, that are related to aggressive behavior. It is important to keep these three types of outcome variables (behavior, thoughts, emotions) separate, and to reserve the labels "aggression" and "violence" for behaviors intended to harm another person.

Second, as we and others have frequently noted, the weight of evidence indicates that violent actions seldom result from a single cause; rather, multiple factors converging over time contribute to such behavior. Accordingly, the influence of the mass media is best viewed as one of the many potential factors that help to shape behavior, including aggression. When we use causal language, we do not mean that exposure to media violence is either a necessary or a sufficient cause of aggressive behavior, let alone both necessary and sufficient (Anderson & Bushman, 2002c). To our knowledge, no media-violence researcher has ever made such an extreme claim. The 14-year-old boy arguing that he has played violent video games for years and has not ever killed anybody is absolutely correct in rejecting the extreme "necessary and sufficient" position, as is the 45-year-old two-pack-a-day cigarette smoker who notes that he still does not have lung cancer. But both are wrong in inferring that their exposure to their respective risk factors (violent media, cigarettes) has not causally increased the likelihood that they and people around them will one day suffer the consequences of that risky behavior.

Third, a developmental perspective is essential to an adequate understanding of how media violence affects youthful conduct and to the formulation of a coherent public-health response to this problem. Most youth who are aggressive and engage in some forms of antisocial behavior do not go on to become violent teens and adults. However, research has shown that a significant proportion of aggressive children are likely to grow up to be aggressive adults, and that seriously violent adolescents and adults often were highly aggressive and even violent as children. In fact, the best single predictor of violent behavior in older adolescents and young adults is aggressive behavior when they were younger (Huesmann & Moise, 1998; Tremblay, 2000). Thus, influences that promote aggressive behavior in young children can contribute to increasingly aggressive and ultimately violent behavior many years later. It is therefore important to identify factors – including media violence – that, singly and together, may play a role in these outcomes in childhood.

Fourth, it is important to avoid the error of assuming that small statistical effects necessarily translate into small practical or public-health effects. There are many circumstances in which statistically small effects have large practical consequences. Perhaps the most relevant circumstances are when small effects accumulate over time and over large proportions of the relevant population. For example, when Abelson (1985) asked a group of Yale University psychology scholars knowledgeable both about the concept of statistical variance and about baseball "to estimate what percentage of the variance in whether or not the batter gets a hit is attributable to skill differentials between batters" (p. 131), he found that these statistically sophisticated psychologists greatly overestimated the variance due to skill differences. The median estimate was 25%, whereas the correct statistical answer is actually about 0.3%. But this small effect of batting-skill differences has a huge impact on outcomes such as team win/loss records, career runs batted in, league championships, and World Series championships, because even small differences in batting skill accumulate across large numbers of times at bat within a season and across a career.

Similarly, even small statistical effects of media violence on aggressive behavior can have important societal consequences for at least three different reasons. First, a large portion of the population (almost everyone, in fact) is exposed to this risk factor (accumulation across a large population). Second, the deleterious effects of exposure to media violence are likely to accumulate (via learning) within the individual with repeated exposure. Third, even short-lived effects of a single exposure (via priming effects – see the Theoretical Explanations section) can add significant amounts of aggression and violence to society because at any given waking hour a large portion of the population either is currently being exposed to violent media or has been exposed to such violence within the past 20 min.

Medical scientists and public-health officials seem to have avoided the problem of underestimating the public-health importance of small effects by translating their findings into cancer rates or heart attack rates or death rates for the entire U.S. population, but behavioral scientists have not traditionally done this type of population-rate translation. Thus, people are frequently shocked to learn that many behavioral science effects are considerably larger than key medical science effects that are deemed extremely important (e.g., Bushman & Huesmann, 2001). For example, Rosenthal (1990) reported that the major study on aspirin's ability to reduce heart attacks was stopped prematurely because the initial results were so strong that it was deemed ethically irresponsible to continue giving placebos to the control group; aspirin's effect accounted for about 0.1% of the variance. Our point: Conclusions about small statistical effect sizes need to be made with caution and in this broader context.

Finally, it must be recognized that the firmest evidence about the effects of media violence, or any other presumed causal influence, on aggression is provided by true experiments in which participants are randomly assigned to conditions experiencing different "doses" of the factor under investigation. There have been many such experiments involving media violence. Out of ethical necessity, these generally have not examined effects on the most serious types of physical aggression. However, longitudinal studies (as reviewed in a later section) reveal that children who exhibit relatively high levels of the mild forms of aggression common in childhood are more likely than other children to engage in more severe forms of aggression in adolescence and adulthood. Similarly, methodological research designed to test the generality of laboratory measures of aggression (e.g., Anderson & Bushman, 1997; Carlson, Marcus-Newhall, & Miller, 1989) has demonstrated that high levels of the mild forms of aggression typical of laboratory studies correlate well with each other and with more extreme forms of physical aggression measured in real-world contexts. Consequently, experiments on media violence add significantly to understanding of the causal effects of media violence on aggression, and are especially valuable when their findings are integrated with the results of more naturalistic surveys and longitudinal studies dealing with serious forms of physical aggression and violence. In other words, no single methodological approach can provide unequivocal answers to the key questions about media violence, but converging results from studies using multiple methodologies can enhance confidence in the validity of the conclusions drawn. This triangulation approach to science is effective precisely because different methodologies have different inherent strengths and weaknesses, and converging results essentially rule out competing alternative explanations (e.g., Anderson & Bushman, 2001).

OVERVIEW OF EMPIRICAL RESEARCH ON MEDIA VIOLENCE AND AGGRESSION

Most studies of the effects of media violence have examined passive visual media (dramatic television and movies, television news, and music videos), that is, media that viewers observe only. However, there have also been a limited number of investigations of interactive visual media (video games and the Internet), media that viewers both observe and interact with. In this section, we examine both kinds of studies. Within each genre, we begin with experimental studies, in which cause and effect are unambiguous but the effects observed are short term. Of necessity, the outcomes in these experiments tend to be physical aggression that is not life threatening, or else verbal aggression, aggressive thoughts, or aggressive emotions. We then turn to surveys, or cross-sectional studies, that provide a snapshot of the relation at one point in time between individuals' habitual consumption of media violence and their aggressive behavior.[1] These surveys often deal with more serious forms of physical aggression, but this type of methodology by itself is not as conclusive about causation as experimental studies are. For genres for which longitudinal studies exist, we conclude our review by examining how youths' habitual consumption of violence affects their violent and aggressive behavior later in life. Like cross-sectional investigations, longitudinal studies often examine serious physical aggression, but they generally provide better evidence about causal influences than can cross-sectional studies.

Because of space constraints, we provide illustrative examples of carefully selected key studies in each area, rather than an exhaustive review of the research literature. However, in addition to discussing these selected studies, we describe (if available) meta-analyses that have aggregated the results of most major investigations to reach overall estimates of effect sizes. A meta-analysis essentially averages the effect sizes of multiple studies, and allows the researcher to ask whether a particular factor (e.g., exposure to media violence) is significantly linked to a particular outcome (e.g., violent behavior). There are several commonly used measures of effect size, any of which can be applied to experimental, correlational, and longitudinal types of studies. To provide a common metric for this discussion, we have converted all effect sizes to correlation coefficients (*rs*).

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[1] Although we focus primarily on studies that measured exposure to violent media, we also include the occasional study that assessed only a more general measure of total media time (e.g., total time spent watching television per week). In the few studies that have reported both types of measures (e.g., Anderson & Dill, 2000, Study 1), the more specific measure of violent media exposure typically yielded a much higher correlation with aggressive or violent behavior than did the more general measure of total media time. Nonetheless, because a high proportion of entertainment media contains violence (see Research on Media Use and Content), it seems appropriate to include studies that measured total media time only when they provide tests of media-violence hypotheses in contexts where studies using the more specific measure of violent media exposure are lacking. For both theoretical and empirical reasons, studies using the more general measures likely underestimate the true association between media violence and aggressive-violent behavior.

Dramatic Television and Movies

Randomized experiments: Examples

A substantial number of laboratory and field experiments over the past half-century have examined whether exposure to violent behavior on film or television tends to increase aggressive behavior in the short term (see reviews by Bushman & Huesmann, 2001; Comstock, 1980; Geen, 1990; Geen & Thomas, 1986; Huesmann, Moise, & Podolski, 1997). The consistent finding from such randomized experiments is that youths who watch violent scenes subsequently display more aggressive behavior, aggressive thoughts, or aggressive emotions than those who do not.

In the typical experimental paradigm, researchers randomly assign youths to see either a short violent or a short nonviolent film, and then observe how they interact with other people after viewing the film. Both physical and verbal aggression toward others may be assessed. The time period for testing the effects is short – from a few minutes to a few days after seeing the film – and generally there is no attempt to test for lasting effects of the single exposure. With older teenagers and college students, physical aggression has often been measured by the willingness of participants to inflict an electric shock or a loud aversive noise on a peer. This person has sometimes been an individual who provoked them earlier, but in other investigations has been a neutral bystander. The participants are typically given a weak rationale for harming the other person (e.g., the punishment is an unfavorable evaluation of the peer's work on an assigned task).

In the following paragraphs, we describe several studies selected from the large number of studies of this type, in part because their outcome measure was physical aggression against another person, in part because the authors reported enough information that effect sizes could be computed, and in part because they illustrate the wide range of settings, participant populations, experimental procedures, and measures used.

Bjorkqvist (1985) exposed 5- to 6-year-old Finnish children to either violent or nonviolent films. Two raters who did not know which type of film the youngsters had seen then observed the children playing together in a room. Compared with the children who had viewed the nonviolent film, those who had just watched the violent film were rated much higher on physical assault (hitting other children, wrestling, etc.), as well as other types of aggression. The results for physical assault were highly significant ($p < .001$), and the effect size was substantial ($r = .36$).

Josephson (1987) randomly assigned 396 seven- to nine-year-old boys to watch either a violent or a nonviolent film before they played a game of floor hockey in school. Observers who did not know what movie any boy had seen recorded the number of times each boy physically attacked another boy during the game. Physical attack was defined to include hitting, elbowing, or shoving another player to the floor, as well as tripping, kneeing, pulling hair, and other assaultive behaviors that would be penalized in hockey (the only verbal act included in the measure was insulting another player with an abusive name). One added element in this study was that a specific cue that had appeared in the violent film (a walkie-talkie) was carried by the hockey referees in some conditions. This particular cue presumably reminded the boys of the movie they had seen earlier. Josephson found that for aggressive boys (those who scored above average on a measure of aggressiveness), the combination of seeing a violent film and seeing the movie-associated cue stimulated significantly more assaultive behavior than any other combination of film and cue ($p < .05$). The effect size was moderate ($r = .25$).

Two related randomized experiments demonstrated that exposure to media violence can lead to increased physical assaults by teenage boys, at least in the short run. In a home for delinquent boys in Belgium, Leyens, Camino, Parke, and Berkowitz (1975) assigned boys in two cottages to see violent movies every night for five nights while boys in the other two cottages saw nonviolent films. The boys were observed interacting after the movies each evening and were rated for their frequency of hitting, choking, slapping, and kicking their cottage mates. Those boys who were exposed to the violent films engaged in significantly more physical assaults ($p <$ .025) on their cottage mates. The effect sizes for such physical aggression were not published, but the best estimates from the published data suggest a substantially larger effect for the boys who were initially more aggressive ($r = .38$) than for the boys who were initially less aggressive ($r = .14$). In similar field experiments with American youth in a minimum-security penal institution for juvenile offenders, Parke, Berkowitz, Leyens, West, and Sebastian (1977) found similar effects of exposure to violent films on overall interpersonal attacks (physical or verbal), although they did not report the effects on frequency of physical assault separately. These two experiments are especially important because they demonstrate that violent movies can generate serious physical aggression even in a setting where this behavior is counter to officially prescribed rules.

Although witnessed violence can evoke aggression in people who are not highly emotionally aroused at the time, several experiments have shown that emotionally or physically excited viewers are especially apt to be aggressively stimulated by violent scenes. For example, in the experiment by Geen and O'Neal (1969), college men who had been provoked by another student and who were also exposed to loud noise shocked their provocateur significantly more intensely ($p < .01$) after they had watched a film of a prizefight than after they had seen a movie of a track meet. The effect size was quite large ($r = .75$) and seemed to be accentuated by the viewers' noise-generated excitement. This study has been replicated with variations of film content and provocation with essentially identical results (see Berkowitz, 1993).

Finally, Donnerstein and Berkowitz's (1981) study demonstrated that combining violent portrayals with sexual stimulation is particularly potent at stimulating male viewers to be more physically assaultive toward females who have provoked them. In this experiment, male university students watched either a movie portraying sex and violence, a nonviolent sex film, or a movie that was neither sexual nor violent and were then given an opportunity to retaliate against a woman who had angered them earlier, by giving her electric shocks. The men who had viewed the violent sex film punished the woman more intensely than did their counterparts who had watched either the neutral film or the nonviolent sex movie. Again, the effect size was quite large ($r = .71$).

The six key experiments we have just reviewed all examined the immediate causal effect of media violence on physical aggression. A great many studies have also examined the immediate effect of media violence on aggressive thoughts or emotions (for reviews, see Berkowitz, 1993; Bushman & Huesmann, 2001; Geen, 2001; Rule & Ferguson, 1986). These studies are important to consider because research has shown that the risk of physically aggressive behavior against other people is increased among youth who believe that violence against others is acceptable (Huesmann & Guerra, 1997), in part because they believe that their targets are "bad" people and that punishing them is justified (e.g., Berkowitz, 1965; Berkowitz & Geen, 1967). Similarly, people who accept violence toward females (Byers & Eno, 1991; Lackie & de Man, 1997), who view others as being hostile (Dodge & Frame, 1982), who believe that retaliation is "honorable" (Nisbett & Cohen, 1996), who fantasize about violence (Rosenfeld, Huesmann, Eron, & Torney-Purta, 1982), or who just simply think about violent words (Carver, Ganellen, Froming, & Chambers, 1983) also are at high risk for physical aggression against others.

Typically, randomized experiments reveal that exposure to media violence can cause immediate increases in aggressive thoughts and tolerance for aggression in both children and older youth. For example, in studies with young children (Drabman & Thomas, 1974, 1975; Thomas & Drabman, 1975), youngsters shown a brief violent film clip were slower to call an adult to intervene when they saw two younger children fighting than were peers who had watched a neutral film. The single violent clip appeared to make the children more tolerant of aggression, at least temporarily. Similarly, Malamuth and Check (1981) found an increased acceptance of physical aggression toward women by college men several days after they had watched violent sex scenes. Still other studies have shown that college students randomly assigned to view a short violent film segment display more aggressive thoughts (e.g., Bushman, 1998) or more aggressive emotions (e.g., Anderson, 1997) than comparable students who are assigned to view a nonviolent film segment. Using a somewhat longer time frame, Zillmann and Weaver (1999) reported an experiment in which college-age males and females viewed either four violent or four non-violent feature films on consecutive days. One day after viewing the last film, all participants took part in a supposedly unrelated study in which level of hostile behavior was assessed. Those who previously had seen the violent films exhibited significantly more hostility than did those who previously had seen the nonviolent films.

Randomized experiments: Meta-analysis and summary

Three meta-analyses in the past 15 years have computed the overall effect sizes for randomized experiments investigating the influence of TV and movie violence on aggression (Hearold, 1986; Paik &

Comstock, 1994; Wood, Wong, & Chachere, 1991). The most recent and comprehensive of these was the analysis of Paik and Comstock, who examined effect sizes from 217 studies published between 1957 and 1990. On the basis of 432 independent tests of effects in the randomized experiments they reviewed, Paik and Comstock found a moderate to large average effect size ($r = .38$). When the analysis was limited to experiments in which the outcome was classified as physical violence against a person, the 71 independent effect sizes yielded an average r of .32. The studies in the review reported 32 independent effect sizes for criminal violence against a person; among this group, the average effect size was smaller but still significant, $r = .13$.

In summary, many well-controlled, randomized experiments have examined how exposure to violent TV and film media affects aggression in youths of all ages. The evidence from these experiments is compelling. Brief exposure to violent dramatic presentations on TV or in films causes short-term increases in youths' aggressive thoughts, emotions, and behavior, including physically aggressive behavior serious enough to harm others. The effect sizes are moderate on the average but vary greatly depending on the outcome measure used; usually, effect sizes are smaller for more serious outcomes than for less serious outcomes. There is some evidence that youth who are predisposed to be aggressive or who recently have been aroused or provoked are somewhat more susceptible to these effects than other youngsters are, but there is no evidence of any totally immune group. The average effect sizes, even for relatively serious physical aggression, are large enough to warrant social concern.

Cross-sectional surveys: Examples

Cross-sectional surveys over the past 40 years have consistently provided evidence that the current physical aggression, verbal aggression, and aggressive thoughts of young people are correlated with the amount of television and film violence they regularly watch (see reviews by Chaffee, 1972; Comstock, 1980; Eysenck & Nias, 1978; Huesmann & Miller, 1994). Moreover, the studies reporting significant correlations have used a variety of research methods and examined youngsters of different ages and from different cultures (e.g., Huesmann & Eron, 1986). In some studies, the aggression assessed has included physically aggressive acts serious enough to fit our definition of violence. For example, McLeod, Atkin, and Chaffee (1972) studied the correlations between "aggressive behavioral delinquency" (fighting, hitting, etc.) and viewing of TV violence in samples of Wisconsin and Maryland high school and junior high school students. They found significant correlations ranging from .17 ($p < .05$) to .28 ($p < .01$) for both males and females. In a study of English 12- to 17-year-old males, Belson (1978) reported 49% more violent acts in the past 6 months by heavy TV violence viewers than by light violence viewers.

The cross-sectional correlations have generally been in the small to moderate range. On the average, they have been slightly higher for elementary-school children than for teenagers and adults, particularly when general aggression is assessed. For example, Eron, Huesmann, Lefkowitz, and Walder (1972) obtained a significant correlation of .21 for 8-year-old boys and a nonsignificant correlation for the same boys when they were 19. Similarly, Huesmann, Moise-Titus, Podolski, and Eron (2003) reported a correlation of .18 ($p < .05$) between TV-violence viewing and general aggression for 6- to 10-year old males, but a nonsignificant correlation between general aggression and concurrent TV-violence viewing for the same males when they were in their 20s. For females in their 20s, however, Huesmann et al. reported a significant correlation ($r = .23$, $p < .01$). Other studies also have found significant correlations at older ages.

Cross-sectional surveys: Meta-analysis and summary

Paik and Comstock's (1994) meta-analysis examined cross-sectional surveys published between 1957 and 1990. For 410 tests of the hypothesis that viewing television violence is positively correlated with aggressive behavior, they reported an average r of .19. Perhaps more important for the current review, these authors identified 200 tests of the hypothesis in which the dependent measure of aggressive behavior was actual physical aggression against another person. The effect size was essentially the same for these studies as for all surveys combined (i.e., $r = .20$).

These cross-sectional surveys provide convincing evidence that frequent viewing of violence in the media is associated with comparatively high levels of aggressive behavior. The surveys also support the causal conclusions of the experimental studies, and suggest that findings of short-term effects in the laboratory may well be generalizable to longer-term effects on real-world aggression. However, these cross-sectional surveys alone do not indicate whether media violence causes aggression, whether aggressive youth are attracted to media violence, or whether some other factor predisposes the same youth to both watch more violence and behave more aggressively than their peers. Longitudinal surveys investigating the subsequent effects of exposure to media violence at an early age provide better evidence regarding these possibilities.

Longitudinal surveys: Examples

A small group of studies have examined the effects of television violence on aggressive behavior over time. Four of the key studies are discussed here. In a study of a representative sample of 856 youth in Columbia County, New York, beginning in 1960, Eron and his colleagues found that a boy's exposure to media violence at age 8 was significantly related to his aggressive behavior 10 years later, after he graduated from high school ($r = .31$, $N = 184$, $p < .01$; Eron et al., 1972; Lefkowitz, Eron, Walder, & Huesmann, 1977). At both times, aggressive behavior was measured primarily by peer nomination, a technique in which the youths answer a series of questions about their classmates' aggressiveness. The researchers assessed both physical aggression (e.g., "Who pushes and shoves other kids?") and verbal aggression (e.g., "Who makes up stories and lies to get other kids in trouble?"). The longitudinal correlation remained above .25 even when there was statistical control of other potentially relevant factors, such as initial aggressiveness of the child, IQ of the child, family socioeconomic status (SES), parents' aggressiveness, and parents' punishment and nurturance of the child. Furthermore, additional statistical analyses evaluating the connection between scores at the two ages cast doubt on the possibility that the longitudinal relation was merely a consequence of highly aggressive youth liking to watch more violence than their less aggressive counterparts. Aggressiveness at age 8 did not predict viewing of violence at age 18. In contrast to the findings obtained for the boys (and to the results obtained in other investigations – see Huesmann & Eron, 1986; Huesmann, Lagerspetz, & Eron, 1984; Huesmann et al., 2003), the findings for the girls revealed no relation between exposure to TV violence and aggressive behavior.

In a longitudinal study of boys and girls ages 7 to 16 from two Midwestern cities (conducted by the NBC television company), Milavsky, Kessler, Stipp, and

Rubens (1982) examined the effects of television violence on aggression using measures that included serious physical aggression and delinquency. The youth were surveyed up to five times during a 3-year period (1970-1973). Cross-sectional correlations between viewing of TV violence and concurrent levels of aggression were obtained for the total sample within each time of assessment; they were significant and comparable to those found in most other cross-sectional studies, that is, .13 to .23 for boys and .21 to .37 for girls.

The investigators then examined the longitudinal correlations between aggressive behavior at one point in time and TV violence viewing at an earlier time, while statistically controlling for earlier aggression. They examined these correlations over 15 intervals ranging from 5 months to 3 years apart. For elementary-school boys, 12 of the 15 correlations were positive, although only 2 were statistically significant. Ten of the 15 correlations were positive for girls, although only 3 were statistically significant. A comparable analysis carried out in a sub-sample of teenage boys showed a positive correlation in 6 of 8 cases, but only 1 such "lag" yielded a significant effect. In all cases, adding SES as a covariate reduced the significant effects further. However, it should be noted that these predictive analyses were based on subsamples from which the research team had deleted the data of many of the most aggressive children (25% of boys and 16% of girls in the initial sample), because they supposedly had not reported their TV viewing accurately. Given that highly aggressive youths appear to be more likely than others to be aggressively stimulated by violent scenes, it may well be that discarding these data artificially decreased the reported effects.

In the late 1970s, Huesmann and his colleagues began a longitudinal study of the effects of TV violence in five countries (Huesmann & Eron, 1986; Huesmann et al., 1984; Huesmann et al., 2003). Representative samples of middle-class youth in each country were examined at three times as they grew from 6 to 8 or from 8 to 11 years of age. Aggression was assessed by peer nominations in response to questions about physical and verbal behaviors, among other things. The cross-sectional correlations between aggression and overall exposure to TV violence were positive and small to moderate in all countries, with significant correlations being obtained for both boys and girls in the United States. However, the extent to which earlier viewing of TV violence predicted later aggression varied substantially between the genders and among the countries. In the United States, girls' viewing of TV violence had a significant effect ($r = .17$, $p < .05$) on their later aggression even after taking into account their early levels of aggression, SES, and scholastic achievement. For the boys in the U.S. sample, TV violence alone did not predict later aggression, but those who had watched violent programming frequently in their early childhood and who also reported a strong identification with aggressive TV characters were generally regarded by their peers as the most aggressive ($r = .19, p < .05$).

Fifteen years after the study started, more than 300 participants in the U.S. sample were reinterviewed when they were in their early 20s (Huesmann et al., 2003). Results from this 15-year follow-up suggest a delayed effect of media violence on serious physical aggression. The researchers found significant correlations between television violence viewing during childhood and a composite measure of aggression (physical, verbal, and indirect) during young adulthood, for both men ($r = .21$, $n = 153$, $p < .01$) and women ($r = .19$, $n = 176$, $p < .01$). When the outcome examined was restricted to physical aggression or violence (e.g., punch, beat, choke, threaten or attack with a knife or gun), the correlations were still significant ($rs = .17$ and $.15$, respectively). Furthermore, when the people who had watched violent programs frequently in childhood were compared with their counterparts who viewed these programs much less often, it was found that the former, as adults, committed significantly more acts of physical aggression, such as having "pushed, grabbed, or shoved their spouses" (p. 210; 42% vs. 22% in the case of males) or "shoving, punching, beating or choking" (p. 210) someone who had made them angry (17% vs. 4% for females). Finally, analyses showed that for both men and women, frequent exposure to TV violence during childhood resulted in high levels of aggressive behavior later, whereas high aggressiveness during childhood did not lead to frequent viewing of television violence later.

These effects of frequent childhood exposure to TV violence on later aggression remained significant even when the researchers controlled statistically for parents' education and children's achievement. Although analyses of the data from the other countries are not yet completed, preliminary results indicate that childhood exposure to media violence also predicts adult aggression in males and females in Finland and in males in Israel, but not in Poland, where the social transition of the 1980s seems to have changed the relations (Huesmann & Moise-Titus, 1999; Viermero, 2002).

A final longitudinal study worth discussing examined effects of TV habits in adolescence and early adulthood on later violent behavior (J.G. Johnson, Cohen, Smailes, Kasen, & Brook, 2002). Total amount of television watching (rather than amount of violent TV viewing more specifically) was assessed at ages 14 and 22. Although this is not the ideal measure of violent TV exposure, the high proportion of television programs that contain violence (see the section on Violent Content of Media) suggests that, on average, those people who watch a lot of television usually are also getting the most exposure to violent TV. Moreover, in analyzing total time watching TV rather than the more specific time watching violent TV, the study probably underestimated the actual effect of exposure to violent television on later aggressive behavior (Anderson & Bushman, 2002a).

The most relevant results of this study have to do with effects on "assault or physical fights resulting in injury" (pp. 2469-2470), which was assessed at age 16 or 22 in one analysis, and at age 30 in another analysis. TV exposure at age 14 significantly predicted assault and fighting behavior at 16 or 22 years of age, even after controlling statistically for family income, parental education, verbal intelligence, childhood neglect, neighborhood characteristics, peer aggression, and school violence. The effect size across all participants was in the small range ($r = .17$). In addition, TV exposure at age 22 significantly predicted assault and fighting behavior at age 30; the size of this effect was in the medium range ($r = .35$). There were many additional findings of interest involving differences in effect size for males versus females at different time periods and for different measures of aggression. But the most important implication of this study is that television watching (and presumably exposure to violent TV) may have important adverse effects on much older populations than was previously believed.

Longitudinal surveys: Meta-analysis and summary

The only meta-analysis to look at longitudinal studies of media violence separately was conducted by Anderson and Bushman (2002c). Although this analysis pooled studies of all types of media violence, the great majority were investigations of violent TV. Anderson and Bushman found a statistically significant average effect size of .17 across 42 independent tests involving almost 5,000 participants. Given these meta-analytic results and the specific outcomes of the key longitudinal studies we have already discussed, it seems safe to draw a conclusion from this research: High levels of exposure to violent TV programs in childhood can promote aggression in later childhood, adolescence, and even young adulthood. The effect sizes are small to medium, depending on the time lag. There also is some evidence that more aggressive children tend to watch more violence than their less aggressive peers, but the evidence is stronger that seeing a lot of media violence is a precursor of increased aggression even when social class, intellectual functioning, prior level of aggressiveness, and parenting are statistically controlled. Furthermore, the most recent studies suggest that this increased aggression in young adulthood includes very serious forms of aggression and violence.

Studies on the Introduction of TV

Television was not introduced in all communities at the same time. A few researchers have taken advantage of this variation in timing to examine TV's effects on aggression within a society (Joy, Kimball, & Zabrack, 1985). For example, Centerwall (1989a, 1989b, 1992) carried out time-series analyses using aggregated data on crime and media viewing to examine the effect of the introduction of TV on violence in the United States, Canada, and South Africa (where television came on the scene only recently), comparing crime rates before and after the introduction of television. He concluded that the introduction of television, combined with frequent portrayal of violent acts, increases interpersonal violence in a society. However, this analysis must be viewed with caution because of other factors that might have influenced national crime rates at the same time.

For methodological reasons, more convincing evidence is provided by Williams (1986), who found an increase in the level of children's aggression in one Canadian community after TV was introduced to it, although two comparable communities (without TV) showed no such increase. Even in this case, though, caution must be exercised in drawing any conclusions, because Williams assessed the total amount of TV viewing, not the amount of media violence to which the children were being exposed. Finally, Hennigan et al. (1982) reported that rates of larceny went up more in American cities in which TV was introduced than in comparable American cities in which TV was not yet available. Again, caution is required in interpreting these results, because there is no way to know what aspect of TV might be responsible (e.g., rising consumer desires promoted by commercials might lead to increases in stealing). In summary, the investigations of the relatively immediate after-effects of the introduction of television do not contradict the conclusion, drawn from the other types of studies, that TV violence stimulates aggression in young viewers, but these investigations do not provide much corroborative support either.

Studies on Television News Violence

Does seeing violence in news coverage encourage imitative, or "copycat," behavior? There are many anecdotal reports of people imitating fictional violence. For example, it has been claimed that the movie *Taxi Driver* led directly to John Hinckley's attack on President Reagan. Despite the frequency of these presumed instances of a "contagion of violence," however, there has been relatively little research examining how news stories of aggressive events affect behavior. Most such investigations have been time-series field studies that have compared data on a community's violence rate before and after some highly publicized news of a violent occurrence. On the whole, these studies support the notion of a contagion effect, with some of the best evidence indicating that stories of a well-known person's suicide increase the likelihood that other people will also take their own lives (Phillips, 1979, 1982; Simon, 1979; Stack, 1989). Other investigations indicate there might also be a contagion of criminal violence. For example, a study by Berkowitz and Macaulay (1971) showed that there was a jump in the number of violent crimes, but not property crimes, after several high-profile murder cases in the early and mid-1960s, including the assassination of President Kennedy. However, some of the research in this area has been questioned, and the results are subject to various interpretations. For example, Phillips's (1983) frequently cited finding of increases in violent crimes following televised prizefights has not been widely accepted by researchers because of methodological challenges (Baron & Reiss, 1985; see Phillips & Bollen, 1985, for a response) and the difficulties in explaining the specific pattern of results (e.g., increases only exactly 3 days after the event).

Studies of Music Videos and Music Lyrics

Music videos are also of concern because these videos are sometimes replete with violence. Even those that do not have explicit aggressive content often have antisocial overtones (Baxter, De Riemer, Landini, Leslie, & Singletary, 1985; Caplan, 1985; Rich, Woods, Goodman, Emans, & DuRant, 1998), and music videos are widely watched by adolescents.

Randomized experiments

No experimental studies to date have examined how exposure to music videos affects youths' physically aggressive behavior. However, Waite, Hillbrand, and Foster (1992) observed a significant decrease in aggressive behavior on a forensic in-patient ward after removal of Music Television (MTV). Barongan and Hall (1995) reported a study suggesting that antisocial lyrics (without video) can affect behavior, but the assessed behavior was not clearly aggressive. In this investigation, male college students listened to misogynous or neutral rap music, viewed three vignettes (neutral, sexual and violent, assaultive), and then chose one of the three vignettes to be shown to an unknown female (who was actually a member of the research team). Those who had listened to the misogynous music were significantly more likely than those in the neutral-music condition to select the assaultive vignette.

Several research groups have examined how music videos affect adolescents' aggressive thinking and attitudes. For example, J.D. Johnson, Adams, Ashburn, and Reed (1995) randomly assigned African American adolescents to an experimental condition in which they viewed nonviolent rap music videos containing sexually subordinate images of women or to a no-music-video control condition. When queried about their attitudes, the young women who saw the demeaning videos indicated greater acceptance of teen dating violence than did comparable women in the control condition. In related work with young African American men, J.D. Johnson, Jackson, and Gatto (1995) found that exposure to violent rap music videos increased endorsement of violent behavior in response to a hypothetical conflict situation. Peterson and Pfost (1989) found that exposing males to nonerotic violent music videos led to a significant increase in adversarial sexual beliefs and negative affect. Similarly, college students shown rock music videos with antisocial themes reported a greater acceptance of antisocial behavior compared with the students in the control group, who were not shown antisocial rock music videos (Hansen & Hansen, 1990). Students were also more likely to accept stereotypic sex role behavior after being exposed to music videos that displayed such behavior (Hansen, 1989; Hansen & Hansen, 1988).

Several experiments have examined the influence of violent songs without video on aggression-related variables. Some of these failed to obtain reliable effects of the lyric content (e.g., Ballard & Coates, 1995; St. Lawrence & Joyner, 1991; Wanamaker & Reznikoff, 1989). For example, participants in Ballard and Coates's investigation heard one of six songs varying in genre (rap vs. heavy metal) and lyric content (homicidal, suicidal, neutral). Lyric content had no impact on participants' rating of their mood, including anger. In most studies showing no effect, the genre of the songs (heavy metal) made the lyrics nearly incomprehensible, a problem noted by the researchers themselves. Other studies have reported mixed results. Wester, Crown, Quatman, and Heesacker (1997) had male undergraduates listen to (a) sexually violent music and lyrics, (b) the same music without lyrics, (c) sexually violent lyrics without music, or (d) no music or lyrics. Analyses yielded no differences in negative attitudes toward women among the four groups. However, participants exposed to violent lyrics viewed their relationships with women as more adversarial than other participants did.

More recently, Anderson, Carnagey, and Eubanks (2003) reported a series of five experiments on the effects of music lyrics. The experiments were designed to avoid the problems of comprehensibility and music genre encountered in earlier work. Across studies, seven violent songs by seven artists and eight nonviolent songs by seven artists were used to ensure that results were not due to one or two specific songs, artists, or genres. These five experiments provided consistent evidence that songs with violent lyrics increase aggression-related thoughts ($r = .21$) and affect ($r = .27$).

Cross-sectional surveys

We found no published cross-sectional studies of the effects of exposure to violent music videos on aggressive behavior. However, Roberts, Christenson, and Gentile (2003) summarized the results of an unpublished study that found a positive correlation between amount of MTV watching and physical fights among third- through fifth-grade children. In addition, children who watched a lot of MTV were rated by peers as more verbally aggressive, more relationally aggressive, and more physically aggressive than other children. Teachers rated them as more relationally aggressive, more physically aggressive, and less helpful.

Several studies suggest a connection between the kind of music youths listen to and whether their behaviors and attitudes are maladaptive. Rubin, West, and Mitchell (2001) found that college students who preferred rap and heavy metal music reported more hostile attitudes than students who favored other genres of music. Heavy metal listeners held more negative attitudes toward women, whereas rap music fans were more distrustful. Similarly, Took and Weiss (1994) found a correlation between preference for rap and heavy metal music and below-average academic performance, behavior problems in school, drug use, arrests, and sexual activity. Still other studies have obtained correlations between music preferences and a variety of maladaptive behaviors. But these studies have not specifically linked lyric preferences to those behaviors.

Summary of studies of exposure to music videos and lyrics

The experimental studies provide substantial evidence that watching violent music videos creates attitudes and beliefs that are relatively accepting of violence in young viewers, at least in the short term. The cross-sectional studies also link violent music videos to more long-term maladaptive attitudes and beliefs in youth, but provide no direct evidence on the reasons for this connection. Studies of music lyrics without video show less consistency, perhaps because of the methodological problems mentioned earlier. However, the better controlled experiments suggest that understandable violent lyrics can increase aggressive thinking and affect. There are no published longitudinal studies of the effects of violent music videos or violent lyrics without video. Such studies are clearly needed before a definitive conclusion about long-term effects of exposure to violent music videos and lyrics can be reached.

Studies of Video Games

Violent video games have recently surpassed violent music videos and even violent TV as a matter of concern to parents and policymakers. There are several reasons for this. First, children are spending an increasingly large amount of time playing video games. Second, a large portion of these games contain violence. Third, because the children playing these games are active participants rather than observers, they may be at increased risk of becoming aggressive themselves. The impact of exposure to violent video games has not been studied as extensively as the impact of exposure to TV or movie violence; however, on the whole, the results reported for video games to date are very similar to those obtained in the investigations of TV and movie violence (Anderson & Bushman, 2001; Anderson et al., in press).

Randomized experiments

In several studies, children were randomly assigned to play violent or nonviolent video games and then were observed when given an opportunity to be aggressive. Most of these studies found that the violent game significantly increased youths' aggressive behavior. For example, Irwin and Gross (1995) assessed physical aggression (e.g., hitting, shoving, pinching, pulling at clothes or hair, kicking) between boys who had just played either a violent or a nonviolent video game. Those who had played the violent video game were more physically aggressive toward peers. The average effect size (r) across six measures of physical aggression was .31. Also, several randomized experiments measured college students' propensity to be physically aggressive (by delivering a mild shock or unpleasantly loud noise to someone who had provoked them) after they had played (or not played) a violent video game. For example, Bartholow and Anderson (2002) found that college students who had played a violent game subsequently delivered more than two and a half times as many high-intensity punishments as those who played a nonviolent video game. The effect of the violent game was significant for both women (r = .50) and men (r = .57).

A number of randomized experiments have examined the effects of violent video games on aggressive thoughts, emotions, and physiological arousal. For example, Calvert and Tan (1994) had participants play the violent virtual reality game *Dactyl Nightmare* or engage in movements similar to those of *Dactyl Nightmare* players, and then used a procedure in which participants listed their thoughts to assess aggressive cognitions. The participants who had played the violent game generated significantly more aggressive thoughts than those who had simply mimicked its movements (r = 50). Other studies have found similar effects using a wide array of measures to assess aggressive thinking, including time taken to read aggressive and nonaggressive words (Anderson & Dill, 2000), aggressive content of written stories (Bushman & Anderson, 2002), and hostile explanations for hypothetical unpleasant interpersonal events (Kirsh, 1998).

Several randomized experiments have tested the effects of video games specifically selected to differ in violent content but not in arousal or affective properties. For example, Anderson et al. (in press) tested the effects of 10 video games on physiological arousal and several affect-relevant dimensions, including frustration, difficulty, and enjoyment (Experiment 1), and then selected two games that were similar on these measures but different in violent content. In two subsequent experiments, the violent game significantly increased aggressive behavior relative to the nonviolent game (*rs* = .25 and .19), demonstrating that the effects of violent video games on aggression are independent of the games' effects on arousal or affect.

Cross-sectional surveys

Several survey studies have measured the correlation between time spent playing violent video games and aggression. For example, Anderson and Dill (2000) created a composite measure of recent exposure to violent video games, and correlated it with college students' self-reported acts of aggressive delinquent behavior in the past year (e.g., hitting or threatening other students, attacking someone with the idea of seriously hurting or killing him or her, participating in gang fights, throwing objects at other people). The overall correlation between exposure to violent video games and violent behavior was significant ($r = .46, p < .05$). The magnitude of the association decreased but remained significant when analyses controlled for antisocial personality, gender, and total time spent playing any type of video game. Similarly, Gentile, Lynch, Linder, and Walsh (in press) obtained a significant correlation between time playing violent video games and physical fights among eighth and ninth graders ($r = .32$).

Longitudinal surveys

There are no published longitudinal surveys specifically focusing on effects of violent video games on aggression. However, two recent longitudinal studies have linked such games to increases in aggression. Slater, Henry, Swaim, and Anderson (in press) surveyed sixth- and seventh-grade students from 20 middle schools across the United States on four occasions over a 2-year period. The media-violence measure included three items assessing the frequency of watching action movies, playing video games involving firing a weapon, and visiting Internet sites that describe or recommend violence. The aggressiveness measure included aggressive cognitions, values, and behavior, and thus is not a pure aggression measure. Control variables included gender, sensation seeking (a personality trait), general use of the Internet, and age. The main result was that media-violence exposure at one point in time was positively (and statistically significantly) related to aggressiveness at a later point in time even after statistically controlling for earlier aggressiveness and various other aggression-related variables. Interestingly, the longitudinal effect of aggressiveness on later use of violent media was not statistically significant. Both of these findings are similar to the longitudinal effects reported in the earlier section on television violence (i.e., the effect of exposure to violent television on later aggression is larger than the effect of early aggression on later exposure to violent television).

The second longitudinal study was reported by Ihori, Sakamoto, Kobayashi, and Kimura (2003). They studied Japanese fifth and sixth graders at two points in time separated by 4 to 5 months, measuring overall video-game exposure rather than exposure to violent video games. They reported that amount of exposure to video games was positively (and significantly) related to later levels of violent physical behavior after controlling for earlier violent behavior.

Neither of these two longitudinal studies has all of the desired features needed to draw strong longitudinal conclusions about effects of violent video games on aggression. Nonetheless, both are strongly suggestive.

Video-game violence: Meta-analysis and summary

The findings of the first comprehensive meta-analysis of violent-video-game effects (Anderson & Bushman, 2001) have recently been corroborated in a new analysis (Anderson et al., in press) that examined methodological features of the studies in greater detail. In the latest analysis, studies were divided into two categories – those without any of nine potential methodological problems (the best-practices studies) and those that had at least one of these problems. For each of five outcome variables examined, the best-practices studies yielded a significant effect of exposure to violent video games, as can be seen in Figure 1. Specifically, such exposure was related to increases in aggressive behavior ($r = .27$), aggressive affect ($r = .19$), aggressive cognitions (i.e., aggressive thoughts, beliefs, and attitudes; $r = .27$), and physiological arousal ($r = .22$) and was related to decreases in prosocial (helping) behavior ($r = -.27$). Furthermore, the best studies yielded larger effect sizes than the not-best studies, contradicting claims by representatives of the video-game industry and other critics of the video-game research literature. Finally, experimental and cross-sectional studies yielded essentially similar effect sizes for all five outcome variables with one exception – there were no best-practices cross-sectional studies of arousal to compare with best-practices experimental studies of arousal.

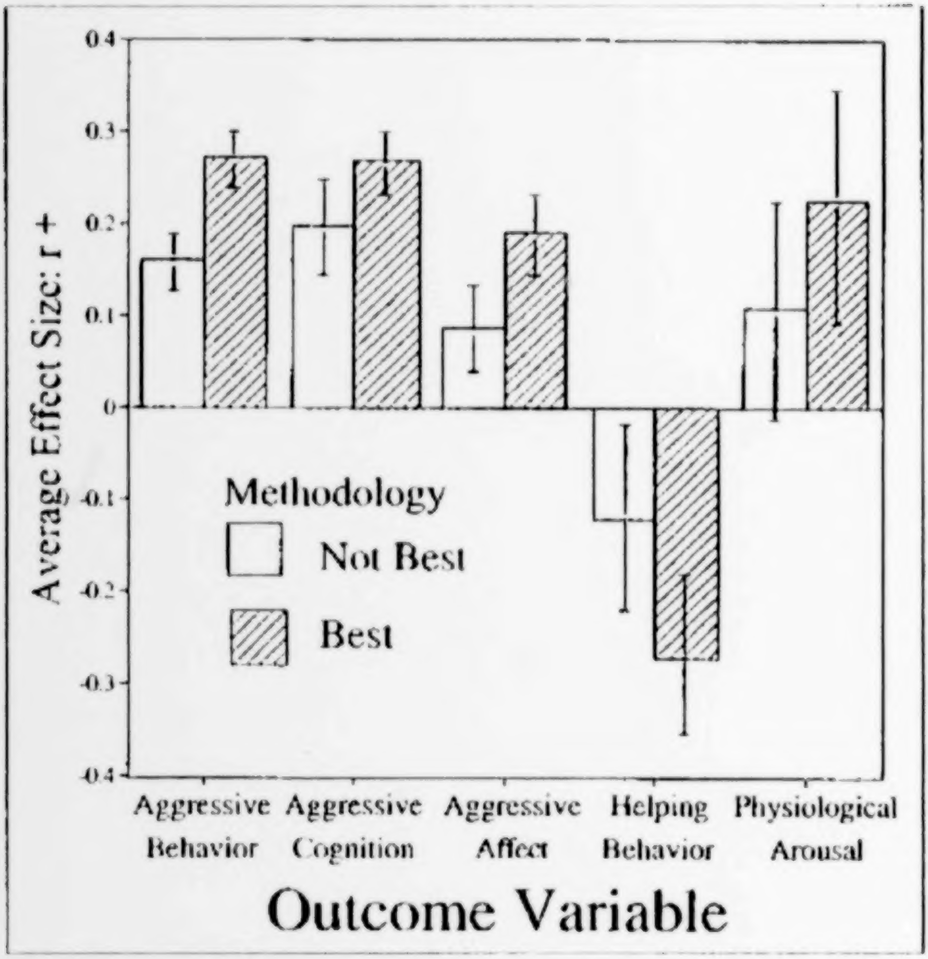

Fig. 1. Effects of violent video games on aggressive behavior, aggressive cognition, aggressive affect, helping behavior, and physiological arousal. Results are shown separately for studies without any of nine potential methodological problems (best-practices studies) and those that had at least one of these problems. Vertical capped bars indicate 95% confidence intervals. If a vertical capped bar does not include the zero line, then the effect of violent video games on that outcome variable is statistically significant for the

methodology category indicated. Adapted from "Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior," by C.A. Anderson, N.L. Carnagey, M. Flanagan, A.J. Benjamin, J. Eubanks, and J.C. Valentine, in press, in M. Zanna (Ed.), *Advances in Experimental Social Psychology, Vol. 36*, New York, Elsevier. Reprinted by permission from Elsevier.

Though the number of studies investigating the impact of violent video games is small relative to the number of television and film violence studies, there are sufficient studies with sufficient consistency (as shown by the meta-analysis results) to draw some conclusions. These studies offer support for a connection between playing violent video games and increased likelihood of engaging in aggression. The experimental studies demonstrate that in the short term, violent video games cause increases in aggressive thoughts, affect, and behavior; increases in physiological arousal; and decreases in helpful behavior. The cross-sectional studies link repeated exposure to violent video games with aggressive and violent behavior in the real world. The longitudinal studies further suggest long-term effects of repeated exposure to violent video games on aggression and violence.

Studies of Internet Participation

The basic theoretical principles concerning the effects of exposure to media violence should be applicable to Internet media. To date, there are no published studies that address how exposure to Web-based media violence affects aggressive and violent behavior, attitudes, beliefs, and emotions. However, because of the visual and interactive nature of Web material, we expect the effects to be very similar to those of other visual and interactive media. The Web materials with violence tend to be video games, film clips, and music videos, and there is no reason to believe that delivering these materials into the home via the Internet, rather than through other media, would reduce their effects.

Meta-Analyses Combined Across Media Type

Five major meta-analyses of general effects of media violence have been published in the past 20 years (Anderson & Bushman, 2002c; Bushman & Anderson, 2001; Hearold, 1986; Paik & Comstock, 1994; Wood et al., 1991). The most recent one (Anderson & Bushman, 2002c, based on data collected and reported in Bushman & Anderson, 2001) examined all published reports of effects of media violence on aggression through the year 2000. A restrictive definition of aggression (i.e., behavior intended to harm another person) was used to ensure the validity and integrity of the results. The studies included in the analysis covered all types of media: television, movies, comic books, music, and video games. By far the most frequent type of media violence investigated was the violence in TV and movies, although the growing video-game literature contributed a fair number of tests as well. More modern meta-analytic procedures were used than in some earlier meta-analyses of media-violence effects, such as averaging multiple effect sizes when a study reported effects for more than one measure of aggression, so that each group of participants was represented in the meta-analysis only once. These modifications resulted in somewhat lower numbers of "studies" of media-violence effects than reported by Paik and Comstock, but the basic conclusions of all of these meta-analyses are essentially the same.

Figure 2 presents Anderson and Bushman's (2002c) results broken down into four separate categories: cross-sectional studies, longitudinal studies, field experiments, and laboratory experiments. The figure shows considerable convergence in results across methods: All four kinds of studies demonstrate highly reliable effects of media violence on aggression. The average effect sizes obtained were .17 for 42 longitudinal studies involving 4,975 participants, .18 for 86 cross-sectional studies involving 37,341 participants, .19 for 28 field experiments involving 1,976 participants, and .23 for 124 laboratory experiments involving 7,305 participants. These results differ substantially from Paik and Comstock's (1994) results primarily in that the average effect size for experiments is considerably lower in the more recent analysis (.23 compared with .38), perhaps because of the more conservative methodology employed in the later analysis.

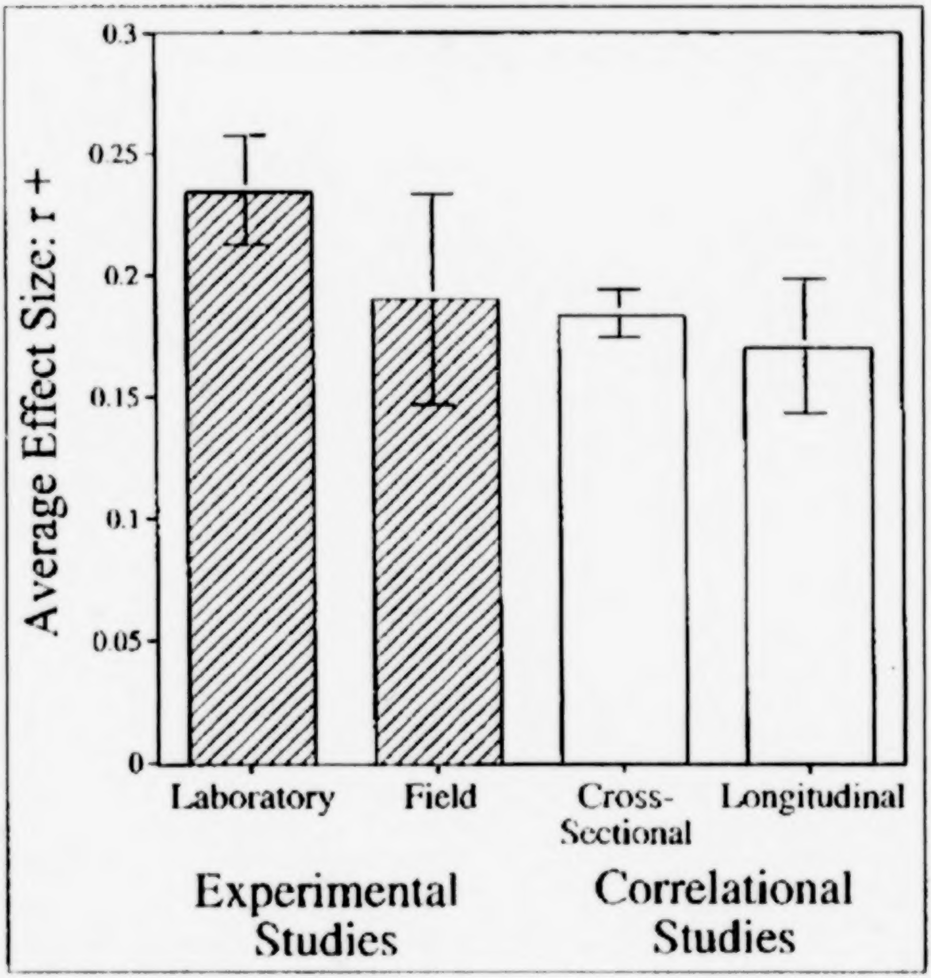

Fig. 2. Effects of media violence on aggression for two types of experimental studies and two types of correlational studies. Vertical capped bars indicate 95% confidence intervals. If a vertical capped bar does not include the zero line, then the effect of violent video games on that outcome variable is statistically significant for the methodology category indicated. Based on data reported in Anderson and Bushman (2002c).

Summary of Empirical Research

As this review of the empirical research has shown, exposure to media violence has a statistically significant association with aggression and violence among youth. The findings are generally consistent across media type and research methodology. The experimental research clearly demonstrates that exposure to media violence heightens the chances that a youth will behave aggressively and have aggressive thoughts in the short run. The cross-sectional surveys consistently indicate that the more frequently youth are exposed to media violence, the greater is the likelihood they will behave aggressively and have aggressive thoughts. The longitudinal research consistently shows that exposure to media violence in childhood is a predictor of subsequent aggression in adolescence and young adulthood even when many other possible influences are statistically controlled. Furthermore, there is evidence that habitual exposure even in late adolescence and early adulthood produces similar increases in aggression and violence in later years. Although the sizes of these effects are in the range that statisticians call small to medium, the effects are generally of the same magnitude as many other effects that are considered important public-health threats (e.g., cigarette smoking, exposure to asbestos; Bushman & Huesmann, 2001).

THEORETICAL EXPLANATIONS

One reason these empirical results have been increasingly accepted by the scientific community over the 30 years since the first Surgeon General's report on media violence is the growing understanding of the psychological processes underlying these effects. Although the underlying tenets of the current theories of media-violence effects were formulated even before that early Surgeon General's report (see Bandura, 1973; Bandura, Ross, & Ross, 1961, 1963a, 1963b, 1963c; Berkowitz, 1962; Eron, Walder, & Lefkowitz, 1971), researchers from a variety of disciplines, primarily psychology, communication, and sociology, have developed, tested, and refined ever-better theoretical models accounting for the consequences of exposure to media violence. The generally accepted theories that have evolved not only explain why exposure to media violence increases aggressive and violent behavior, but also suggest numerous factors that might exacerbate or mitigate the effect. These models generally fall under the rubric of social-cognitive, information processing models. Such models focus on how people perceive, think, learn, and come to behave in particular ways as a result of interactions with their social world, a world that includes observation of and participation in real social interactions (e.g., with parents, peers), as well as fictional social interactions (e.g., various forms of media). Reviews of several such formulations are available (Anderson & Bushman, 2002b; Anderson & Huesmann, 2003; Berkowitz, 1984, 1993; Huesmann, 1997, 1998).

Within the framework of these theories, it is important to distinguish between relatively immediate (or short-term) and delayed (or long-term) effects. It is now generally agreed that although some processes contribute to both kinds of effects, others contribute primarily to one or the other. In particular, short-term effects are thought to be due to observational learning and imitation, arousal and excitation, and priming, whereas long-term effects are thought to be due to observational learning, automatization of aggressive schematic processing, and desensitization or emotional habituation. We discuss each of these processes in turn.

Observational Learning and Imitation

Humans begin imitating other humans at a very early age, and the observation of others' behaviors is the likely source of many of a young child's motor and social skills (Bandura, 1977; Meltzoff & Moore, 1977). Humans and chimpanzees are now known to have specific neurological systems designed for imitation (Rizzolati, Fadiga, Gallese, & Fogassi, 1996), and these systems make it easy for very young primates to acquire rudimentary social behaviors. Social interactions hone these behaviors that children first acquire through observation of others, but observational learning remains a powerful mechanism for the acquisition of new social behaviors throughout childhood and maturity. As a child grows older, the behaviors and the circumstances in which they are seen as appropriate or useful become more abstract, and beliefs and attitudes are developed from inferences made about observed social behaviors (Guerra, Huesmann, & Spindler, in press). Theoretically, children can be expected to learn from whomever they observe – parents, siblings, peers, or media characters – and many researchers now agree that such observational learning can contribute to both the short- and the long-term effects of media violence on aggressive behavior. Much of this learning takes place without an intention to learn and without an awareness that learning has occurred.

According to observational-learning theory, the likelihood that an individual will acquire an observed behavior is increased when the model performing the behavior is similar to or attractive to the viewer, the viewer identifies with the model, the context is realistic, and the viewed behavior is followed by rewarding consequences (Bandura, 1977).[2] A child's immediate imitation of observed behaviors would probably be the simplest example of observational learning though some scholars would suggest that there should be a lag before the imitation occurs for it to be called "learning." Observational learning can help to explain some of the short-term effects of exposure to violent media, but what happens in the longer term? The reinforcements a person receives when imitating a behavior are largely responsible for whether the behavior persists. For example, youngsters might be rewarded or punished by people in their social environment (parents, teachers, peers) for the actions they exhibit, or they might vicariously experience the rewards or punishments other persons obtain when these others imitate the portrayed behavior. Through imitation and reinforcement, children develop habitual modes of behavior (e.g., Bandura, 1977, 1986; Huesmann, 1997). Whether observational learning leads to long-term effects of media violence depends in part on the consequences the imitated behaviors bring.

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[2] Though these factors facilitate observational learning, none are necessary conditions for media violence to have effects. For example, cartoon characters in television or video games are not very realistic, but numerous randomized experiments have shown that exposure to violent cartoonish behavior increases aggressive behavior.

It is theorized that children not only learn specific behaviors from models, but can also learn more generalized, complex social scripts (sets of "rules" for how to interpret, understand, and deal with a variety of situations, including conflict; e.g., Anderson & Huesmann, 2003; Huesmann, 1988, 1998; Huesmann & Miller, 1994). Once learned, such scripts serve as cognitive guides for future behavior. For example, from observing violent people, children may learn that aggression can be used to try to solve interpersonal conflicts. As a result of mental rehearsal (e.g., imagining this kind of behavior) and repeated exposure, this approach to conflict resolution can become well established and easily retrieved from memory. Finally, through inferences they make from repeated observations, children also develop beliefs about the world in general (e.g., is it hostile or benign) and about what kind of behavior is acceptable.

Observational learning and imitation are often thought of as conscious processes, but that need not be the case. Recent theoretical and empirical work (e.g., Bargh & Chartrand, 1999; Neuman & Strack, 2000) suggests that some types of imitative behaviors are very automatic, nonconscious, and likely to be short-lived. Similarly, observational learning of complex scripts and schemas (e.g., beliefs, attitudes, and other types of knowledge that guide perception, interpretation, and understanding) can also occur outside of awareness, even with no immediate imitation of behaviors. Theoretically, it should not matter much for the long-term consequences of observation of violent behavior whether or not the child is aware of its influence. Repeated observation of aggressive behavior should increase the likelihood that children will incorporate aggressive scripts into their repertoires of social scripts, particularly if their own use of those scripts is followed by reinforcement.

Priming and Automatization of Aggressive Schematic Processing

Neuroscientists and cognitive psychologists have discovered that the human mind often acts as an associative network in which ideas are partially activated (primed) by associated stimuli in the environment (Fiske & Taylor, 1984). An encounter with some event or stimulus can prime, or activate, related concepts and ideas in a person's memory even without the person being aware of this influence (Bargh & Pietromonaco, 1982). For example, exposure to violent scenes may activate a complex set of associations that are related to aggressive ideas or emotions, thereby temporarily increasing the accessibility of aggressive thoughts, feelings, and scripts (including aggressive action tendencies). In other words, aggressive primes or cues make aggressive schemas more easily available for use in processing other incoming information, creating a temporary interpretational filter that biases subsequent perceptions. If these aggressive schemas are primed while certain events – such as ambiguous provocation – occur, the new events are more likely to be interpreted as involving aggression, thereby increasing the likelihood of an aggressive response. Priming effects related to aggression have been empirically demonstrated both for cues usually associated with violence, such as weapons (Anderson, Benjamin, & Bartholow, 1998; Berkowitz & LePage, 1967; Carlson, Marcus-Newhall, & Miller, 1990), and for initially neutral cues that have been observed repeatedly to be connected to violence, such as the color of a room in which violence is repeatedly observed (Leyens & Fraczek, 1983). For example, the mere presence of a weapon within a person's visual field can increase aggressive thoughts and aggressive behavior (Bartholow, Anderson, Benjamin, & Carnagey, in press).

Priming effects are often seen as purely short-term influences. But research by cognitive and social-cognitive scientists has shown that repeated priming and use of a set of concepts or schemas eventually makes them chronically accessible. In essence, frequently primed aggression-related thoughts, emotions, and behavioral scripts become automatically and chronically accessible. That is, they become part of the normal internal state of the individual, thereby increasing the likelihood that any social encounter will be interpreted in an aggression-biased way, and therefore increasing the likelihood of aggressive encounters throughout the individual's life (e.g., Anderson & Huesmann, 2003). This automatization process, which changes short-lived increases in aggression-biased perceptions into relatively long-lasting aggression-biased perceptual filters, is essentially another type of learning process, one that has long-term consequences.

Arousal and Excitation Transfer

Media violence is exciting (arousing) for most youth. That is, it increases heart rate, the skin's conductance of electricity, and other physiological indicators of arousal. There is evidence that this arousal can increase aggression in two different ways. First, arousal, regardless of the reason for it, can energize or strengthen whatever an individual's dominant action tendency happens to be at the time. Thus, if a person is provoked or otherwise instigated to aggress at the time increased arousal occurs, heightened aggression can result (e.g., Geen & O'Neal, 1969). Second, if a person who is aroused misattributes his or her arousal to a provocation by someone else, the propensity to behave aggressively in response to that annoyance is increased (e.g., Zillmann, 1971, 1982). Thus, people tend to react more violently to provocations immediately after watching exciting movies than they do at other times. This kind of effect is usually short-lived, perhaps lasting only minutes.

Such arousal-transfer effects can occur with any kind of exciting activity, not just exciting movies, TV shows, music videos, or video games. For this reason, the arousal properties of violent media have not drawn as much attention as their other consequences. Nonetheless, it bears noting that frequent episodes in which exposure to violent media is followed by frustrating or provoking events could well lead to an increase in the viewers' aggressive social encounters, which in turn can affect their self-images and the aggressiveness of their social environment. Indeed, recent research shows that playing a violent video game for as little as 10 min increases the player's automatic association of "self" with aggressive actions and traits (Uhlmann & Swanson, in press). In the same study, the researchers also found that past history of exposure to violent video games was positively associated with aggressive views of the self.

Emotional Desensitization

The term "desensitization" has been employed in so many different ways that the exact meaning of any particular usage can be quite unclear. We specifically use the label emotional desensitization to refer to a reduction in distress-related physiological reactivity to observations or thoughts of violence (Carnagey, Bushman, & Anderson, 2003). In the present context, emotional desensitization occurs when people who watch a lot of media violence no longer respond with as much unpleasant physiological arousal as they did initially. Because the unpleasant physiological arousal (or negative emotional reactions) normally associated with violence has an inhibitory influence on thinking about violence, condoning violence, or behaving violently, emotional desensitization (i.e., the diminution of the unpleasant arousal) can result in a heightened likelihood of violent thoughts and behaviors (Huesmann et al., 2003).

Habituation of neurophysiological responses over time is a well-established psychological phenomenon (though some responses resist habituation); repeated presentation of the same stimulus usually results in smaller and smaller neurophysiological responses to that stimulus. Similarly, systematic desensitization procedures are highly successful in the treatment of phobias (e.g., Bandura & Adams, 1977; Wolpe, 1958, 1982) and other anxiety or fear disorders (e.g., Pantalon & Motta, 1998). For example, systematically exposing someone with a snake phobia to snakes (initially under conditions designed to minimize anxiety and later under more anxiety-producing conditions) reduces the original anxiety reactions to such an extent that the person is no longer snake phobic. One feature of modern systematic desensitization treatments is to have the phobic person observe other people (live or filmed) successfully interacting with the feared stimulus (Bandura, Grusec, & Menlove, 1967; Bandura & Menlove, 1968).

Similarly, violent scenes do become less unpleasantly arousing over time (see Cline, Croft, & Courrier, 1973), and more aggressive (relative to less aggressive) college students do tend to show decreased arousal to repeated scenes of violence (Titus, 1999). Research has shown that even relatively brief exposure to media violence can reduce physiological reactions to the sight of real-world violence (Carnagey et al., 2003; Thomas, Horton, Lippincott, & Drabman, 1977) and can decrease helpful behavior toward victims of aggression (Carnagey et al., 2003; Drabman & Thomas, 1974, 1975; Thomas & Drabman, 1975). However, it still has to be established whether or not such decreased arousal in response to violent scenes stimulates violent behavior, and it is therefore uncertain how big a role emotional desensitization plays in the long-term cumulative effects of media violence on the instigation of aggression. Unfortunately, there have been few attempts to date to test this hypothesis directly.

RESEARCH ON MODERATOR EFFECTS

Although the psychological processes through which media violence operates are present in every child, children are not affected equally by media violence. Some studies indicate that different children are affected differently by media violence. Similarly, not all portrayals of violence in the media have the same effect. It is therefore important to examine the characteristics of individuals, of media content, and of social environments that may increase or decrease – that is, moderate – the influence of media violence on aggressive behavior. A number of factors have been proposed as possible moderators, some on the basis of the psychological theorizing reviewed in the previous section, some because of empirical evidence that seems to suggest their importance, and others for both reasons.

Viewer Characteristics

Many viewer characteristics have been hypothesized as moderators of how people interpret and react to violent media content. For example, developmental theory suggests that younger children, whose social scripts, schemas, and beliefs are less crystallized than those of older children, should be more sensitive to this influence (Guerra et al., in press). Observational-learning theory suggests that the viewers' age and gender can influence the extent to which they identify with the depicted aggressive characters, which may in turn influence learning and enactment of the observed aggression. Relatively low intellectual competence might exacerbate the effects of exposure when the story plots are fairly subtle and complicated. A high level of aggressiveness might result in an enhanced susceptibility to media-violence effects by affecting the perception of violence in the observed scenes.

Age and gender of the viewer

Paik and Comstock (1994) reported an inverse relation between viewers' age and the magnitude of the effect of TV violence on aggression and other antisocial behaviors. In other words, as several developmental psychologists had theorized, the media-violence effect was largest in the youngest age group (less than 5 years old). However, the moderating influence of age was found to be quite complicated: The effect size did not decrease consistently as age increased. For example, the overall effect size among college-age students matched or exceeded that for 6- to 11-year-olds in experimental studies. However, these comparisons did not control for the different outcome measures used in research with adults and children. Aggressive behavior is often used as an outcome measure for children, whereas measures of aggressive thoughts are often used for college students and adults. In one of the two longitudinal investigations that used the same behavioral measure of aggression on the same participants at different ages, the longitudinal effect of media violence on aggressive behavior was significant for children (age 8) but non-existent for young adults (age 19; Eron et al., 1972). But what constitutes an appropriate or "best" measure of aggression differs for different ages and genders. Spousal violence is appropriate for adult couples but not children, whereas classroom aggression is more appropriate for children. To further complicate matters, the recent study by J.G. Johnson et al. (2002) found a larger longitudinal effect of television viewing on assault and fighting behavior at age 30 than at earlier ages (16, 22).[3]

Paik and Comstock (1994) also reported little difference in the average effect size for females and males. Although some early studies in the United States and some studies in other countries found stronger relations between media-violence viewing and aggression for boys than for girls (e.g., Eron et al., 1972), more recent investigations seem to show mostly similar effects. For example, in their recent study of children growing up between 1977 and 1995, Huesmann et al. (2003) reported similar effect sizes for males and females over 15 years old. However, there were some gender differences in the kinds of aggression associated with early childhood exposure to media violence. For example, early exposure to violence predicted increased use of indirect aggression (e.g., telling lies to get colleagues in trouble, taking other people's things out of anger) as an adult among females but not males; and early exposure to media violence had a stronger relation to physical aggression as an adult among males than females. Several possible factors have been suggested as contributors to these gender differences, as well as to changes in gender differences over time. One set concerns media violence itself: the difference in the frequency with which aggressive males and females are depicted in the mass media, the different kinds of aggression those characters use, and the increase in the depiction of aggressive females over the years. Another possible contributing factor is the increasing acceptability of female aggression by society – a change which makes it more likely that aggressive inclinations will be enacted by females.

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[3] This study assessed television viewing time, not time spent viewing violent television programs specifically. Nonetheless, the reversal in the relation between age and effect size is very difficult to explain, and suggests that the nuances of the developmental effects on the relation between exposure to media violence and aggression are incompletely understood.

Aggressiveness of the viewer

Individuals who are characteristically more aggressive than their peers are likely to have multiple risk factors predisposing them toward aggressive behavior. Existing research indicates that one of these risk factors may be a lower threshold for a media-violence-induced activation of aggressive behavior. Studies of violent television, film, and video games (e.g., Anderson & Dill, 2000, Study 1; Bushman, 1995; Bushman & Geen, 1990; Friedrich & Stein, 1973; Josephson, 1987) have found that highly aggressive individuals show greater effects (on aggressive behavior, attitudes, emotions, and beliefs) of exposure to media violence than their relatively less aggressive counterparts. Children who are at the greatest risk to grow up to be very aggressive are those who both were initially aggressive and watched relatively high amounts of TV violence (Dorr & Kovaric, 1980; Huesmann, Eron, Lefkowitz, & Walder, 1973). At the same time, this does not mean that the relatively nonaggressive child is unaffected by violent portrayals. Several studies have shown significant effects of media violence on later aggression among children with low levels of earlier aggression, as well as their highly aggressive peers (e.g., Eron et al., 1972; Gentile & Anderson, 2003; Huesmann et al., 1973, 2003). Furthermore, studies sometimes obtain essentially equal-size media-violence effects for individuals with low and high aggressive tendencies (e.g., Anderson & Dill, 2000, Study 2) and sometimes find that less aggressive individuals are more affected by media violence than more aggressive individuals are (e.g., Anderson, 1997).

Bandura's (1977) concept of "reciprocal determinism" helps to make sense of some of these findings. Different types of people seek out different types of media content but then are also affected differently by the content. Thus, children with strongly aggressive predispositions may be especially attracted to viewing violent media, perhaps because it helps them justify their own behavior (Bushman, 1995; Fenigstein, 1979; Gunter, 1983; Huesmann et al., 2003;

O'Neal & Taylor, 1989), but, as noted, they may also be more likely than other children to be influenced by such exposure. For example, they may perceive the violence as more normative and may identify more with the violent characters. Both of these factors should increase the likelihood that the media exposure will influence them. Along these lines, studies focusing on sexually violent media have shown that young men who are relatively high in risk for sexual aggression are more likely to be attracted to and aroused by sexually violent media (e.g., Malamuth & Check, 1983) and may be more likely to be influenced by exposure to such violent media than those at low risk for sexual aggression (e.g., Malamuth & Check, 1985). Finally, it is important to realize that experiments and longitudinal studies have shown that aggressive youths' attraction to violent media cannot explain away the effect of the violent media on those youths. Rather, their attraction is an added risk factor that increases the likelihood they will be affected by the violence they observe.

Intelligence of the viewer

The relevant theories do not make a clear prediction about the role of the viewers' intelligence as a moderator of the effect of media violence. On the one hand, children of lower intellectual ability watch more television and see more television violence (see Comstock & Paik, 1991, pp. 86-95) than children of higher intelligence, and also are more at risk to behave aggressively (Huesmann, Eron, & Yarmel, 1987). On the other hand, children of higher intelligence usually learn more rapidly, through either conditioning or observational learning, so one might expect them to be influenced more. The existing empirical research provides little support for either argument. Although statistically controlling for intelligence has frequently lowered observed media-violence correlations in cross-sectional and longitudinal studies (see Milavsky et al., 1982), differences in intelligence do not explain the media-violence effects on aggression, and there is little evidence that either high or low intelligence exacerbates the media-violence effects (see Eron et al., 1972; Huesmann & Eron, 1986; Huesmann et al., 2003).

Perceptions of realism and identification with aggressive TV characters

Observational-learning theory suggests that children who identify fairly strongly with an aggressive character or perceive a violent scene as realistic are especially likely to have aggressive ideas primed by the observed violence, to imitate the character, or to acquire a variety of aggressive scripts and schemas (beliefs, attitudes, interpretational biases). Of course, identification and realism depend on the portrayal as well as the viewer. Some evidence indeed suggests that relatively realistic portrayals are more likely to increase viewers' aggression than those presented in a more fictionalized or fantastic fashion (Atkin, 1983; Berkowitz & Alioto, 1973; Feshbach, 1972; Geen, 1975; Hapkiewicz & Stone, 1974). Also, when people are asked to imagine themselves as the protagonist in a violent film, the effects of viewing the film are enhanced, perhaps because of the viewers' relatively greater psychological involvement (Leyens & Picus, 1973). In longitudinal research, Huesmann and his colleagues (1986, 2003) found that children who thought that violent shows they watched were telling about life "just like it really is" or who identified with aggressive TV characters had relatively high average scores on a measure of physical and verbal aggression 1 year later and scored higher on a composite measure of aggressiveness (physical, verbal, and indirect or relational) 15 years later. In both of these longitudinal analyses, those most at risk to behave aggressively were children who both watched violence and identified with the violent characters.

As with other moderator effects, though, it is important to note that the occasional finding of increased risk when perceptions of realism and identification are high does not mean that there are no deleterious effects when levels of realism or identification are low. For instance, numerous studies have found significant effects of media violence on aggression even when the media violence is clearly fictional and unrealistic (e.g., virtually all experiments using cartoonish media-violence stimuli and college-student participants).

Media Content Characteristics

Not all violent portrayals pose the same risk to viewers (Wilson et al., 1997). A variety of studies – primarily laboratory investigations involving children and young adults – indicate that how violence or aggression is presented can alter its meaning for the audience and may moderate viewers' behavioral, cognitive, and emotional reactions. We have already noted that the effect of media violence is sometimes enhanced when the violence seems like "real life" and is committed by characters with whom the viewer can identify. However, some other characteristics of the content also seem to be important.

Characteristics of the aggressive perpetrator

Given that identification with the perpetrator may increase the effects of his or her behavior on viewers, it is important to consider what characteristics of a perpetrator might be conducive to identification. There is evidence suggesting that viewers are particularly likely to identify with and be influenced by an aggressive character portrayed as similar to themselves (e.g., in age, gender, and race; Bandura, 1986, 1994). However, the overall attractiveness, power, and charisma of the perpetrator may be more important than any of these personal attributes by themselves. For example, in the early 1970s, African American children imitated the behavior of White male actors more than African American actors (Neely, Hechel, & Leichtman, 1973).

Portrayed justification and consequences of the aggression

According to observational-learning theory, when violence is portrayed as justified, viewers are likely to come to believe that their own aggressive responses to a perceived offense are also appropriate, so they therefore are more apt to behave aggressively. Supporting this contention, findings from experiments that varied the extent to which the observed violence was justified demonstrated that seemingly warranted media violence increased the likelihood that angered participants would assault people who had provoked them earlier (Berkowitz, 1965; Berkowitz & Geen, 1967; Berkowitz & Powers, 1979; Geen & Stonner, 1973). Theoretically, rewarding perpetrators for their aggression should also raise the likelihood that viewers will model the aggressive act, and indeed, media portrayals in which violence is rewarded have been shown to increase the risk that viewers will behave aggressively (Bandura et al., 1961, 1963a, 1963b, 1963c; Lando & Donnerstein, 1978). However, violence does not need to be explicitly rewarded to increase the risk of a harmful effect; seeing unpunished media violence may also enhance learning of aggressive thoughts and behaviors (Bandura, 1965; Walters & Parke, 1964).

Another important question concerns the effects of showing the negative consequences to the victim of portrayed aggression. Seeing the harm and pain resulting from violence might serve as a vicarious punishment for the viewer who identifies with the aggressor, reducing the vicarious value of any rewards associated with the aggressive act, and thereby reducing the usual media-violence effect on aggressive behavior. However, little research has been conducted to test this speculation. Goranson (1970) summarized two unpublished experiments on this topic. He reported that after being angered and then viewing a filmed aggressive boxing match, participants who were subsequently informed that the losing boxer had died behaved less aggressively toward their earlier antagonist than those not informed of the victim's death. Malamuth and Check (1985) obtained similar results. Participants in their study listened to an audiotaped passage of a rape. For some participants, the passage indicated that the victim was hurt and disgusted, whereas others heard that the victim became sexually aroused by the rape and was not hurt. A subsequent measure indicated that those who heard about negative consequences to the rape victim were less accepting of common rape myths than those who heard about positive consequences to the victim.

However, there is some theoretical and empirical support for the opposite view, that explicit portrayal of blood, gore, or other painful consequences might increase aggressiveness on the part of the viewer. Repeated exposure to such negative consequences can lead the viewer to experience less of a negative emotional reaction to future scenes of blood and gore and to pain expressed by victims. Such habituation (or desensitization) may well enable one to consider harming someone without experiencing the negative emotional reactions that normally inhibit aggression. Empirically, viewers who show less negative emotional reactions to viewing violence are more likely to behave aggressively than those who show more negative reactions (Kirwil & Huesmann, 2003; Titus, 1999).

These few studies are not sufficient for firm conclusions. It may be that the short-term effects of portraying negative consequences differ from the long-term effects, and there may well be other complicating factors involved. In any case, it is clear that additional research is needed on this question.

Social Environment

Little research to date has examined how cultural, environmental, and situational variables (e.g., place, presence of co-viewers) moderate the impact of media violence. However, the theories and the data we have already reviewed suggest that such social factors might moderate the effect if they alter the chances that the child will identify with aggressive characters, alter the child's perception of the scene's reality, alter the chances that the child will watch violence, or alter the chances that the child will carry out aggressive behaviors learned from watching the violence. Any of these factors might be influenced by culture, neighborhood environment, or family.

Influence of culture

There have been many studies on media violence carried out in countries other than the United States, but few studies have examined the effect of media violence in non-Western cultures. Within Western countries, the empirical results have mostly been similar, but with important exceptions. For example, Huesmann and Eron (1986) reported there was no relation between viewing of TV violence and aggression among Israeli children raised on a kibbutz, but found a moderate to strong relation among Israeli children raised in a suburb. It may be that cultural environments with strong sanctions against violence within the group mitigate the expression of any aggressive behaviors learned from media violence. This could also explain why effects for U.S. females appear to be much stronger among those who grew up in the 1970s and 1980s than among those who grew up in the 1950s and early 1960s. However, the lack of research in non-Western cultures and other anomalies in the research in Western countries suggest that the full effects of culture and society are not yet well understood. For example, in the preliminary results from a 15-year follow-up among Polish females who experienced the social upheavals of the end of Communism as teenagers, Huesmann and Moise-Titus (1999) reported that those girls who were more aggressive as children and watched more violence became less aggressive and more successful young adults than the girls who had been less aggressive and watched less violence.

Influence of neighborhood and SES

Low-SES children on average watch more television and television violence than high-SES children (Comstock & Paik, 1991). The SES link to television-viewing habits does not account for the overall association between viewing media violence and aggression among youth, however (Huesmann et al., 2003). Nor is there much evidence that low SES increases or decreases the effect of media violence on behavior. That is, the effect of media violence on aggression appears essentially the same on low- and high-SES children. However, the generally high dose of media violence given to low-SES children is yet another risk factor for adulthood violence in this population.

Influence of parents

From a theoretical standpoint, parents have the potential to be important moderators of the effects of media violence on children. Children and adolescents form attitudes and beliefs and take action as a result of their exposure to media content, but they also may discuss what they see with others – especially parents and friends – and their responses may ultimately be shaped by these interpersonal interactions. Singer and Singer (1986a, 1986b) proposed that when parents take an active mediating approach toward television viewing by their children – including commenting regularly and critically about realism, justification, and other factors that could influence learning – children are less likely to be influenced badly by media content. Singer and Singer reported some data in support of this view, and some recent research has provided additional support. For example, Nathanson (1999) found that children whose parents discuss the inappropriateness of television violence with them or restrict access to violent television shows report lower aggressive tendencies than children whose parents do not discuss television violence or restrict access to violent television shows. Other findings suggested that either type of parental intervention may decrease the importance children give to violent TV, which in turn may lower children's aggressive attitudes.

The few studies that have examined parents' characteristics as possible moderators have found little evidence that factors such as parents' aggressiveness, coldness, personality, or viewing habits increase or decrease the effects of exposure to violence (Huesmann et al., 2003). How parents control their children's viewing and what parents do when their children view violence appear to be more important in mitigating the effects of observing violence than who the parents are.

Summary and a Caveat

The studies discussed in this section on moderators suggest potentially productive avenues for studies on preventive intervention. One approach would be based on parental interventions with the child during and after exposure to violence, as well as parental restrictions on access to violent media. Another would be based on altering violent presentations to reduce the characteristics that increase observational learning, desensitization, automatization, and priming effects. However, such intervention studies will require a much more systematic research base to more clearly identify the most important moderating factors. Furthermore, although there is evidence of a number of moderating factors (e.g., realism), there is no evidence that any group is completely protected from the effects of media violence or that any moderator provides complete protection from these effects. For example, even though more realistically presented media violence sometimes produces larger effects than less realistic portrayals, and youth who perceive violent media as more "real" are sometimes more affected than peers who perceive it as less real, studies using portrayals that are clearly not real (e.g., cartoon characters) and participants who know that the stimuli are fictitious (e.g., college students) still yield significant media-violence effects.

RESEARCH ON MEDIA USE AND CONTENT

In the preceding sections, we have addressed how exposure to violent media may affect children, youth, and young adults. The findings raise questions about the content of media violence and its accessibility to and consumption by youth. This section provides an overview of current knowledge about family access to and children's use of media in general, violent content in the media, and factors that affect children's preferences for (and potential for exposure to) violence in media. We focus on media in the United States, but similar issues have been raised in many other countries as well.

Children's Access to Media in the Home

Three recent nationally representative surveys – two from the Kaiser Family Foundation (hereafter referred to as Kaiser; Rideout, Vandewater, & Wartella, 2003; Roberts, Foehr, Rideout, & Vrodie, 1999)[4] and one from the Annenberg Public Policy Center[5] (hereafter referred to as APPC; Woodard, 2000) – illustrate just how prevalent media are in the home. All three studies reported that virtually all families with children have at least one television set, most have at least one VCR or DVD player, and the majority (between 74 and 78%) now subscribe to cable or satellite TV. In addition, these studies concurred that 7 in 10 families with children have a video-game system, a similar percentage of families own a computer, the majority of American children have a bedroom TV (including 30% of children ages 0 to 3), and the likelihood of having a bedroom TV increases as children get older; less common but also palpably present in 2- to 17-year-old children's rooms are video-game players (between 33 and 39%), VCRs (30%), and Internet hookups (between 6 and 11%). In recent years, the percentage of families with on-line connections has risen, from 15% in 1996 to 52% in 2000. Family income is positively related to all media ownership except video games. And of course, the rapid growth of video gaming means that even these fairly recent figures underestimate the current level of access and use.

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[4] Data for the 1999 study are from a nationally representative sample of 1,090 children aged 2 through 7, for whom data were collected through face-to-face interviews with parents and caregivers, and a nationally representative sample of 2,065 students in grades 3 through 12 (8-18 years old), who filled out in-class pencil-and-paper questionnaires with the assistance of trained researchers. Data for the 2003 study are from a nationally representative, random-digit-dial telephone survey of 1,065 parents of children ages 6 months to 6 years old, conducted from April 11 to June 9, 2003.

[5] Data for this study are from telephone interviews conducted in April and May 2000 with 1,235 parents of children between the ages of 2 and 17 and 416 children between the ages of 8 and 16. The samples were drawn through random digit dialing.

Children spend more time consuming entertainment media than engaging in any other activity besides school and sleeping (Roberts et al., 1999; Stanger & Gridina, 1999). They average approximately 4 hr per day in front of a television or computer screen (Roberts et al., 1999; Woodard, 2000), but the number of hours is even higher for many children. For example, 25% of sixth graders watch more than 40 hr of television per week (Lyle & Hoffman, 1972) – more time than they spend in school. At 10 a.m. on any Saturday morning, about 60% of the 6- to 11-year-olds in America are watching television (Comstock & Paik, 1991). Indeed, children ages 0 to 6 spend more time on entertainment media than on reading, being read to, and playing outside combined (Rideout et al., 2003).

The 1999 Kaiser survey (Roberts et al., 1999) and Comstock and Paik (1991) both reported that TV viewing peaks at ages 8 through 13, although the APPC survey found no significant age differences in TV viewing. For all other media, all surveys show that children's time spent with media does vary significantly by age. For example, younger children spend more time watching television (including videos and DVDs) than do older children, whereas teenagers spend more time on computer-related media and the telephone than do young children.

As one might expect, children from households with lower incomes, on the average, spend significantly more time watching TV and videotapes and playing video games than children from families with higher incomes (Comstock & Paik, 1991; Roberts et al., 1999). In addition, children with lower IQs spend more time watching TV than children with higher IQs do (Comstock & Paik, 1991). However, the variation within any social class or IQ level is large; at all levels, some children watch large amounts of TV and some children watch none.

The Violent Content of Media

Several content analyses over the past three decades have systematically examined the amount of violence on television (Gerbner, 1972; Gerbner, Gross, Morgan, & Signorielli, 1980; Larsen, 1968; Potter et al., 1995; Signorielli, 1990). The largest and most recent of these was the National Television Violence Survey[6] (NTVS; Wilson et al., 1997, 1998), which examined the amount and content of violence[7] on American television for 3 consecutive years.

The programs for NTVS were randomly sampled from 23 broadcast and cable channels over a 20-week period ranging from October to June during the 1994 through 1997 viewing seasons. The NTVS report revealed that 61% of programs on television contain some violence. Only 4% of all violent programs on television feature an antiviolence theme – or put in another way, 96% of all violent television programs use aggression as a narrative, cinematic device for simply entertaining the audience. These prevalence findings were quite consistent across 2 randomly sampled composite weeks of television from 3 different years. Moreover, most aggression on television is glamorized and trivialized: 44% of the violent interactions involve perpetrators who have some attractive qualities worthy of emulation; nearly 40% of the violent scenes involve humor either directed at the violence or used by characters involved with the violence; and nearly 75% of all violent scenes feature no immediate punishment or condemnation for violence. Almost 45% of all programs feature "bad" characters who are never or rarely punished for their aggressive actions. Much of the violence is also sanitized: 51% of violent behavioral interactions on television feature no pain, 47% feature no harm, and 34% depict harm unrealistically. The greatest prevalence of unrealistic harm appears in children's programming, presumably in cartoons. Of all violent scenes on television, 86% feature no blood or gore, and only 16% of violent programs depict the long-term, realistic consequences of violence.

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[6] This study randomly sampled programs from 6:00 a.m. to 11:00 p.m.

[7] Violence was defined as overt depiction of a credible threat of physical force, or the actual use of such force intended to physically harm an animate being or group of beings. The study authors also noted that "violence also includes certain depictions of physically harmful consequences against an animate being or group that occur as a result of unseen violent means. Thus, there are three primary types of violent depictions: credible threats, behavioral acts, and harmful consequences" (Smith & Donnerstein, 1998, p. 170). Content analyses of television programs generally treat the program itself as the unit of analysis and exclude advertisements.

NTVS is not without limitations, however; violence in news was not assessed. Much of news programming is filled with stories about crime and violence (R.N. Johnson, 1996; Lichter & Amundson, 1994; Slattery & Hakanen, 1994). Approximately 15% of the programs on the broadcast networks and 10% of the programs on the independent stations are news programs, not to mention the all-day news programming on two CNN channels on basic cable. Given that news stories often feature violence or its harmful aftermath, the prevalence of violence on

American television may be considerably higher than the NTVS findings reveal.

There are no comparable comprehensive studies of violent content in contemporary American movies or in video games. However, several independent research groups have conducted smaller-scale analyses of video-game content, using various methods, and the results converge on the same conclusion – that violence is widely present. A 1999 National Institute on Media and the Family report (Walsh, 1999) noted that a panel of parents rating 78 popular video games found that 25% of the games showed "many, intense instances" of violence, and another 30% showed at least "some instances" of violence. Another recent analysis found that about 89% of video games contain some violent content (Children Now, 2001). Studies of fourth- through eighth-grade children found that more than half stated preferences for games in which the main action is predominantly violent (Buchman & Funk, 1996; Funk, 1993). In surveys of children and their parents, about two thirds of children named violent games as their favorites; only about one third of parents were able to correctly name their child's favorite game, and 70% of the time that parents were incorrect, children described their favorite game as violent (Funk, Flores, Buchman, & Germann, 1999). Similar results have been reported in Japan. Shibuya and Sakamoto (2003) reported that 85% of the most popular video games of Japanese fifth graders contained violent content.

Factors Affecting Children's Exposure to Violent Content

By the time a typical child finishes elementary school, he or she will have seen approximately 8,000 murders and more than 100,000 other acts of violence on TV (Huston et al., 1992). The rate of violence per minute is much higher in video games than in most violent TV programs or movies, but data on the number of violent acts witnessed (or committed) in video games are not available.

Conventional wisdom holds that children enjoy violence in the media, and Nielsen data do show that the most frequently watched children's programs are filled with conflict (Jordan, 1996). However, Cantor (1998) pointed out that this trend may be the result of what is made available during times when children are likely to be in the audience (e.g., Saturday morning); children's favorite programs are prime-time sitcoms depicting family interactions.

There is little systematic research (outside of the industry) that examines children's tastes for different genres. That boys are more likely than girls to be attracted to and enjoy violent media is fairly well established in studies on television (Cantor & Nathanson, 1997; Comstock, 1995; Huston & Wright, 1997; Valkenburg & Janssen, 1999) and appears to be the case with computer-video games (Barnett et al., 1997; Gentile & Anderson, 2003; Griffiths, 1997). However, males may be more strongly attracted to violent entertainment media than are females because media tend to cater to male audiences and use males as lead characters (e.g., X-*Men*, Bat*man*, Spider*man*, Super*man*).

Males and females also differ in their perceptions of and preferences for different types of violence. For example, Funk and Buchman (1996) found no gender difference in overall preference for violent video games, but girls preferred fantasy violence, whereas boys preferred human violence. Cantor (1998) reported that males were more attracted to "justice restoring" violent programming (such as that found in *Batman*) than females, but males and females were equally attracted to "comedic violence."

A few studies have examined the impact of the family's SES on children's attraction to violence; interpretation of the findings of these studies is complicated by the fact that lower-SES children tend to consume more media overall. Van der Voort (1986) found that children from lower-SES homes engaged in higher levels of viewing than children from more affluent families, but also showed more enjoyment and approval of the violence and identified more strongly with the characters. Comstock (1995; Comstock & Paik, 1991) and Huston and Wright (1997) found a relationship between lower income levels and a greater preference for violence, particularly among boys. Evidence on ethnic differences in children's preferences remains unconvincing, because many studies have failed to appropriately control for SES. For both boys and girls, a lower self-evaluation of behavior (e.g., lower ratings of their own ability to get along well with others) is linked to a higher preference for violent games (Funk, Buchman, & Germann, 2000). Finally, perhaps because lower-IQ children watch more television on the average than higher-IQ children do, they also watch more violent television on the average (Eron et al., 1972; Huesmann et al., 2003).

RESEARCH ON INTERVENTIONS

Recent efforts to reduce the harmful effects of media violence on youth have taken various forms, including (a) attempting to reduce the amount of media violence and its accessibility to children (e.g., calls for media self-regulation and violence ratings), (b) encouraging and facilitating parental monitoring of children's media access (e.g., V-chip legislation), (c) educating parents and children about the potential dangers of media violence (e.g., media and empathy educational programs), and (d) changing children's thinking to reduce the chance that they will imitate the violence they see. Only a few of these approaches have received scientific study. The lack of formal research on interventions related to media violence is somewhat surprising, considering that the knowledge base from which experimental interventions could be developed is large. Historically, much more attention has been paid to establishing the existence of a relationship between media violence and behavior, determining its theoretical basis, and discovering what moderates the effect than has been paid to determining how to prevent it.

Changing Attitudes

Interventions specifically designed to counter violent messages presented in the media are rare (Eron, 1986; Singer & Singer, 1986a, 1986b; Singer, Singer, & Rapaczynski, 1984); however, two have shown some success. Huesmann, Eron, Klein, Brice, and Fischer (1983) studied the effectiveness of two intervention programs designed to reduce the likelihood that 7- to 8-year-old children would imitate aggressive behaviors they saw on TV. In the first study, training sessions about television and realism failed to change attitudes or aggressive behavior. However, the same children participated in an additional – and successful – intervention the following year. In the second study, the children produced a videotape (ostensibly for children who had been "fooled by television or harmed by television violence") of themselves presenting persuasive essays explaining why it is bad to imitate TV violence and how television is not like real life (Huesmann et al., 1983, p. 905). Four months after the intervention, the children's aggressive behavior (as reported by peers) had increased, as would be expected for this age, but it increased significantly less than the aggressive behavior of a randomly assigned comparison group of children who received a placebo intervention. Children who received the preventive intervention were also more inclined to view television violence as harmful and "not reflecting true life." The effectiveness of this intervention fits well with basic research on the effect of creating or reading causal explanations on beliefs, attitudes, and behavior (e.g., Anderson, Lepper, & Ross, 1980; Anderson & Sechler, 1986; Slusher & Anderson, 1996). That research showed that creating or considering causal explanations relevant to an issue leads to corresponding changes in beliefs, judgments, and behaviors.

Similar results for media-violence interventions have been found with judgments involving sexual aggression. Linz, Fuson, and Donnerstein (1990) showed college men an educational documentary on the psychological impact of "slasher" films and two rape-prevention education films. The men were assigned to write essays about myths of sexual violence or essays critically evaluating television for its inaccurate portrayal of real life. After being videotaped reading these essays, they watched a playback of themselves and other participants advocating their antirape arguments or their media critiques. Men who had participated in either of these educational interventions were less likely to assign responsibility to a rape victim in a videotaped mock trial than were men in the control groups, who saw a neutral video or no video at all.

Encouraging Parental Monitoring and Guidance

As noted in the Research on Moderator Effects section, recent research has found that the harmful effects of exposure to media violence can be reduced if parents guide their children's media exposure and discuss their interpretation of media violence with their children. For example, one study found that when parents speak negatively about violent TV or restrict viewing of violent television content, children place less importance on violent programming and have less aggressive attitudes. However, if parents watch TV with their children and say nothing about the violent content, children report higher than normal aggressive attitudes (Nathanson, 1999). Other studies have shown that when children watch a violent program with someone else present, they are less likely to express aggressive attitudes (Corder-Bolz, 1980) or to behave aggressively (Hicks, 1968) immediately after viewing the program if the other person makes negative comments about the violence than if that person is silent. They also are quicker to notify an adult that other children are fighting (Horton & Santogrossi, 1978) if they heard negative commentary while watching the violent program.

Providing Media Education

The preceding examples suggest that educating parents and teachers about specific techniques to reduce the effects of media violence might be a viable general intervention strategy. However, from an empirical and theoretical standpoint, there is little reason to believe that improving consumers' ability to critically analyze, interpret, and evaluate media messages (i.e., improving media literacy; Corder-Bolz, 1982) would have much of an impact. To minimize observational learning, priming, automatization, and desensitization, an intervention must either reduce the child's exposure to violence or reduce the likelihood that the child will identify with the aggressive characters, perceive their actions as realistic and justified, and perceive aggression as acceptable. General media literacy programs do not specifically attempt to accomplish either of these two types of reductions; thus, it is not surprising that there is no valid research demonstrating effectiveness of general media-literacy education.

On a more positive note, one recent study tested an intervention that combined education about the effects of violence with a counterattitudinal intervention and parental monitoring (Robinson, Wilde, Navracruz, Haydel, & Varady, 2001). Two elementary schools similar on many key factors were selected for the study; one was randomly chosen to participate in the intervention, and the other served as a control. The intervention consisted of 18 classroom lessons over a 6-month period. The lessons, which lasted 30 to 50 min each, included elements of media education and attitude interventions. After the lessons were completed, the children were encouraged to not watch TV or movies or play video games for a "TV Turnoff" period of 10 days. Finally, the children were encouraged to create and follow a video-entertainment budget of 7 hr per week. Newsletters were used to enlist parents' support in helping the children achieve these goals. Note that the TV Turnoff targeted media use in general, but did not address issues of aggressive behavior.

The aggressive behavior of both the control children and the children who received the intervention was assessed in several ways. First, peers were asked to report on the participants' aggressive behavior before the intervention (September) and again 7 months later (April). In addition, 60% of the children were observed for physical and verbal aggression on the playground. Finally, parents were interviewed about their child's aggressive and delinquent behavior. All four of the aggression measures showed that levels of aggression in April (adjusted for scores before the intervention) were lower for the intervention participants than for the control participants. Both peer ratings ($p < .03$) and observed verbal aggression ($p < .01$) showed significant effects of the intervention, whereas observed physical aggression and parent-reported aggression did not yield statistically significant effects. The authors also reported that the effect of the intervention did not differ significantly for boys versus girls or for children of different ages.

DISCUSSION

Major Research Findings

We began our review by listing five questions that were our focus:

- What does research say about the relation – both short-term and long-term – between media violence and violent behavior?
- How does media violence produce its effects on violent behavior?

- What characteristics of media violence are most influential, and who is most susceptible to such influences?
- How widespread and accessible is violence in the media (TV, music videos, video games, Internet)?
- How can individuals and society counteract the influence of media violence?

We summarize the broad answers to these questions in this section.

Media violence, aggression, and violent behavior

In brief, five general observations follow from this review of relevant research. First, media violence has a modest direct effect (r = .13 to .32) on serious forms of violent behavior. Second, a more extensive body of research documents a larger impact of media violence on aggression (including violence; r = .18 to .38). Third, the research base for these first two conclusions is large; diverse in methods, samples, and media genres; and consistent in overall findings. Fourth, for many individuals, the negative effects of habitual childhood exposure to media violence extend well into adulthood even if media violence is no longer being consumed. Fifth, even individuals who typically are not highly aggressive are negatively affected by exposure to violent media both in short-term situations and over long periods of time.

More specifically, research provides strong evidence that in the short term, exposure to media violence causes increases in children's, adolescents', and young adults' physically and verbally aggressive behavior, as well as in aggression-related variables (such as aggressive thoughts and emotions) that are theoretically linked to aggressive and violent behavior. This body of research has grown considerably over the decades since the 1972 Surgeon General's report. The relatively few large-scale longitudinal studies reported in recent years provide converging evidence linking repeated exposure to violent media in childhood with aggression later in life, and in particular with increased likelihood of serious physically aggressive behavior including physical assaults, spouse abuse, and other types of crimes. Because extremely violent criminal behaviors (e.g., forcible rape, aggravated assault, homicide) are relatively rare, additional longitudinal studies with very large samples are needed to estimate accurately how habitual childhood exposure to media violence compares in magnitude with other risk factors for the most serious criminally violent behavior.

Theory

There is a growing body of well-supported theory explaining why and when exposure to media violence causes increases in aggression and violence. Although the scope of this overview did not include positive media influences, the same principles used to explain and understand how media violence increases aggression could also help to clarify how media examples of prosocial behavior might cause increases in prosocial behavior. Media violence produces short-term increases in aggression by activating (priming) aggressive thoughts, increasing physiological arousal, and triggering an automatic tendency to imitate observed behaviors (especially among children). Media violence produces long-term increases in aggression and violence by creating long-lasting (and automatically accessible) aggressive scripts and interpretational schemas, and aggression-supporting beliefs and attitudes about appropriate social behavior. Additionally, repeated exposure to violence desensitizes individuals' normal negative emotional responses to violence, thereby making it easier to think about engaging in violence and decreasing sympathetic and helping reactions to victims of violence.

Moderators

Although more research is needed to specify the conditions that exacerbate or mitigate the negative effects of exposure to violent media, knowledge about some of the critical links in the causal chain between viewing violence and behaving aggressively or violently is growing. Moderators in this chain include certain characteristics of viewers (e.g., age, aggressiveness, perceptions of media realism, identification with aggressive characters) and their social environment (e.g., parental and family influences), as well as aspects of media content (e.g., perpetrator characteristics, degree of realism, justification of violence, depiction of the consequences of violence). The relative influence of these factors is not yet clear, but their importance is clear. Research on moderators not only enhances understanding of media violence and aggression, but also provides clues to potential avenues for preventive intervention. For example, the research points to the vital role of parents in supervising and influencing what their children see and do, and in helping them to interpret media violence in a healthy (or less harmful) way.

Finally, the existing empirical research on moderators suggests that no one is exempt from the deleterious effects of media violence; neither gender, nor nonaggressive personality, nor superior upbringing, nor higher social class, nor greater intelligence provides complete protection. Many youths who consume media violence will not be obviously influenced by it (e.g., will not rush out to commit violent crimes), but the psychological processes that can produce the effect operate in everyone, thereby putting all at some risk.

Media use and content

Recent surveys depict the abundant presence of electronic media in American homes, as well as the extensive presence of violence within the media landscape. They also document the expansion of opportunities for children's exposure to media violence at home through the proliferation of new media, including video games, music videos, and the Internet. Current psychological theory suggests that the interactive nature of many of these new media may lead to more powerful effects on children's behavior than are found with more passive media such as TV. However, research to test this hypothesis is not yet well developed. Although it is apparent from existing data that most youths are exposed to many hours of violent media each week, the patterns of usage for the newest media (e.g., video games, Internet) are likely changing so rapidly that estimates of violence exposure may be out of date by the time they are published. New and more extensive data on exposure are needed.

Interventions

Many efforts (e.g., media education, promotion of V-chips) to lessen the effects of media violence are under way, but almost none have been systematically studied. From a scientific public-health perspective, this preventive domain is largely uncharted territory. As noted in the *Report on Youth Violence* (U.S. Department of Health and Human Services, 2001), a powerful body of scientifically based knowledge about effective ways to prevent violence in youth is emerging. Although many of the preventive programs that have been implemented address a complex array of factors in the life of young people, few have addressed the role of media. The gap between these areas of research needs to be filled. What is clear is that reducing exposure to media violence will reduce aggression and violence in both the short term and the long term. What is less clear is what sorts of interventions will lead to a reduction in exposure, though current evidence suggests that counterattitudinal interventions and parental interventions are likely to reduce exposure, and general media-literacy interventions by themselves are unlikely to do so.

Implications

Unlike earlier federal research reports on media violence and youth (NIMH, 1982; U.S. Surgeon General's Scientific Advisory Committee on Television and Social Behavior, 1972), this overview was initiated within a broader examination of the causes and prevention of youth violence. This context is vital, and we urge readers to take a close look at that report (despite our misgivings about its treatment of media violence). It permits media violence to be seen as one part of the complex influences on the behavior of children and youth. And it suggests that multilayered solutions – including but not limited to solutions that address exposure to media violence – are needed to address the problem of aggressive and violent behavior in modern society. Media-violence exposure is only one risk factor underlying aggression and violence. It may be the least expensive risk factor to modify – it costs little to choose nonviolent forms of entertainment for oneself or one's children. However, the troubling truth is that violent media are entering the home and inviting active participation of even very young children – often with little parental supervision.

The cup of research knowledge about violence in the media is relatively full but not overflowing. It certainly supports sustained concern about media violence and sustained efforts to curb its adverse effects. It suggests that simply reducing children's exposure to violent media would be a positive step that would yield positive benefits. How best to approach the goal of reducing exposure to violent media is a question that will require additional research into intervention programs, as well as public policy debates.

Although at present, violence rates in the age group most prone to such behavior (i.e., early teens to mid 20s) appear to be leveling off somewhat, this recent trend should not be misinterpreted as a sign that concern with media violence is misplaced. As we have noted throughout this report, violence is a complex interpersonal phenomenon that occurs when a host of contributing factors converge at the right (or wrong) time and place. The large number of contributing factors points to the complexities of understanding social and psychological causation in a context of human development. The extant research literature clearly reveals that exposure to violent media plays an important causal role in violence in modern society.

Similarly, the fact that estimates of the size of the effect of media violence are typically in the small to moderate range should not mislead people into thinking that the overall impact of media violence on aggressive and violent behavior is small to moderate. Because of the large numbers of youth exposed to many hours of media violence, even a small effect can have extremely large consequences (Abelson, 1985; Rosenthal, 1986). Although a correlation of .20 between viewing media violence and aggressive behavior indicates that media violence may statistically account for only 4% of the variation in aggressive behavior, few other factors account for much more. A correlation of .20 can be said to represent a change in the odds of aggressive behavior from 50/50 to 60/40, which is not a trivial change (Rosenthal, 1986). Furthermore, the size of the media-violence effect is equal to or larger than the size of many medical effects that our society deems large, such as the effect of condom use on sexually transmitted HIV, the effect of passive smoking on lung cancer at work, and the effect of calcium intake on bone mass (see Bushman & Huesmann, 2001).

Despite limitations in current research knowledge, it is possible to develop a coherent public-health approach to violence prevention that builds upon what is known, even as attempts to learn more are under way. Clearly, even without all the pieces of the research puzzle in place, a troubling picture is emerging: A variety of violent media are entering the home and inviting the active participation of young children – often with little parental supervision. Although additional research to address unresolved questions is needed, it is clear that media violence is a causal risk factor that should be addressed in thoughtful ways.

Regardless of the attempts made to limit the amount of violence reaching American families, those families themselves are clearly critical in guiding what reaches their children. Whether by adopting V-chip technology for home TV programming, subscribing to voluntary violence screening by Internet providers, or simply monitoring closely children's use of TVs, computers, and video games, parents can reduce and shape their children's consumption of violent media. Communities – including schools, religious organizations, and parent-teacher organizations – can teach parents and children how to be better, healthier consumers of the media. Federal agencies can be more proactive in encouraging needed research, in sharing with the public the relevant findings of current research, in encouraging violence-prevention researchers to interact more with media researchers, and in creating networks for sharing solutions to social and public-health problems. Furthermore, as the media-violence landscape continues to change, parents will need better tools (e.g., more thorough and more simple computer and Internet screening tools) to aid them in the increasingly difficult task of monitoring and modifying their children's media habits.

Media use is often described in nutritional terms: People talk about "media consumption" and "a steady diet of violence." Implicitly, perhaps, they recognize that nourishing children's minds through the media is like nourishing their bodies. In both cases, from a public-health perspective, today's consumption patterns are far from optimal. And for many youths, they are clearly harmful. The challenge is to discover how to provide more nourishing fare.

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December 2, 2002

Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity

INDIANAPOLIS – Exposure to violent media may affect the brains of youths with aggressive tendencies differently than the brains of non-aggressive youths, according to research at the Indiana University School of Medicine.

The results of the study conducted by the Departments of Radiology and Psychiatry were released Monday, Dec. 2, at the 88th Scientific Assembly and Annual Meeting of the Radiological Society of North America in Chicago.

The brain activity of aggressive adolescents diagnosed with disruptive behavior disorders (DBD) is different from that of other adolescents when both groups viewed violent video games, as demonstrated by the study. Brain function was measured by functional MRI (Magnetic Resonance Imaging) scans.

"Initial evidence from the study demonstrates that adolescents with disruptive behavior disorders have different frontal lobe activation patterns than teens without the disorder," said principal investigator Vincent P. Mathews, M.D., professor of radiology and chief of neuroradiology at the IU School of Medicine. "In other words, fMRI scans show less brain activity in the frontal lobe while the youths with DBD watch violent video games. The frontal lobe is the area of the brain responsible for decision-making and behavior control, as well as attention and a variety of other cognitive functions."

"This is the first evidence that adolescents with aggressive, disruptive behavior disorders have brain activation patterns that are different from non-aggressive adolescents while watching video games," said William G. Kronenberger, Ph.D., associate professor of psychiatry and a co-investigator on the study.

Disruptive behavior disorders are separated into two behavioral disorders, one characterized by persistent rule breaking and resistance to the limits of authority. The other consists of significant violations of the basic rights of others and includes such actions as destruction of property, theft, truancy, human or animal cruelty and fire-setting. This study does not differentiate between the two.

The research, conducted over a 24-month period, had teens with DBD and teens without DBD watch a car racing video game that had excitement without violent content and a James Bond video game that had excitement and violent content. While watching the video games, the youths were scanned with fMRI to determine changes in brain activity.

The researchers also found that among subgroups of the non-aggressive adolescents there were differences in brain function dependent upon the amount of violent media exposure that they reported experiencing on television and in video games during the past year.

"There appears to be a difference in the way the brain responds depending on the amount of past violent media exposure through video games, movies and television," Dr. Mathews explained. "These early findings confirm there is a difference in the brain activation patterns of youths with DBD and those without when exposed to a specific stimulus. There also may be a relationship between violent media exposure and brain activity in normal subjects."

"These results indicate what part of the brain should be studied in future, more controlled research studies," said Dr. Kronenberger.

Other IU researchers involved with the study are Mark Lowe, Ph.D., Tie-Qiang Li, Ph.D., Yang Wang, M.D., and David Dunn, M.D.

Funding for this study was provided by the Center for Successful Parenting.

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UNITED STATES DISTRICT COURT
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Big Game Hunting: A Former Soldier and Expert on Killing Sets His Sights on Violent Video Games

By Ted Gregory, Chicago Tribune Staff Writer

In his black cowboy boots, jeans, and tweed sport coat over a denim shirt, Dave Grossman looks downright disarming. He laughs quickly and intensely and, when the situation calls for it, dips into a deep well of quips that reporters crave.

Dave Grossman also knows more about killing than just about anybody. And, in particular, virtual killing. What makes him newsworthy these days is his argument that ultraviolent video games are helping transform children into unflinching, deadly accurate killers. It's a point that elevates his profile above almost everyone else in the debate about media violence.

"So, these kids would send me death threats," Grossman said on a recent visit to Chicago. "It almost always goes like this: 'You say violent video games make kids violent. That's not true and it makes me so mad, I'm going to kill you.'" And Grossman started laughing that infectious, almost wild laugh that suits his wild, wide blue eyes so well.

His message clearly is gaining momentum. President Clinton last spring said Grossman bears listening to. He has been profiled on "60 Minutes." Illinois Atty. Gen. Jim Ryan and US senators are supporting his work to curb sales of violent video games. His speaking schedule is booked for eight months. As Grossman picks up speed, he poses a greater threat to the $6.1-billion-a-year video game industry.

Until his retirement in February 1998, Dave Grossman was Lt. Col. David Grossman, United States Army. As a teenager and as a young adult, he now says, he was violence prone. He enlisted in the Army in 1974. He rose through the ranks to training sergeant in the 82nd Airborne Division, then to infantry company commander, where he led soldiers patrolling the jungles of Panama before the US invasion in 1989.

Along the way, he earned a college degree with an emphasis in military history, then a master's in education. He taught psychology at West Point. He's a member of Mensa and the author of two books: "On Killing: The Psychological Cost of Learning to Kill in War and Society" and "Stop Teaching Our Kids to Kill: A Call to Action Against TV, Movie & Video Game Violence."

So, what you have in the framework of an Arkansas hayseed is a highly educated man who knows killing as thoroughly as literature professors know William Faulkner. It makes the experts uncomfortable.

For the last two years, Grossman has been traveling the country, teaching about killing, while leading an institution with the peculiar-sounding name, Killology Research Group.

He teaches cops, teachers, superintendents, and physicians. He talks to local Rotary Clubs and PTAs. He'll talk to anybody about it, sometimes for free, sometimes for his negotiable fee of $5,000 a day.

"I teach them what we know about killing," said Grossman, 43, during a recent stop in Chicago, "what enables killing, what our psychological responses to killing are. How we turn it on and off in our soldiers . . . and how we're doing the same thing to our kids."

In fact, a significant chunk of "Stop Teaching Our Kids to Kill," published last fall and co-authored by media consultant Gloria DeGaetano, is something of a treatise on the dangers of violent video games.

Essentially, Grossman starts with research that shows video games are addictive. Then, he argues that the "first-person shooter" games use "operant conditioning," a repetitive stimulus-response training (think flight simulators for pilots) that almost matches the military's method of desensitizing humans' aversion to killing other humans while it hones reflexes.

Grossman goes on to state that several military and law enforcement training simulators – the Army's Multipurpose Arcade Combat Simulator, Fire Arms

Training Simulator, used by law enforcement agencies – are more or less identical to violent video arcade games.

Then he cites the horrifying anecdotes of school shootings in Paducah, Ky., and Littleton, Colo. In both cases, and in other youth shootings, Grossman said, the shooters were avid video game players.

Beyond his military training and education, the compelling aspect of Grossman's theory is that you can almost see him as one of those vulnerable kids who might have spent thousands of hours playing Doom or Quake or any number of ultraviolent video games he now contends are dangerous.

Born in Frankfurt, Germany, Grossman was an "Army brat" whose family lived in North Dakota, South Dakota, Montana, Wyoming, and Nebraska – never in one place for more than 18 months. He brawled nearly everywhere he went and immersed himself in Zane Grey novels and science fiction.

"I just would never take anything off anybody," Grossman recalled, "and I didn't mind getting the daylights beaten out of me if I could hurt the guy bad enough that he'd hesitate to do it next time."

He said he was a C+ high school student who left early and worked on a wildcat oil rig in Nebraska for a few months before returning to high school to graduate. Then, he enlisted in the Army.

He got married, had three sons, and kept moving but stayed married. He entered Columbus College near

Ft. Benning, Ga., at night, and for his first college paper he wrote about how the military uses operant conditioning and denial defense mechanisms to enable killing. That started him studying killing, he said. He wrote "On Killing" en route to teach at West Point.

Then in 1994, he took a teaching job at Arkansas State University, in a town of about 46,000 people in the northeast corner of the state. A town named Jonesboro.

Four years later, two boys gunned down 15 people in a local middle school, killing five, and infamy descended upon Jonesboro. Grossman found himself called on to brief teachers and administrators on how to deal with the aftermath. The experience motivated him to write "Stop Teaching Our Kids To Kill," which he was working on when the Columbine High School shootings occurred a little more than one year later.

That effort served to illuminate his understanding of violence, Grossman said. But over the years his work also has forced him to come to grips with his failings as a parent.

"I blew it with my kids," Grossman said. "My oldest boy never lets me forget how I let him sit there and watch some movie, I think it was 'It.' They're up there in the Arctic and this monster's coming. My boy's about 5 years old and he's crying and he's crawled under the seat and I said, 'C'mon, knock it off. It's just a movie.' And, today, I realize that was shameful. I am truly ashamed of that. But, you know, people don't just one day wake up and say, 'Wow, I was a jerk!' It takes a while for you to sneak up on it and say, 'Wow, you know, I shouldn't have done that! I'm going to do a better job with my grand babies."

He's waiting for grandchildren and active in his local Baptist church with his wife, Jeanne – when he's home. He's on the road six days a week speaking against violence in the media.

But, for all the emotional and seemingly logical pull his arguments have, Grossman seems to lack universally accepted research that draws a direct correlation to violent video games and violent behavior in children.

Even those who believe Grossman is on the right track said the evidence is sparse.

"I think we're still at the if [sic] point," said Jeanne Funk, a psychologist at University of Toledo who has been studying the effect of video game violence on children and young adults for 10 years. "I believe that we will find that it is a factor, but I just don't believe we've found it yet."

She said her research indicates that "the effects are subtle, and some of the relationships seem to be more long term and built up over a period of time." She added that "it's premature to start enacting laws and take severe or drastic actions before we have more information."

Dan Snyder, a former Marine sergeant who designed training simulators for the military, said the commercial games actually teach bad training habits and are so lacking in context that they are nothing like military training. "If your real targets are sprites on a screen and you're handling a plastic pistol that shoots beams of light," Snyder said, "these games will make you ready."

And, those from the Interactive Digital Software Association, the leading organization representing video and computer game manufacturers, used even stronger language.

"The leap from taking animated characters out in a fantasy environment to the fact that these games translate into real world behavior involving real guns and shooting real people is something that nobody comes close to," said Doug Lowenstein, president of the association. He noted the Australian government's five-year study of computer games found "at best only weak and ambiguous evidence" that violent games bring violent behavior.

Many Grossman critics also argued that the games clearly are fantasy, that other factors, including dysfunctional parenting and children with delayed emotional and intellectual functioning, are more serious factors in youth violence. A few opponents said the violent games actually provide a healthy outlet for aggressions and a harmless way for adolescents to rebel.

Grossman maintains that most of the criticism is from media spin specialists whose observations amount to snipping at the fringes of his otherwise tightly woven principles.

"This concept of these things being fantasy is interesting," Grossman said, "because the Holy Grail of this industry is realism, seeking ever greater levels of realism. And, when the child spends more waking hours playing the game than he does anything else, what becomes fantasy and what becomes reality?

"People tell me, 'you can't tell me that a 6-year-old in Flint, Mich., couldn't tell the difference between fantasy and reality.'" Grossman said, recalling the Feb. 29 shooting in which a 6-year-old boy shot and killed a classmate. "And I say, 'Well, you know, how many adults do you know who think professional wrestling is real?"

The thing that both sides agree on is that children should not be playing the graphically violent games. In fact the association six years ago formed the Entertainment Software Rating Board, which places warning stickers on game packages.

The problem is getting retailers to enforce those ratings guidelines. Illinois Atty. Gen. Jim Ryan is leading the effort to pressure store owners. In the spring, he called for stores to stop selling the most graphic video games to children.

That call prompted Montgomery Ward and Sears Roebuck and Co. to pull the most graphic games from their shelves. Legislative action is pending in Tennessee and Indianapolis. And, on May 24, nine US senators, Democrats and Republicans, sent a letter to Target, Best Buy, Circuit City and K-Mart asking them to follow Ryan's recommendation to stop selling violent video games to children. Grossman believes more will follow. And, he will keep traveling and preaching the gospel of violent video vigilance wherever he is asked to speak. He said he's booked for the next nine months. And, whenever the grind starts to get to him, he recalls his days serving Uncle Sam.

"If I were in the Army," he said, laughing, "they'd be treating me a lot worse than this."

No. 08-1448

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

ARNOLD SCHWARZENEGGER, Governor of the
State of California, and EDMUND G. BROWN Jr.,
Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

**On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit**

◆

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UNITED STATES DISTRICT COURT
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American Academy of Pediatrics • American Academy of Child & Adolescent Psychiatry American Psychological Association • American Medical Association American Academy of Family Physicians • American Psychiatric Association

Joint Statement on the Impact of Entertainment Violence on Children Congressional Public Health Summit July 26, 2000

We, the undersigned, represent the public health community. As with any community, there exists a diversity of viewpoints – but with many matters, there is also consensus. Although a wide variety of viewpoints on the import and impact of entertainment violence on children may exist outside the public health community, within it, there is a strong consensus on many of the effects on children's health, well-being and development.

Television, movies, music, and interactive games are powerful learning tools, and highly influential media. The average American child spends as much as 28 hours a week watching television, and typically at least an hour a day playing video games or surfing the Internet. Several more hours each week are spent watching movies and videos, and listening to music.

These media can, and often are, used to instruct, encourage, and even inspire. But when these entertainment media showcase violence – and particularly in a context which glamorizes or trivializes it – the lessons learned can be destructive.

There are some in the entertainment industry who maintain that 1) violent programming is harmless because no studies exist that prove a connection between violent entertainment and aggressive behavior in children, and 2) young people know that television, movies, and video games are simply fantasy. Unfortunately, they are wrong on both counts.

At this time, well over 1000 studies – including reports from the Surgeon General's office, the National Institute of Mental Health, and numerous studies conducted by leading figures within our medical and public health organizations – our own members – point overwhelmingly to a causal connection between media violence and aggressive behavior in some children. The conclusion of the public health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children.

Its effects are measurable and long-lasting. Moreover, prolonged viewing of media violence can lead to emotional desensitization toward violence in real life.

The effect of entertainment violence on children is complex and variable. Some children will be affected more than others. But while duration, intensity, and extent of the impact may vary, there are several measurable negative effects of children's exposure to violent entertainment. These effects take several forms.

- Children who see a lot of violence are more likely to view violence as an effective way of settling conflicts. Children exposed to violence are more likely to assume that acts of violence are acceptable behavior.
- Viewing violence can lead to emotional desensitization towards violence in real life. It can decrease the likelihood that one will take action on behalf of a victim when violence occurs.
- Entertainment violence feeds a perception that the world is a violent and mean place. Viewing violence increases fear of becoming a victim of violence, with a resultant increase in self-protective behaviors and a mistrust of others.
- Viewing violence may lead to real life violence. Children exposed to violent programming at a young age have a higher tendency for violent and aggressive behavior later in life than children who are not so exposed.

Although less research has been done on the impact of violent interactive entertainment (video games and other interactive media) on young people, preliminary studies indicate that the negative impact may be significantly more severe than that wrought by television, movies, or music. More study is needed in this area, and we urge that resources and attention be directed to this field,

We in no way mean to imply that entertainment violence is the sole, or even necessarily the most important factor contributing to youth aggression, anti-social attitudes, and violence. Family breakdown, peer influences, the availability of weapons, and numerous other factors may all contribute to these problems. Nor are we advocating restrictions on creative activity. The purpose of this document is descriptive, not prescriptive: we seek to lay out a clear picture of the pathological effects of entertainment violence. But we do hope that by articulating and releasing the consensus of the public health community, we may encourage greater public and parental awareness of the harms of violent entertainment, and encourage a more honest dialogue about what can be done to enhance the health and well-being of America's children.

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Violent Video Games as Exemplary Teachers

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Abstract

A great deal is known about how to teach effectively. We describe several of the "best practices" of learning and instruction, and show how violent video games use those practices. Three hypotheses are advanced and tested. First, curricula that teach the same underlying concepts across contexts and domains have the best likelihood of transfer. Second, learning is more likely to be long-term if practice is distributed across time, in contrast to massed practice. Third, systematic physiological and emotional responsiveness can improve learning, and may lead to what some call video game "addiction." Data with elementary school children, middle school children, and college students support each of these hypotheses. Finally, we describe what educators can learn from the successful instructional practices of video games.

"The great thing, then, in all education, is to *make our nervous system our ally instead of our enemy . . . we must make automatic and habitual, as early as possible, as many useful actions as we can*, and guard against the growing into ways that are likely to be disadvantageous to us, as we should guard against the plague." William James (*The Principles of Psychology*, p 122)

Suppose you wanted to teach so that all of the following instructional goals were demonstrable:

- Steady progress in mastering the required knowledge and skills established for the curriculum at successive levels of difficulty.

- Multiple ways of solving problems were practiced to avoid the "one best way" mentality and thus increase the probability of transferring those acquired skills to different settings.

- Students who originally learn to a high standard and then voluntarily distribute their practice day after day, thus providing overlearning of the knowledge and skills to the point of automaticity.

- Instructional activities which provide an adrenaline rush that truly excites the learners, even to the point of seeming addicted to their studies.

- Students' rewards for achieving success at each level is the opportunity to use more advanced tools and higher-level skills to attempt even more difficult material in the curriculum.

- Popularity is gained by achieving success in the curriculum, with students proud to be seen as high achievers and/or aspire to be like the highest achieving models.

- Success is available to all – no child need be left behind – because previous academic record, standardized test scores, or socio-economic status have been rendered of negligible importance.

"This is an educational system to die for," most teachers and parents might exclaim. And yet, it exists and few of us – educators or parents – have more than a cursory awareness of it. The educational system of which we speak is video games, particularly violent video games.

Yes, there is evidence for all of the above accomplishments of the violent video game curricula that modern societies have accepted as mainstream education/entertainment for their children. It is our purpose in this report to show two things: first, how these games use all the best-practice principles of learning and instruction to captivate our children in the above ways and, second, what we might learn from the successes of the video game curricula that might transfer to our official scholastic curricula.

Playing the Game

Consider the following first-person account of playing a state-of-the-art violent game, *Manhunt* (from the team who also created the top-selling *Grand Theft Auto* series). You have been captured by a demented film-maker who drops you into a gang-infested slum. While the gangs think they are hunting you, they don't know the real plot: that you are hunting them, while the director records each act of murder on film. Since you are outnumbered and could easily be mobbed, you cannot just jump in and fight everyone. Rather, you must be silent and patient, tracking your prey so that you can strike from behind. One reviewer's account continues (Grossman, 2003):

> *Manhunt* is an exceptionally violent game – garrote a villain with a sharp wire, and a finely-rendered mist of blood sprays from his

> severed carotid. Interestingly, the game's premise feels like an attempt to help you sidestep any twinges of conscience you may feel at your own sadism – hey it's that sick director guy who's making you do this! Not that this is any excuse, but if you can make your peace with the carnage, the game play is a bracing change from the usual button-mashing slugfests: *Manhunt*'s thrills aren't in the action; they're in the taut, panting breaks in between, the up slope of the roller coaster, the pause just before the kill. It's a game that rewards thought and patience -- which is, of course, a virtue. You might mention that when you tell your kids it will be a while before they're old enough to play it. (p. 105)

Despite the final sentence caveat for parents, few can be so naive as to believe that such games are only being played by adults. (In addition, it is worth debating whether such games are healthy for adults, given that the evidence suggests adults are as affected as children, but that is an issue for discussion elsewhere.) Among elementary and middle-school populations, girls play video games for an average of about 5.5 hours/week and boys average 13 hours/week (Anderson, Gentile, & Buckley, under review; D. Gentile, Lynch, Linder, & Walsh, 2004). In a nationally representative sample of parents, D. Gentile & Walsh (2002) found that young children aged two to seven play an average of 43 minutes/day, and Woodard and Gridina (2000) reported that preschoolers aged two to five play an average of 28 minutes/day. Comparing these data with previous studies shows that the amount of time spent playing video games is increasing, but not at the expense of television viewing which has remained stable (D. Gentile & Anderson, 2003). Although most children play video games, the average age of video game players has steadily risen to age 29, demonstrating that many children continue playing into adulthood (Entertainment Software Association, 2004).

Data about children's amount of time spent playing video games are content-independent and, like the data on television watching, are correlated with many other risk factors for health such as obesity (Berkey et al., 2000; Subrahmanyam et al., 2000; Vandewater, Shim, & Caplovitz, 2004) as well for poorer academic performance (e.g., Anderson & Dill, 2000; Anderson et al., under review; D. Gentile et al., 2004; Harris & Williams, 1985). When video games play is analyzed for violent content, additional risk factors are observed for aggressive behavior and desensitization to violence (again in parallel with the data on viewing violent television; e.g., Anderson et al., 2003; Anderson et al., under review; D. Gentile, 2003; D. Gentile et al., 2004).

As the entertainment industry and reviewers regularly point out, viewer discretion and parental monitoring are advised. But if one examines the natural developmental progression of how people get hooked into video games, one can understand how parents who play games have habituated to the violence over time and may therefore not be able to make well-informed judgments. Moreover, most parents do not know that as many as 89% of video games include violent content (Children Now, 2001), with about half including violence against others culminating in serious injury or death (Children Now, 2001; Dietz, 1998; Dill, Gentile, Richter, & Dill, in press). By inventing educational and entertaining games for preschoolers and then slowly but surely including more and more need for "viewer discretion," the industry trains people to be ready – emotionally, cognitively, and behaviorally – for games like *Manhunt*. Most consumers are not conscious of the learning principles underlying this progression, but the developers and marketers probably are, if only by realizing that they need to keep creating games that outdo previous games in order to capture a larger share of the market.

Video Games as Exemplary Teachers

Although the research has become clearer that violent video games can cause people to have more aggressive thoughts, feelings, and behaviors (e.g., Anderson & Bushman, 2001; Anderson, 2004), our goal here is to praise video games for their effective use of psychological principles of learning, cognition, and instruction. Video games are excellent teachers along several dimensions.

First, the games have clear objectives, often set at multiple difficulty levels to adapt to the prior knowledge and skills of each learner. Second, and related to the first, the pace of the activities can be adjusted for faster or slower learners, novices or experts, to truly deliver differentiated instruction. Inventing ways of matching objectives and pace to the capabilities of learners is no small accomplishment, since it is central to most if not all models of instruction from Glaser's (1962) and Hunter's (1982) specification of objectives at the correct level of difficulty to Carroll's (1963; 1989) concept of aptitude as time needed to learn to an established standard of mastery. Moreover, there is empirical evidence for many memory tasks that the average learning rate of the top third of any class is at least three times faster than the bottom third, with the fastest and slowest learners in the same class differing by even larger multiples (e.g., J.R. Gentile & Lalley, 2003; J.R. Gentile, Voelkl, Mt. Pleasant, & Monaco, 1995).

Third, learning is active with practice, feedback, and more practice to the point of mastery. This is in contrast to much classroom learning in which teachers lecture on or demonstrate a concept or skill, then take questions, if any, and move on to cover other material. But as is well known in the development of skills such as sports or music, learners have questions only after attempting to *do* what was demonstrated. Feedback and corrections operate only then, which in classrooms often happens only much later (e.g., on a unit test) and thus is too late to be of much help. Practice to the point of mastery – that is, to a higher rather than lower standard of accuracy – is predictive of how much is remembered later, as well as how much savings will occur in relearning at a later date (Bahrick, 1984; Ebbinghaus, 1885; J. R. Gentile & Lalley, 2003; Semb & Ellis, 1994; Willingham, 2004).

Fourth, once mastered, the knowledge and skills are practiced further to provide *overlearning*. This helps the knowledge and skills become automatized and consolidated in memory, so that the learner can begin to focus consciously on comprehending or applying new information. In other words, the novice is beginning to process and organize new information with more expertise (Chase & Simon, 1973; Chi, Glaser, & Rees, 1982). Bloom (1986) illustrated this process for developing reading ability. Only after knowledge of letters and sounds are automatized can the budding reader recognize whole words. Only after achieving a number of "sight words" can the reader focus on the meaning of the sentences.

Fifth, mastery of an objective is reinforced both extrinsically (with points, totals, better weapons, more money, more health, etc.) and intrinsically (by advancement to higher levels of complexity and the self-esteem that accompanies increased competence). This last point is perhaps underappreciated by educators who have been told to praise often so as to increase children's self-esteem. But a wide range of theorists agree that perceived self-efficacy arises from competence or efficacy (Bandura, 1977), and lack of competence leads to learned helplessness (Seligman, 1975). Likewise, mastering the essential tasks of school results in solving the identity crisis of that age ("I am what I can do"), while nonmastery leads to feelings of inferiority (Erikson, 1963; 1968; 1980). Vygotsky (1962) also speaks of the "rupture," "turning point," or "struggle" that is involved in maturation and which is resolved by mastering society's developmental tasks. Finally, Piaget's central motivational construct is "cognitive conflict," which arises when there is a discrepancy between a child's perception of an event and disconfirming evidence (e.g., in the conservation of liquid's tasks; Piaget & Inhelder, 1941). This cognitive conflict establishes a tension (between assimilation and accommodation in the equilibrium mechanism), which produces the ultimate teachable moment. That is, the child recognizes what he or she does not understand and is now ready to learn it. Accomplishing this difficult task earns self-esteem, self-efficacy, and indeed a new identity (when, for example, a non-reader is now a reader).

Sixth, and related to the fifth, video games are well-sequenced in levels of increasing difficulty, complexity or pace, with success at subsequent levels contingent upon competencies mastered at previous levels. Consider the example of the popular first-person-shooter game[1] *Halo*. For the first hour of play,

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[1] A "first-person-shooter" game is one in which the action is seen from the point of view of the main character. Usually one sees as if one were "in" the game, so when you hold a gun in front of you, you see the barrel of the weapon and sometimes the hand holding it. The "shooter" part of the definition should be self-evident. This type of game can be distinguished from other violent games in which the action is seen from a distance (a

(Continued on following page)

the game not only sets up the story (you are a warrior in a science fiction future, in which you are saving humans from attacking aliens), but also teaches you how to play. The game characters and spaceship computer teach you systematically which control buttons to use to look around, to walk, to crouch, to jump, to pick up weapons, to reload, etc. This is necessary partly because of the complexity of the game controller (13 buttons, joysticks, pads, and triggers). But after teaching a specific skill, the game immediately gives you a chance to practice it. The game then gives immediate feedback, including adapting to your specific skill using the controller. For example, the first author had difficulty with the joystick in looking up and down – it was more "natural" to pull back to look up and push forward to look down (as one would in an airplane). This was contrary to the default settings on the game. The game noticed this, and inverted the joystick controls to fit the author's predilection, and asked if this was better. Over the course of the first hour of play, a series of skills are taught systematically, with feedback and opportunities for practice, until one has learned several skills necessary for successful game play (such as how to use the information shown on the display, when to reload, and how to sneak up behind one's prey for silent kills).

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third-person perspective). First-person-shooters have become so popular, they are now known by that title as a distinct genre of game.

This is the embodiment of the *spiral curriculum* (Bruner, 1960), in which each learning objective has identifiable prerequisites which, when mastered, facilitate transfer to the next level of difficulty. Thus, learners come to see mastery of an objective not as the completion of a learning objective, or "benchmark" in current educational lingo (as J.R. Gentile & Lalley quipped, "The easiest way to achieve benchmarks . . . is to sit too long on a bench;" 2003, p. 133). Rather, mastery is properly conceived as the beginning: you are now ready to use that knowledge or skill in some meaningful way on the road toward expertise.

Seventh, because video games are adaptable in level of difficulty and pace, they encourage a close-to-optimal combination of massed and distributed practice. Initial attempts at the game, no matter how abysmal, receive feedback or a score immediately and few can resist trying again and again until they begin to show progress. Such massed practice eventually begins to produce diminishing returns (when a plateau is reached or fatigue sets in). However, the repetition has begun to develop both physical and mental skills and habits (e.g., eye-hand coordination, knowledge of what is required, etc.) on parts of the task, but always in the context of the whole sequence. Each subsequent encounter with the game provides the memory benefits of distributed practice – namely, relearning anything that was forgotten; providing new cues for memory, interpreting new information or examples with what is already in memory and reorganizing the memory accordingly. This combination of massed practice to build sufficient initial mastery to play the game, followed by distributed practice over days or weeks to prevent forgetting is optimal for the development of automatized structures of knowledge, or schemas (e.g., Ellis & Hunt, 1993; J. R. Anderson, 1983; Glaser, 1984).

Eighth, knowledge or skills learned and practiced in multiple ways, on several problems, or in a variety of contexts are more likely to transfer than when practiced in only one way on a single kind of problem, or the same context. One reason for this, in Bransford, Brown, and Cocking's words, is that "with multiple contexts, students are more likely to abstract the relevant features of concepts and develop a more flexible representation of knowledge" (1999, p. 66). Multiple contexts also provide a variety of cues for recall rather than memory having to rely on availability of cues from the original context or problem situation, what Tulving and Thompson (1973) called the encoding specificity principle, and Brown, Collins, & Duguid (1989) called situated cognition.

Multiple ways of solving problems or performing skills also avoid the mental sets or rigidities that naturally arise from success with a particular method (e.g., Luchins, 1942). To avoid the aversion so many Americans have to the metric system, for example, students need to learn to measure in multiple ways – feet and meters, pounds and grams – and then practice using them in math, science, and social problems in school and in the rest of life. Learning multiple ways of representing division of fractions, rather than simply memorizing the "invert and multiply" algorithm is more likely to lead to greater comprehension than the same amount of time spent simply practicing the algorithm. Violent video games are set in many contexts. Some are set in historical times, some are modern, some are very realistic, some are cartoonish, some are futuristic, etc. Some portray hand-to-hand combat, some use small arms, some use military weapons, some use laser guns, and one popular game even uses a golf club as a lethal weapon. The common feature among all of these different games and contexts is that violence is the solution to whatever problem the gamer/student faces. This is exactly the best way to teach so that the student will be able to transfer the underlying concept to new situations.

In addition to the above well-known principles of educational instruction, video game producers also use time-honored "tricks" that have been well-known by the media and advertisers. For example, Kubey & Csikszentmihalyi (2002) describe how the "orienting response," first described by Ivan Pavlov, has been used to increase attention to television ads. Visual or auditory changes, such as edits that change the angle of camera view or sound effects, make us look at them. Increasing the frequency of edits has been shown to improve recognition memory (up to a point . . . there is an optimal level). Furthermore, provocative scenes of sex and violence not only capture one's attention, but also supply vivid visual images, which are known to create better memory than the same information provided verbally (e.g., Paivio & Begg, 1981). Active participation in aggressive or provocative scenes in video games increases physiological arousal (e.g., Ballard & Weist, 1996; Gwinup, Haw, & Elias, 1983; Lynch, 1994; Lynch, 1999; Murphy, Alpert, & Walker, 1992; Segal & Dietz, 1991). This physiological responding in the context of "playing fun games" is likely to condition one's emotions to such activities, not unlike other addictive "highs." Indeed, there is some research demonstrating that the brain releases dopamine in response to playing violent video games (Koepp et al., 1998). Dopaminergic neurotransmission may also be involved in learning, reinforcement of behavior, attention, and sensorimotor integration as well (Smith, McEvoy, & Gevins, 1999). Because the difficulty of the games, which varies as one progresses, guarantees that reinforcement will be intermittent, not continuous, they take full advantage of the addictive nature of intermittent reinforcement (e.g., slot machines). While research in this area is still young, there is evidence that video games may indeed be "addictive" for some people, perhaps as many as 15% to 20% of players (Griffiths & Hunt, 1998; Hauge & Gentile, 2003; Yee, 2001).

Finally, these games are marketed widely as something everyone must have, thus making skill in such games an important social currency for popularity among children (especially among boys).

The General Aggression Model and Research Hypotheses

Although the major thrust of the present article is to discuss how educational theory can be used to predict violent video game effects, it is important to note that the studies described below were designed under the theoretical framework of the General Aggression Model (GAM; see Anderson & Carnagey, 2004; Anderson, Gentile, & Buckley, under review; Anderson & Huesmann, 2003 for detailed descriptions). A brief description is necessary here to help understand the choice of variables measured.

Although the GAM has a single aggressive episode as its central focus, it also can be used to predict long-term learning of aggression. Figure 1 displays many of the personality variables believed to be influenced by an individual's ongoing bio-social interactions. What is learned across time depends on the experiences an individual has, including interactions with biological factors (such as biological predispositions to learn certain types of associations through rewards and punishments).

Violent video games may affect individuals by having influences on their aggressive beliefs, schemata, scripts, and by desensitizing them to aggression. One type of schema that has received a good amount of empirical support is called a hostile attribution bias (see Crick & Dodge, 1994, and Crick et al., 1999 for reviews). Having a hostile attribution bias is basically a filter in which a person perceives the outside world in aggressive terms. In response to an ambiguous situation (e.g., one gets bumped in the hallway), the person with a hostile attribution bias assumes that the bump had hostile intent instead of assuming it was accidental. Once children begin to have this bias, they are much more likely to begin to respond aggressively to perceived provocations (Crick, 1995; Crick et al., 1999). As children begin to see the world in aggressive terms and therefore begin to act more aggressively, their personality changes over time to become more aggressive and hostile. These changes will result in increased opportunities for aggressive behavior, because of both changes in the individual's personality variables and changes in the situations the individual is likely to get involved in as others react to the individual. Thus these experiences and changes over time act as distal processes and causes of later aggressive encounters. Once in a specific social situation where aggressive behaviors are a potential outcome, proximal influences such as the individual's affect, cognitions, and physiological arousal will be relevant factors partially determining whether the individual will react aggressively (see Anderson & Bushman, 2002 and Anderson & Huesmann, 2003 for further details).

Several testable hypotheses can be formed from the educational principles described above, three of which will be addressed here. First, curricula that teach the same underlying concepts across contexts and domains have the best likelihood of transfer. Therefore, students who play multiple violent video games are more likely to learn aggressive cognitions and behaviors than students who generally play fewer violent video games. Second, learning is more likely to be long-term if practice is distributed across time, in contrast to massed practice (our students know this as "cramming"). Therefore, students who play violent video games frequently across time are more likely to learn aggressive cognitions and behaviors than students who play less frequently even if they play for equal amounts of time. Third, students who become "addicted" to video games are also likely to be more affected by them, perhaps because of the enhanced learning created by conditioned emotional/physiological responding to them. Therefore, students who are addicted to video games are more likely to learn aggressive cognitions and behaviors than students who are not addicted to video games.

Methods

Three sets of data were collected, one with elementary school children in grades 3 to 5, one with young adolescents in grades 8 and 9, and one with late adolescents enrolled in a large Midwestern university. For the elementary school sample, 430 3rd (N = 119), 4th (N = 119), and 5th grade (N = 192) students participated in the study. Students were recruited from five Minnesota schools, including one suburban private school (N = 138), three suburban public schools (N = 265), and one rural public school (N = 27). The sample was almost evenly divided between boys and girls, with 49% of the children being female (51% male). Participants ranged in age from 7 to 11 years of age ($M = 9.65$; $SD = 1.03$). Eighty-six percent of the respondents classified their ethnic background as Caucasian (which is representative of the region).

For the young adolescent sample, 607 8th-grade ($N = 496$) and 9th-grade ($N = 111$) students participated in the study. Students were recruited from four schools, including one urban private school ($N = 61$), two suburban public schools ($N = 350$), and one rural public school ($N = 196$). Students were recruited from mandatory classes within their schools. The mean age of respondents was 14 years ($SD = 0.64$). Fifty-two percent of respondents were male. Eighty-seven percent of the respondents classified themselves as Caucasian.

For the late adolescent college sample, 1,441 students participated in the study. Students voluntarily participated in mass testing sessions, and earned extra credit points for their introductory psychology classes. Forty-five percent of respondents were male. Eighty-nine percent of the respondents classified themselves as Caucasian, which is representative of the region and university populations.

Elementary Sample Procedure

Data were collected between November 2000 and June 2003. Consent levels were at least 70% for all classrooms, each of which was a mandatory class (i.e., not elective) to reduce the likelihood of selection bias.

Participants completed three confidential surveys, and teachers completed one survey for each participating child (described below). Each participant (including teachers) completed each of these surveys at two points in time during the school year. The first administration (Time 1) occurred between November and February of the academic year. The second administration (Time 2) occurred between April and May of the year. The time lag between the two administrations was therefore between two and six months. Additional details of the procedure and instruments are available in Anderson, Gentile, & Buckley (under review).

Assessment of Social Adjustment

Peer Assessment of Social Adjustment. A peer nomination instrument was used to assess children's social adjustment, and was adapted from a peer nomination instrument that has been used in several previous studies of children's social behavior (e.g. Crick, 1995; Crick & Grotpeter, 1995). Only the physical aggression scale (2 items) will be discussed here. Coefficient alpha was computed and was found to be satisfactory ($\alpha = .92$).

Teacher Ratings of Aggressive Behavior. Teachers completed a survey assessing children's aggression and prosocial behavior (D. Gentile et al., 2004). For the purposes of this study, only the subscales reflecting physical aggression were used in subsequent analyses. Coefficient alpha was computed and found to be satisfactory ($\alpha = .92$).

Self-Report of Fights. One item asked how many physical fights the participants had been in during the school year.

Assessment of Media Habits

Violent video game exposure. Similar to Anderson and Dill's (2000) approach, participants were asked to name their three favorite video or computer games. For each named video game, participants were asked to rate how frequently they played on a 5-point scale (1 = "Almost never," 5 = "Almost every day"). Participants were also asked to rate how violent they consider each media product to be on a 4-point scale (1 = "Not at all violent," 4 = "Very violent"). Data were also collected regarding TV and movies, which will not be reported here.

Weekly amount of video game play. Participants reported the amount of time they spent playing video games during different time periods on weekdays and weekends. Weekly amounts were calculated from these responses.

Assessment of hostile attribution bias/social information processing.

The final survey was an adapted version of a hostile attribution survey that has been reliably used in past research (e.g., Crick, 1995; Nelson & Crick, 1999). This instrument is composed of stories, each describing an instance of provocation in which the intent of the provocateur is ambiguous. Participants answer two questions following each story. The first presents four possible reasons for the peer's behavior, two of which indicate hostile intent and two reflect benign intent. The second question asks whether the provocateur(s) intended to be mean or not. This survey assesses the participant's perception of hostility from the outside world. Based on procedures delineated by Fitzgerald and Asher (1987), the children's responses to the attribution assessments were summed within and across the stories for each provocation type. Coefficient alpha was computed and found to be satisfactory ($\alpha = .85$).

Composite measures. A composite measure of physical aggression was created because we had multiple informants. Peer ratings of physical aggression, teacher ratings of physical aggression, and self-reports of physical fights were standardized and averaged to create a physical aggression composite. Coefficient alpha was computed and found to be satisfactory at both points in time (Time 1 $\alpha = .87$, Time 2 $\alpha = .89$).

Young Adolescent Sample Procedure

Data were collected in schools between 4 April and 2 May 2000. Consent levels were greater than 90% for all classrooms, each of which was a mandatory class. Each participant completed an anonymous survey that gathered descriptive data about students' habits, attitudes, and knowledge about video games, as well as school performance, demographic data, and a measure of trait hostility. Additional details of the procedure and instruments are available in D. Gentile et al. (2004).

Variables

Violent video game exposure. Similar to the approach described for elementary school students, participants were asked to name their three favorite video games. For each named game, participants were asked to rate how frequently they played the game on a 7-point Likert scale (1 = "rarely", 7 = "often"). Participants were also asked to rate how violent each game is on a 7-point Likert scale (1 = "little or no violence", 7 = "extremely violent").

Participants were also asked to indicate how much violence they prefer to have in their video games on a 10-point scale (1 = "no violence", 10 = "extreme violence"), and how much violence they prefer to have in their video games compared to 2-3 years ago on a 5-point scale (1 = "a lot less", 5 = "a lot more").

Amount of video game play. Participants were asked the amount of time they spent playing games during different time periods on weekdays and weekends. Weekly amount of game playing was calculated from these responses.

Trait hostility. Hostility was measured using the Cook & Medley Hostility Scale (Cook & Medley, 1954), a commonly used reliable instrument. Because the items for the Cook & Medley are taken from the MMPI, some were inappropriate for young adolescents. The instrument was modified by deleting seven items and changing the wording of some items to make them easier for 8th graders to understand. These modifications were based on those made by Matthews and colleagues (e.g., Woodall & Matthews, 1993).

Physical fights. Participants were asked if they had been in a physical fight in the last year. This question yielded a dichotomous response (yes/no).

Video game addiction. Participants were asked seven items assessing video game addiction. These items were modifications of the DSM-IV criteria for pathological gambling (similar to those used by Fisher, 1994 and Griffiths & Hunt, 1998). Similar to the DSM criteria, participants were considered to be "addicted" if they answered yes to at least four of the items.

Late Adolescent Sample Procedure

Data were collected in Fall 2003. Each participant completed an anonymous survey that gathered descriptive data about students' video game habits, demographic data, self-reported aggressive behaviors, and the Buss-Perry measure of aggression.

Variables

Violent video game exposure. Identical to the approach described for young adolescents.

Amount of video game play. Participants were asked the amount of time they spent playing games during different time periods on weekdays and weekends. Weekly amount of game playing was calculated from these responses.

Trait anger, trait hostility, and overall physical aggression. Students completed the Buss-Perry Aggression Questionnaire (Buss & Perry, 1992), a commonly used reliable instrument. Three subscales are reported here: the trait anger, trait hostility, and overall physical aggression subscales (reliability coefficients, α = .80, .84, & .84, respectively).

Video game addiction. Similar to the approach described for young adolescents, except participants were only able to answer "yes" and "no;" "sometimes" was removed to make the scale more similar to the DSM gambling addiction items. A subset of 463 students received the addiction items.

Proactive and reactive physical aggression. Students completed the Social Interaction Survey (Linder, Crick, & Collins, 2002), which measures self-reported use of physical aggression on a 7-point Likert scale (verbally-anchored "not at all true" to "very true"). It measures both proactive use of aggression (e.g., "I have threatened to physically harm other people in order to control them," α = .68) and reactive aggression (e.g., "When someone has angered or provoked me in some way, I have reacted by hitting that person," $\alpha = .80$).

Results

Because multiple datasets are discussed here, the results are organized by hypothesis.

Hypothesis 1: Playing multiple violent video games will transfer better to aggressive cognitions and behaviors than playing fewer.

In two samples, participants reported their three favorite video games, how often they played each, and how violent each is. Under the logic of Hypothesis 1, if students play multiple violent games (which have different contexts, but share the underlying lesson that violence is an optimal solution to challenges), then those students should show more aggressive cognitions and behaviors, regardless of how much they play. The sample was restricted to only those participants who named three games so that amount of violence would not be confounded with the number of different games played. Because participants rated each game on the amount of violent content, the three violence ratings were averaged; thus, participants who play three violent games would have higher means than participants who play non-violent games or a mix of violent and non-violent games. Table 1 shows the raw correlations between the average violence scores and several measures of aggressive cognitions, personality, and behavior. The pattern of correlations show that students who play several violent games are more likely than students who play no violent games or a mix of violent and non-violent games (1) to have a hostile attribution bias, (2) to have a hostile personality, and (3) to be physically aggressive.

Because of the multicollinearity among hostility, sex, video game violence exposure, and aggressive behavior, simple correlations are not the best statistics to test this hypothesis. In order to provide a stricter test, logistic regressions were conducted on physical fights in which several variables were controlled. For the 8th/9th graders, logistic regressions were conducted in which sex, race, age, hostile attribution bias, and total weekly amount of time playing video games were statistically controlled. Even controlling for each of those variables, the amount of rated violence in the games explained a significant amount of variance in physical fights ($B = .229$, Wald = 7.7, $df = 1$, $p = .006$). This is important because it separates the *content* of the games played from the *amount* of games played. Similar results were found with college students. Controlling for sex, race, and total amount of time playing games, the amount of violence in the games played explained a significant amount of variance in overall physical aggression ($\beta = .094$, $t = 2.5$ $p = .012$).

For the 3rd-5th graders, logistic regressions were conducted in which sex, race, age, amount of lag between the two measurements, weekly amount of time playing video games, hostile attribution bias, and Time 1 physical fights. Again, controlling for each of those variables, the amount of violence in video games explained a significant amount of variance in physical fights (B = .594, Wald = 7.6, *df* = 1, *p* = .006). This result is particularly significant, because it shows that students who played several violent video games *changed* to become more aggressive across a school year, even controlling for several relevant variables.

Similar results are obtained when looking across time at changes in hostile attribution bias: controlling for sex, race, age, lag, weekly amount of video game play, and Time 1 hostile attribution bias, Time 1 amount of violence explains a significant amount of variance in Time 2 hostile attribution bias (ß = .156, *p* = .003). Again, similar results are obtained looking at changes in overall aggressive behavior (self-reported, peer-nominated, and teacher-nominated). Figure 2 displays a path analysis testing a model of causality (the model also includes race, age, and school lag as exogenous variables). It is hypothesized that children who play multiple violent video games are more likely to learn the underlying concepts of aggression as normative, and will therefore begin to see the world more in aggressive terms (hostile attribution bias), which will then result in more aggressive behaviors. As can be seen in Figure 2, both prior aggression and playing multiple violent games at Time 1 predict hostile attribution bias (here shown as a mean of Time 1 and Time 2), which in turn predicts aggressive behavior at Time 2. In addition to this mediated pathway, both prior aggression and playing multiple violent games *directly* influence Time 2 aggressive behavior (and being a boy marginally increases the risk for Time 2 aggressive behavior).

Hypothesis 2: More regular and distributed practice with violent video games will increase learning of aggressive cognitions and behaviors.

In the 8th/9th grade and the college samples, participants reported how often they play video games on a scale ranging from "less than once a month" to "almost every day." Participants also reported for how many years they had been playing video games. A distributed practice variable was created by multiplying the frequency of play by the number of years of play. Under the logic of Hypothesis 2, if students play violent games (but not non-violent games) repeatedly over long periods of time, then those students should show more aggressive cognitions and behaviors. Again, the sample was restricted to only those participants who named three games, and the sample was split at the violence exposure scale midpoint (forming a low violence gaming group and a high violence gaming group). It was expected that students who played games more regularly for more years would have more aggressive cognitions and behaviors, but only for the high violence gaming group.

For the young adolescent sample, multiple regressions were conducted on hostile attribution bias, trait hostility, arguments with teachers, and physical fights. Distributed practice significantly predicted hostile attribution bias for the high violence gaming group, but not for the low violence gaming group, even controlling for sex, grade, and race (see Table 2). Distributed practice also significantly predicted arguments with teachers for both the high and low violence gaming groups, after controlling for sex, grade, and race. There were trends toward distributed practice predicting trait hostility and physical fights for the high violence gaming group, but they were non-significant.

For the college sample, multiple regressions were conducted on self-reported proactive and reactive physical aggression, and the anger, hostility, and physical aggression subscales of the Buss-Perry Hostility Inventory. Distributed practice significantly predicted trait anger, proactive physical aggression, reactive physical aggression, and general physical aggression for the high violence gaming group, but not for the low violence gaming group, even controlling for sex and race (see Table 3). There was a trend toward distributed practice predicting trait hostility ($\beta = .14$, $p = .12$) for the high violence gaming group, but it was non-significant.

Hypothesis 3: "Addiction" to video games will lead to greater learning of aggressive cognitions and behaviors.

In the 8th/9th grade and college samples, participants responded to the video game addiction items. Fifteen percent of the young adolescent sample and five percent of the college sample answered "yes" to four or more of the addiction items, and were classified as "addicted." A clearly non-addicted group was also created by selecting participants who responded "no" to at least six of the items and "sometimes" to a maximum of one item ($N = 265$). For the purposes of these analyses, all other participants were excluded. Under the logic of Hypothesis 3, if students are addicted to games (and hence are likely to have been physiologically and/or emotionally conditioned by them), then those students should show more aggressive cognitions and behaviors.[2]

A series of t-tests were run, comparing addicted and non-addicted students. As can be seen in Tables 4 and 5, addicted students spent more time playing video games ($M = 21.6$ & 18.4 hours/week for 8th/9th grade and college students, respectively) than non-addicted students ($M = 4.5$ & 5.6, respectively). Hypothesis 3 rests on the assumption that being "addicted" would mean that students are more physiologically and emotionally responsive to video games. To our knowledge, this assumption has never previously been tested. The young adolescent sample was given a list of emotional adjectives, and asked whether they usually feel each of them after playing video games. As shown in Table 3, addicted students were more likely than non-addicted students to feel excited, energized, frustrated, cheerful, positive or negative, and less likely than non-addicted students to feel bored. Addicted students also were more likely to say they prefer more violence in their video games (*M* = 7.5 on a 10-point scale, where 10 was verbally anchored as "extreme violence," compared to *M* = 4.6 for the non-addicted students). In addition, when asked whether they like more or less violence in their video games compared to 2 or 3 years ago, addicted students were most likely to say they like a "lot more" violence compared to 2 or 3 years ago (whereas non-addicted students were most likely to say "same amount").

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[2] Although the mechanisms of a hypothesized addiction pathway (physiological, emotional, or behavioral) have not yet been well described or tested, we assume that if video game "addiction" can be said to occur, it is not specific to playing only violent games.

As predicted, addicted 8th/9th grade students were more likely to have a hostile attribution bias and to score higher on trait hostility (Table 4). Addicted students also were more likely to get into arguments with teachers, as well as to be involved in physical fights.

As predicted, addicted college students were more likely to be physically aggressive overall, as well as to use physical aggression both proactively and reactively (Table 5). Addicted students also were more likely to have high anger and hostility scores, although both of these tests were only marginally significant.

Although not germane to this particular set of analyses, it is interesting to note that addicted

8th/9th grade students were more likely than non-addicted students to be male (86% male and 40% male, respectively; $x^2 = 42.9$, $df = 1$, $p < .001$), and also reported receiving poorer grades in school (M = B- and B+, respectively; $t = .5.0$, $df = 337$, $p < .001$, $d = .639$).

Discussion

When considered in the light of what is known to be the "best practices" of education, violent video games appear to be exemplary teachers. Each of our hypotheses was supported. Playing multiple violent video games, even after controlling for total amount of time playing all video games, appears to lead to better transfer of aggressive cognitions and behaviors than playing a mix of violent and non-violent games (or obviously playing only non-violent games). Because we had longitudinal data, we were able to show that students who play multiple violent games actually changed to have a greater hostile attribution bias, which also increased their aggressive behaviors over prior levels (Figure 2). Playing multiple violent games also increased aggressive behaviors directly, in addition to the mediated pathway through hostile attribution bias.

The second hypothesis, that distributed practice over time playing violent video games will lead to greater aggressive cognitions and behaviors was largely supported. Controlling for the amount of violence in video games played by 8th/9th graders, playing more frequently during a given week over multiple years was correlated with greater hostile attribution bias and arguments with teachers. This held true after controlling for sex, race, and grade. There were trends in the hypothesized direction for hostile personality and physical fights, but these were non-significant. Among the college sample, after controlling for sex, race, and the amount of violence in video games played, distributed practice significantly predicted trait anger, proactive physical aggression, reactive physical aggression, and general physical aggression (Table 3). There was also a non-significant trend toward distributed practice predicting trait hostility.

It is likely that there is a great deal of measurement error when attempting to retroactively measure distributed practice. Furthermore, the analyses conducted here also assume that the current levels of violent video game exposure has also remained constant over time, which is likely to be an incorrect assumption. Given that both of these measurement problems would serve to make it unlikely to find any significant effects, it is perhaps surprising that significant effects were found for both aggressive cognition variables and antisocial/aggressive behavior variables.

The third hypothesis, that the potential emotional and physiological conditioning that may come with video game addiction would be related to increased aggressive cognitions and behaviors, was also supported. When video game "addiction" is defined similarly to the DSM-IV criteria for gambling addiction, approximately 15% of young adolescent players can be defined as addicted, and that addiction is significantly related to emotional responses to video games, hostile attribution bias, trait hostility, arguments with teachers, and physical fights. Although a smaller percentage of college students were defined as addicted (5%), such classification was significantly related to preferences for violent games, and the use of proactive and reactive physical aggression.

It is important to remember that the data presented here are correlational, and we cannot conclude that playing violent video games *caused* the changes in aggressive cognition and behavior. However, because we also have longitudinal data, it is clear that our data are not solely showing that aggressive kids play violent video games. Even controlling for prior aggressive cognition and behavior, playing multiple violent video games adds a significant amount of predictive power to predicting which children will become *more* aggressive (e.g., Figure 2). Violent video games appear to be excellent teachers.

How Can Schools Compete with That?

The simple answer is that schools cannot. It is difficult to imagine a lesson on multiplication of fractions being so vivid or arousing to create an addiction to math or be a means to widespread popularity. If math induces conditioned emotions, they are more likely to be anxiety or learned helplessness than euphoria (Dweck & Licht, 1980; J.R. Gentile & Monaco, 1986). Moreover, it is socially acceptable to admit or feign incompetence in math ("I was never good with math" or "I hate math"), while their opposites ("I love math") have little currency for popularity. In contrast, saying "I love this song" or "I am good at this video game" is likely to increase one's popularity, while admitting incompetence or dislike for pop songs or video games may carry a social penalty (e.g., Christenson & Roberts, 1999). To the extent that this is true, it indicts our society for a value system out of balance, but few teachers need to be reminded of that.

Given that the schools cannot – and should not – adopt all of the titillating tactics of the popular media, what can educators learn from the successful *instructional* practices of violent video games? The answer is: (1) Teach fewer concepts, but require that students master and then overlearn them; (2) connect those concepts (via a spiral curriculum) to past and future learnings via continual review and practice, as well as reminders of the connections; (3) reinforce (extrinsically with grades and intrinsically with perceived self-efficacy) increasing levels of competence or automaticity, depth of understanding, and analytic or creative applications of these concepts; and (4) use technology where appropriate to provide practice toward automaticity in a game-like atmosphere, including points for increasing levels of competence.

Most teachers feel that they have too little time to cover too much material. The movement toward higher standards, ironically, only exacerbates the problem by list after list of mostly unrelated objectives. Mastery of an objective – that is, achieving a benchmark – means you are done with that objective when it should instead be considered the beginning (J. R. Gentile & Lalley, 2003). Initial learnings, after all, will be forgotten even when a high standard of 80% to 100% correct is required if for no other reason than interference from previous and subsequent learning objectives (Hulse, Egeth, & Deese, 1980). Lower passing standards assure even less recall. Therefore, what is necessary is an instructional plan to require that knowledge and skills initially mastered will be overlearned, optimally in a variety of new applications and while adding new skills or knowledge incrementally (J. R. Gentile & Lalley, 2003; Willingham, 2004). There are many successful ways to do this, of course, but "covering the curriculum" to survey all of the concepts, historical periods, or formulas in a standard curriculum is not one of them.

As implied above, students must be encouraged – indeed, required – to find connections between previous and current concepts. This must be explicit because teaching for understanding and transfer requires that such connections be made (via a spiral curriculum or scaffolding; e.g., Bruner, 1960 or Glaser, 1984, respectively). It is also necessary because our current practices do not engender trust. Consider that when students ask us "Why do we have to learn this stuff?" we usually answer because you'll need it for something coming later. But when later comes, we often say, "Well, forget what you learned before; we don't do it that way here." J.R. Gentile and Lalley (2003) give the example of addition and subtraction of fractions, which is almost universally illustrated using pies and cakes. When it comes to multiplication and division of fractions, and students ask how dividing Joe's three-quarters of a pie by Mary's fifth of a pie leads to more pie, most teachers give a "Well, forget about pies" answer. The teachers say this because they don't know how to use pies to demonstrate the solution, but notice the message about trust that the students are receiving. Of course, our favorite example is teachers themselves, who upon taking their first job hear from their new colleagues, "Forget all that stuff they taught you in that ivory tower – we do it differently here in the real world of schools."

As much as the current zeitgeist rails against behaviorists and the evils of extrinsic motivation, schools are almost all about extrinsic reinforcers and punishers. Consider the gushy praise that many elementary students receive for mediocre work or for finally paying attention (after much inattention), or the points that are docked for work that is correct but a day late. What the students learn is that they can get by with little effort and that schedules are more important than competence. These are violations of behaviorist principles (e.g., reinforcement contingencies) that the designers of video games do not make. As noted earlier, self-esteem or self-efficacy is something that students must earn by increasing competence on a task that is perceived by them as important and that is just beyond their previous level of competence. Giving points for such skill, then, helps the learner self-monitor and does not undermine intrinsic motivation. Rather, the extrinsic reinforcer (points) is used in service of intrinsic motivation (competence and perceived self-efficacy). Indeed, recently a computer game designed to classically condition positive feedback has been shown to increase implicit self-esteem and lower aggression (Baccus, Baldwin, & Packer, 2004).

For all of the talk about technology in schools, we have not begun to tap its potential broadly and systematically. Eventually, some hope, we will have smart technology which "thinks" along with the student, adapting instruction to each student's current skills, mistakes, etc. Whether such a vision would be a dream or a nightmare, we now have the technology to use personal computers to provide knowledge and skill building: original learning to a high level, distributed practice with feedback, overlearning to automaticity. And yet, too many educators use the pejorative label "training" for such skill-building, which they distinguish from "educating" or "reflective practice." But skills and reflections are not mutually exclusive; moreover, if one were necessary for the other, it is a good bet that for most human endeavors basic knowledge and skills are primary. If our educational software is not yet sufficient to teach and reinforce the knowledge and skills we want our curricula to impart, then perhaps we need to hire some violent video game makers to develop such software.

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Table 1

Correlations between mean violence of 3 favorite games and aggressive cognitions, personality, and behavior

Violence	3rd-5th Graders Average Violence of Games at Time 1	8th-9th Graders Average Violence of Games	College Students Average of Games
Hostile Attribution Bias	.13*	.11*	. . .
Trait Hostility	. . .	.17***	.12**
Arguments with Teachers	. . .	.14*	. . .
Physical Fights (Time 1)	.21***	.28***	. . .
Physical Fights (Time 2)	.29***	. . .	. . .
Time 1 Peer-Nominated Physical Aggression	.27***	. . .	. . .
Time 2 Peer-Nominated Physical Aggression	.33***	. . .	. . .
Time 1 Teacher-Nominated Physical Aggression	.29***	. . .	. . .
Time 2 Teacher-Nominated Physical Aggression	.36***	. . .	. . .
Time 1 Overall Physical Aggression Index	.33***	. . .	. . .
Time 2 Overall Physical Aggression Index	.41***	. . .	. . .
Buss-Perry Trait Anger	. . .	. . .	.10**
Buss-Perry Overall Physical Aggression	. . .	. . .	.26***
Proactive Physical Aggression	. . .	. . .	.16***
Reactive Physical Aggression	. . .	. . .	.24***

Note 1: * $p < .05$, ** $p < .01$, *** $p < .001$.
Note 2: . . . = Not measured in this population

Table 2: Regression Coefficients Predicting Hostile Attribution Bias and Arguments with Teachers (8th/9th Grade)

Violence Group	Variable	Beta	t	Significance
Low Violence Gaming Group: Predicting Hostile Attribution Bias				
	Sex	-.041	-.586	.559
	Grade	.059	.884	.378
	Race	-.012	-.182	.855
	Distributed Practice	.016	.227	.821
High Violence Gaming Group: Predicting Hostile Attribution Bias				
	Sex	.025	.376	.708
	Grade	-.031	-.459	.647
	Race	.032	.479	.632
	Distributed Practice	.176	2.566	.011
Low Violence Gaming Group: Predicting Arguments with Teachers				
	Sex	-.124	-1.527	.129
	Grade	.075	.983	.327
	Race	-.038	-.502	.617
	Distributed Practice	.237	2.928	.004
High Violence Gaming Group: Predicting Arguments with Teachers				
	Sex	.014	.198	.843
	Grade	.178	2.489	.014
	Race	.175	2.451	.015
	Distributed Practice	.239	3.299	.001

Table 3: Regression Coefficients Predicting Anger and Physical Aggression (College Students)

Violence Group	Variable	Beta	t	Significance
Low Violence Gaming Group: Predicting Trait Anger				
	Sex	.069	1.511	.132
	Race	-.104	-1.905	.057
	Distributed Practice	.098	1.794	.073
High Violence Gaming Group: Predicting Trait Anger				
	Sex	.069	.865	.389
	Race	-.016	-.190	.850
	Distributed Practice	.255	2.985	.003
Low Violence Gaming Group: Predicting Proactive Physical Aggression				
	Sex	.074	1.638	.102
	Race	-.226	-4.149	.000
	Distributed Practice	.023	.426	.670
High Violence Gaming Group: Predicting Proactive Physical Aggression				
	Sex	-.015	-.183	.855
	Race	-.010	-.119	.906
	Distributed Practice	.269	3.160	.002

Low Violence Gaming Group: Predicting Reactive Physical Aggression				
	Sex	.102	2.283	.023
	Race	-.264	-4.954	.000
	Distributed Practice	.074	1.392	.165
High Violence Gaming Group: Predicting Reactive Physical Aggression				
	Sex	.034	.424	.672
	Race	-.130	-1.535	.127
	Distributed Practice	.225	2.650	.009
Low Violence Gaming Group: Predicting Overall Physical Aggression				
	Sex	.139	3.335	.001
	Race	-.372	-7.483	.000
	Distributed Practice	.081	1.636	.103
High Violence Gaming Group: Predicting Overall Physical Aggression				
	Sex	-.022	-.274	.784
	Race	-.162	-1.905	.059
	Distributed Practice	.184	2.163	.032

Table 4: *t*-tests comparing "addicted" and "non-addicted" students (8th/9th graders)

Variable		*t*	*df*	*p value*	*Cohen's d*
	Weekly amount of video game play	-13.2	341	.000	-1.681
Post-play emotional response					
	I usually feel EXCITED after playing video games	-5.6	348	.000	-0.694
	I usually feel BORED after playing video games	2.6	348	.010	0.324
	I usually feel ENERGIZED after playing video games	-4.2	348	.000	-0.521
	I usually feel RELAXED after playing video games	-1.0	348	.301	-0.129
	I usually feel FRUSTRATED after playing video games	-2.0	348	.048	-0.248
	I usually feel CHEERFUL after playing video games	-3.7	348	.000	-0.459
	I usually feel POSITIVE after playing video games	-2.2	348	.031	-0.270
	I usually feel NEGATIVE after playing video games	-3.0	348	.003	-0.376
Preference for violent games					
	How much violence do you like to have in your VGs	-9.1	344	.000	-1.138
	Compared to 2 to 3 years ago, how much violence do you like to have in your VGs	-5.3	257	.000	-0.728
Aggressive cognitions					
	Hostile Attribution Bias	-4.1	347	.000	-0.516
	Trait Hostility	-7.3	340	.000	-0.926
Anti-social/aggressive behaviors					
	Arguments with teachers	-3.4	257	.001	-0.466
	Physical fights	-4.4	340	.000	-0.554

Table 5. *t*-tests comparing "addicted" and "non-addicted" students (college students)

Variable		*t*	*df*	*p value*	*Cohen's d*
	Weekly amount of video game play	-4.9	198	.001	1.464
Preference for violent games					
	How much violence do you like to have in your VGs	-2.0	195	.042	-0.609
	Compared to 2 to 3 years ago, how much violence do you like to have in your VGs	-2.2	197	.032	-0.531
Aggressive cognitions					
	Trait Anger	-1.7	198	.093	-0.503
	Trait Hostility	-1.7	198	.085	-0.515
Aggressive behaviors					
	Proactive physical aggression	-3.1	197	.003	-0.934
	Reactive physical aggression	-3.0	197	.002	-0.900
	Overall physical aggression	-2.2	198	.026	-0.668

Figure 1. The General Aggression Model: Developmental Processes

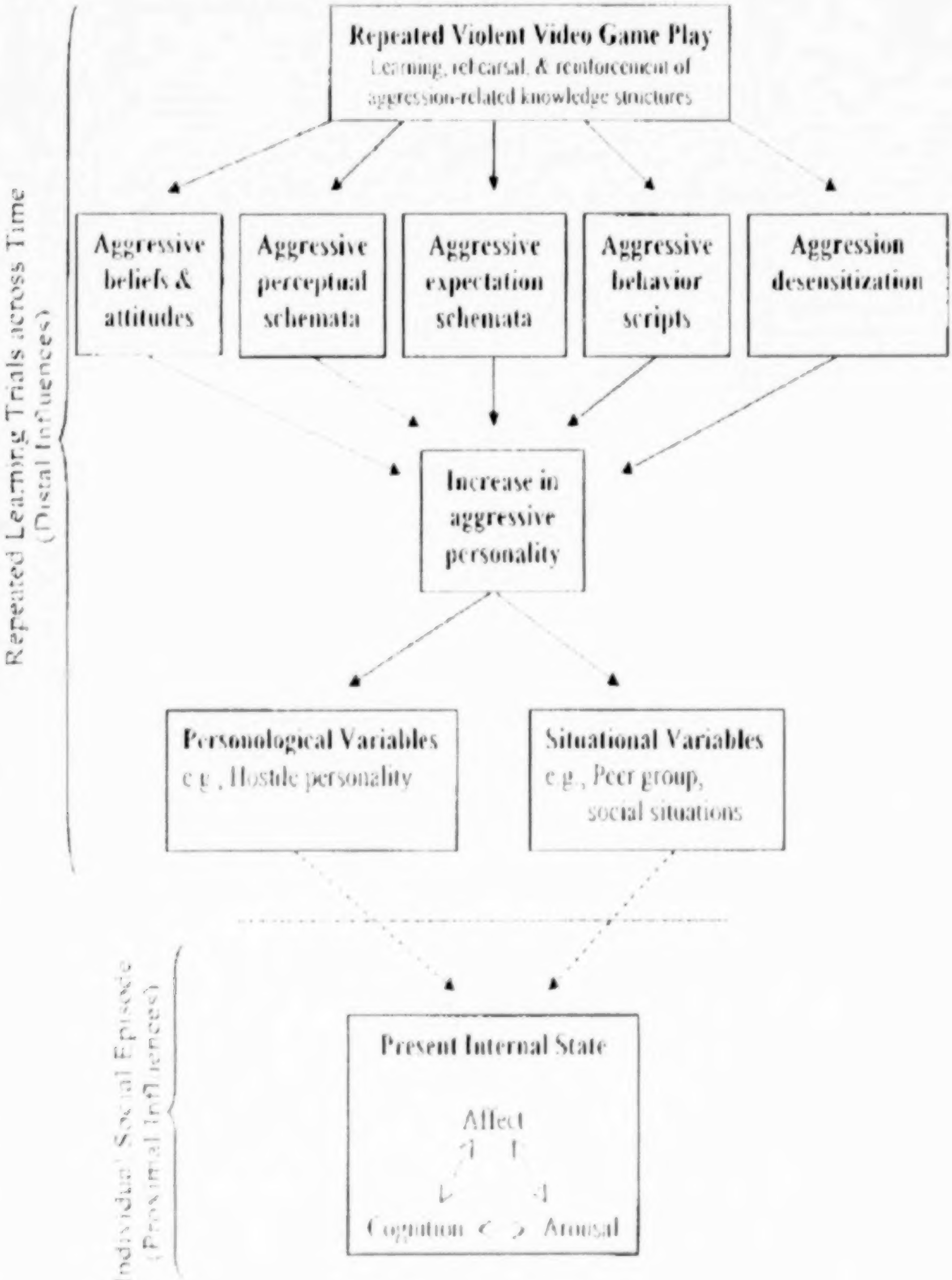
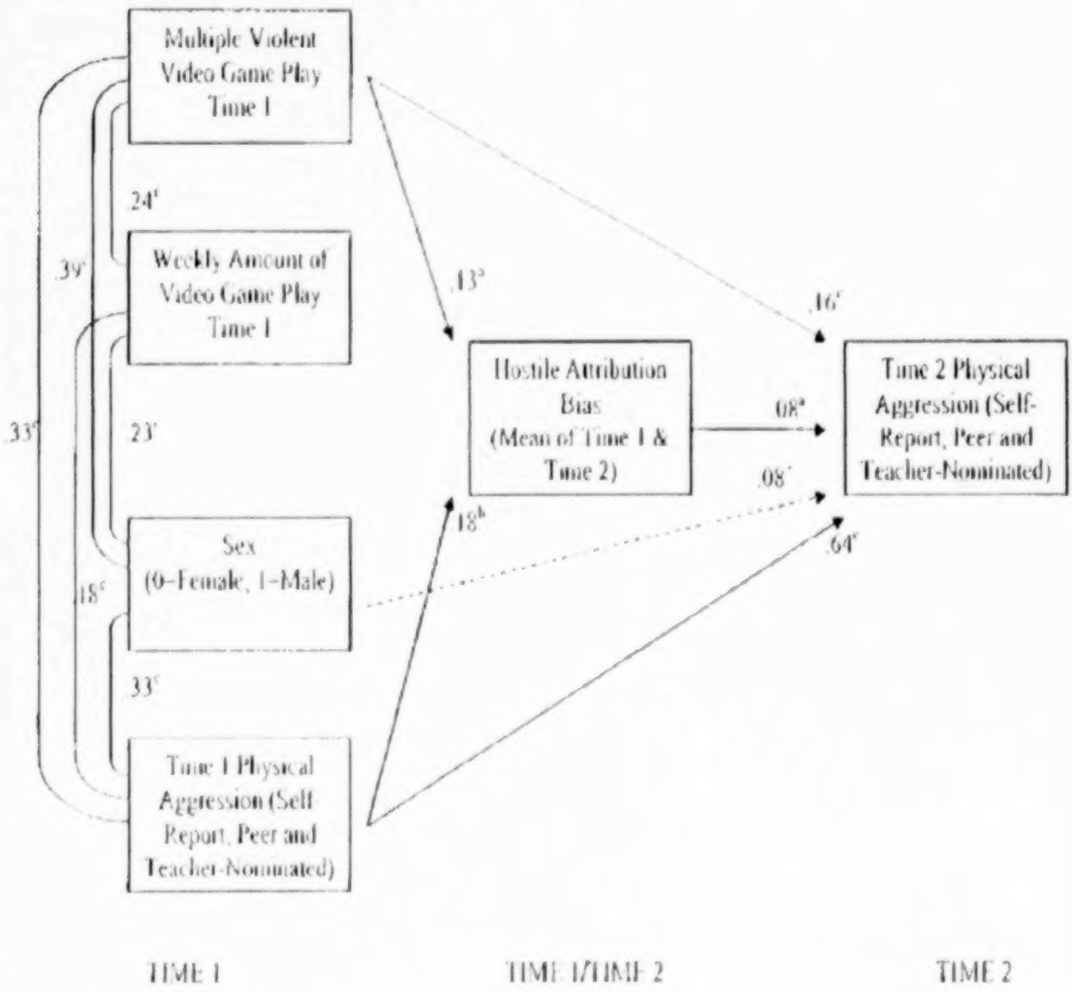

Repeated Violent Video Game Play
Learning, rehearsal, & reinforcement of aggression-related knowledge structures
Aggressive beliefs & attitudes
Aggressive perceptual schemata
Aggressive expectation schemata
Aggressive behavior scripts
Aggression desensitization
Increase in aggressive personality
Personological Variables
e.g., Hostile personality
Situational Variables
e.g., Peer group, social situations
Present Internal State
Affect
Cognition
Arousal
Repeated Learning Trials across Time
(Distal Influences)
Individual Social Episode
(Proximal Influences)

Figure 2. Longitudinal Path Analysis Demonstrating that Playing Multiple Violent Games Leads to Greater Physically Aggressive Behavior, Controlling for Prior Aggressive Behavior, Sex, and Total Amount of Game Play (3rd-5th graders)


Multiple Violent Video Game Play Time 1
Weekly Amount of Video Game Play Time 1
Sex (0=Female, 1=Male)
Time 1 Physical Aggression (Self Report, Peer and Teacher-Nominated)
Hostile Attribution Bias (Mean of Time 1 & Time 2)
Time 2 Physical Aggression (Self-Report, Peer and Teacher-Nominated)
.24^c
.39^c
.33^c
.23^c
.18^c
.33^c
.13^a
.16^c
.08^a
.08^†
.18^b
.64^c
TIME 1
TIME 1/TIME 2
TIME 2

$^{\dagger}p < .10$, $^{a}p < .05$, $^{b}p < .01$, $^{c}p < .001$

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Playing with Kids' Minds?

http://www.medicine.indiana.edu/iu_medicine/03_spring/articles/kidsMinds.html

Media watchdogs have long argued that exposure to violence on television, and in movies and video games affects children's behavior. That theory has received considerable support in behavioral research, but very little research has examined the impact of violent media on the brain. Now a recent study at the IU School of Medicine shows there are measurable differences in the brain patterns of adolescents while playing violent video games.

What the researchers found was a difference in brain activity between youths with diagnosed behavior disorders and normal adolescents when exposed to violent videos.

The departments of Radiology and Psychiatry used functional neuroimaging, a technology that is leading to more accurate methods of understanding mental problems and, hopefully, will lead to major advances in treatment. Neuroimaging is currently used to study such disorders as Parkinson and Alzheimer diseases and multiple sclerosis.

IUSM researchers hope that in the near future it will provide more definitive information in the diagnosis and treatment of such mental health disorders as depression, schizophrenia and bipolar disease. They also are optimistic that the technology will reveal secrets previously hidden in the minds of individuals.

"This study serves as a good first step in our ability to identify the relationship between violent media exposure and brain function," says William Kronenberger, PhD, associate professor of psychiatry and study co-investigator. "I hope that future studies will get us closer to being able to assess the cause-and-effect relationship between exposure to violent TV and video games and neural activity."

Using functional Magnetic Resonance Imaging (fMRI) to measure brain function, the IU researchers found that there was less activity in critical portions of the brains of the group previously diagnosed with disruptive behavior disorders (DBD).

Initial evidence demonstrates that adolescents with DBD have different frontal lobe activation patterns than teens without the disorder, with the fMRI scans showing less brain activity in the frontal lobe while the youths with DBD watch violent video games.

The frontal lobe is the area of the brain responsible for decision-making and behavior control, as well as attention and a variety of other cognitive functions.

"This is the first evidence that adolescents with aggressive, disruptive behavior disorders have brain activation patterns that are different from non-aggressive adolescents while watching video games," says Dr. Kronenberger.

Some might interpret this information as proof that violent media exposure causes changes in brain functioning, but what it really indicates is that more studies are needed, Dr. Kronenberger notes.

Those studies, supported by the Center for Successful Parenting, are planned, including one that will look at brain functioning and the emotional responses of adolescents with different levels of aggressive behavior and different exposures to media violence.

The original study involved thirty-eight teens – nineteen with no history of significant behavioral problems and nineteen with DBD. The healthy teens, who were in the control group, had no history of violence. However, the DBD participants had experienced violent episodes in the six months prior to the study. Both groups, who were selected from the local public schools, were matched for age, gender and other factors to make them as comparable as possible.

DBD can be separated into two behavioral disorders. One group is characterized by persistent rule breaking and resistance to the limits of authority. The other consists of significant violations of the basic rights of others and includes such actions as destruction of property, theft, truancy, human or animal cruelty and fire setting. The study did not differentiate between the two.

In this study, conducted over a two-year period, teens with DBD and teens without DBD watched a car racing video game that had excitement without violent content and a James Bond video game that had excitement and moderately violent content. While watching the video games, the youths were scanned with fMRI to determine changes in brain activity.

The youths were not actually playing the video game because of the limitations imposed by the MRI equipment, but they did have the feeling of participation since they pushed a response button each time they thought the video character should take action. All of the youths in the study had some degree of prior exposure to video games.

In addition to determining that exposure to violent videos affects the brains of these two groups differently, the researchers found something else they believe deserves more study. They found that among subgroups of the non-aggressive adolescents there were differences in brain function related to the amount of violent media exposure the teens reported experiencing on television and in video games during the past year.

"There appears to be a relationship between the way the brain responds to experiencing video violence and the amount of past exposure to violent video games, movies and television," says Dr. Kronenberger, who worked with principal investigator and neuroradiologist Vince P. Matthews, MD, on the study.

These early findings confirm there is a difference in the brain activation patterns of youths with DBD and those without when exposed to a specific stimulus. There also may be a relationship between past history of violent media exposure and brain activity in normal subjects. These results indicate what part of the brain should be studied in future, more controlled research studies, researchers add.

Other IU researchers involved with the study are Mark Lowe, PhD, Tie-Qiang Li, PhD, Yang Wang, MD, and David Dunn, MD.

Indiana School of Medicine, Spring 2003

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Press Releases

Violent Video Games Trigger Unusual Brain Activity in Aggressive Adolescents

Released: December 2, 2002

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At A Glance

- Adolescents with disruptive behavior disorders (DBD) have different brain structure and brain activation patterns than nonaggressive adolescents.
- When watching violent video games, aggressive adolescents had less brain activation than the nonaggressive control group.
- Normal adolescents previously exposed to greater amounts of violent media also exhibited differences in brain function.
- Adolescents with DBD showed abnormal development of the brain's frontal lobes.

CHICAGO – Aggressive adolescents diagnosed with disruptive behavior disorders (DBD) use their brains differently than nonaggressive adolescents when watching violent video games, and the variation could be attributed to differences in actual brain structure.

according to early results of two studies being presented at the 88th Scientific Assembly and Annual Meeting of the Radiological Society of North America (RSNA). These are the first studies to look at the brains of aggressive adolescents with DBD.

"We have preliminary evidence demonstrating that adolescents with DBD have different brain structure and brain activation patterns than nonaggressive adolescents," said co-author Vincent P. Mathews, M.D., professor of radiology and chief of neuroradiology at Indiana University School of Medicine in Indianapolis.

Disruptive behavior disorders are a group of significant behavioral problems that affect children and adolescents. The problems include aggressive disorders such as oppositional defiant disorder (ODD) which is characterized by hostility, hyperactivity, impulsiveness, defiance of authority and verbal aggression; and conduct disorder – which is characterized by cruelty to animals and humans, physical violence, sexual aggression, substance abuse, weapons use and other antisocial behaviors.

An estimated 5 percent to 10 percent of children have ODD and 4 percent of adolescents between the ages of 13 and 16 are diagnosed with conduct disorder.

Both research reports are from a two year study of aggressive adolescents with DBD compared with normal adolescents. The researchers are primarily interested in frontal lobe function, because the frontal lobes are involved in emotional control, attention, response inhibition and a variety of other cognitive functions.

Brain Activation and Violent Video Games

"This is the first evidence that adolescents with aggressive, disruptive behavior disorders have brain activation patterns that are different from non-aggressive adolescents," said Dr. Mathews.

Using functional magnetic resonance imaging (fMRI), the researchers evaluated brain activation patterns in response to stimuli from violent video games and exciting but nonviolent video games to compare the aggressive adolescents with the control group.

The researchers found different patterns and amounts of brain activation in the DBD group while the group viewed a violent video game versus a nonviolent video game. Aggressive adolescents have less activation in the frontal lobes as well as less overall brain activation.

The researchers also found that among subgroups of the nonaggressive adolescents there were differences in brain function dependent upon the amount of previous violent media exposure. Control subjects with high violent media exposure had different brain activation patterns than control subjects with low violent media exposure. "There may actually be a difference in the way the brain responds depending on the amount of past violent media exposure through video games, movies and television," Dr. Mathews explained.

The study participants, 19 adolescents who met the diagnostic criteria for conduct disorder or ODD and 19 age-matched normal control subjects, viewed clips from two different types of video games. The brain activation patterns elicited by a car race game (excitement without violence) and a James Bond video game (violence) were measured by fMRI for comparison.

Dr. Mathews suggested that fMRI may eventually play a role in gauging the effects of psychiatric or psychological treatment of aggressive adolescents. "The next step is evaluating treatment. We will look at the interventional effects to determine if they have changed the way the brain functions. It may be that the brain will normalize after treatment," Dr. Mathews said.

Disruptive Behavior Disorders Associated with Irregular Frontal Lobe Structure

Early results in another study component indicate there are biological differences between adolescents with DBD and those without.

Twenty-nine subjects - 11 who were diagnosed with disruptive behavior disorders and 18 age-matched, normal control subjects – underwent magnetic resonance diffusion tensor imaging (DTI) to map the white matter structural integrity and connections between different parts of their brains.

The researchers found that adolescents with DBD had abnormal development of the white matter in the brain's frontal lobes.

"Potentially, the structural differences we found in the brains of the adolescents diagnosed with disruptive behavior disorders could account for their behavior problems. This may be part of the explanation as to why we see differences in activation through fMRI and also differences in behavior in society," Dr. Mathews said.

Co-authors of the violent media exposure presentation are lead author Yang Wang, M.D., Mark J. Lowe, Ph.D., Joseph T. Lurito, M.D., Ph.D., Mario Dzemidzic, Ph.D., William G. Kronenberger, Ph.D., David Dunn, M.D., and Michael D. Phillips, M.D.

Co-authors of the frontal lobe structure presentation are lead author Tie-Qiang Li, Ph.D., Yang Wang, Ph.D., William G. Kronenberger, Ph.D., and David Dunn, M.D.

The RSNA is an association of more than 33,000 radiologists, radiation oncologists and physicists in medicine dedicated to education and research in the science of radiology. The Society's headquarters are located at 820 Jorie Blvd., Oak Brook, Ill. 60523-2251.

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Using functional magnetic resonance imaging (fMRI), researchers evaluated brain activation patterns in response to stimuli from violent video games to compare aggressive adolescents with a control group of nonaggressive adolescents. Aggressive adolescents with Disruptive Behavior Disorder have less activation in the frontal lobes (bottom images) than the control group (top images).

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Researchers also found that among subgroups of the nonaggressive adolescents there were differences in brain function dependent upon the amount of previous violent media exposure. Control subjects with high violent media exposure (bottom images) had different brain activation patterns than control subjects with low violent media exposure (top images).

View related abstracts:

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# # #

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Exposure to violent video games increases automatic aggressiveness

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Abstract

The effects of exposure to violent video games on automatic associations with the self were investigated in a sample of 121 students. Playing the violent video game Doom led participants to associate themselves with aggressive traits and actions on the Implicit Association Test. In addition, self-reported

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prior exposure to violent video games predicted automatic aggressive self-concept, above and beyond self-reported aggression. Results suggest that playing violent video games can lead to the automatic learning of aggressive self-views.

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Keywords: Video game violence; Aggressive media; Automaticity; Implicit Association Test

Introduction

There is a growing consensus within the social sciences that exposure to violent media increases aggression (Anderson & Bushman, 2002a; Bushman & Anderson, 2001; Singer & Singer, 1983). After half a century of research, the empirical evidence regarding the negative effects of violent television, movies and video games is overwhelming. Trait aggression, as well as self-reported, peer-reported and teacher-reported aggressive behaviour correlates with exposure to violent television shows and video games (Anderson & Dill, 2000; Singer & Singer, 1983, 1986; Singer, Singer, & Rapaczynski, 1984). Experimental studies demonstrate that watching violent television and movie scenes and playing violent video games increases aggressive behaviours like delivering electric shocks and blasts of noise to another person (Anderson & Dill, 2000; Anderson, & Murphy, in press; Bartholow & Anderson, 2002; Bushman, 1998;

Bushman & Huesmann, 2001; Wood, Wong, & Chachere, 1991), increases hostile expectations for others' behaviours (Bushman & Anderson, 2002), and reduces helping behaviour (Anderson & Bushman, 2001). Longitudinal studies have shown that watching violent television is among the best predictors of later violent behaviours, including criminal behaviour (Huesmann, Eron, Lefkowitzb, & Walder, 1973; Johnson, Cohen, Smailes, Kasen, & Brook, 2002). Studies comparing communities into which television has been recently introduced to similar communities that remain without TV find that the introduction of television increases violent crimes, including assault and murder (Joy, Kimball, & Zabrack, 1986; Centerwall, 1989). Increases in violent crime also follow in the wake of aggressive sporting events and television news coverage of suicides, accidents, crimes and other self-destructive and violent behaviours (Berkowitz, 1970; Phillips, 1979; Phillips, 1983). Meta-analytic reviews of the literature (Anderson & Bushman, 2001, 2002a; Bushman & Anderson, 2001; Paik & Comstock, 1994; Sherry, 2001; Wood et al., 1991) have, without exception, concluded that exposure to violent media increases aggression, and moreover has effects comparable in size to those of cigarette smoking on cancer and exposure to lead paint on children's IQ scores (Anderson & Bushman, 2001; Bushman & Anderson, 2001).

Less well understood, however, are the mechanisms by which exposure to violent media increases aggressive behaviour. In addition to relatively deliberative influences, such as the learning of aggressive values (Bandura, 1978; Bandura, Ross, & Ross, 1963), current models (Huesmann, 1986; Berkowitz, 1990; Bushman, 1998; Anderson & Bushman, 2002b) assume that the mechanisms underlying the effects of violent media are often automatic (i.e. spontaneous and unintentional) in nature. For example, Berkowitz (1990) proposes that violent media automatically prime aggressive thoughts and feelings, which subsequently prime aggressive action tendencies (see also Anderson, Benjamin, & Bartholow, 1998; Todorov & Bargh, 2002). In support of this view, researchers find that watching violent movie clips (Bushman, 1998) and playing violent video games (Anderson & Dill, 2000) increases the automatic accessibility of aggressive traits and actions in memory. In addition, Anderson and Dill (2000) found that the increased accessibility of aggressive concepts in memory partly mediated the effects of playing a violent video game on subsequent aggressive behaviour (delivering noxious blasts of noise to another student). Repeated exposure to violent media may make aggressive thoughts and actions chronically accessible, increasing the likelihood that the person will behave in an aggressive manner, especially when provoked or frustrated (Anderson & Dill, 2000; Berkowitz, 1990; Bushman, 1998; Todorov & Bargh, 2002).

Exposure to violent media may also exert an influence on automatic associations with the self (Greenwald & Banaji, 1995; Greenwald, McGhee, & Schwartz, 1998; Todorov & Bargh, 2002). Research in the area of automatic social cognition (Bargh & Chartrand, 1999; Greenwald & Banaji, 1995; Todorov & Bargh, 2002) suggests that people's cognitive associations with the self and other attitude objects may mediate the relationship between their environments and their behaviours. Unobtrusive measures of these associations (Fazio, Jackson, Dunton, & Williams, 1995; Greenwald et al., 1998) are robust predictors of relevant judgments and behaviours, including actions that discriminate against members of social outgroups (Bessenoff & Sherman, 2000; Dovidio, Kawakami, Johnson, Johnson, & Howard, 1997; Fazio et al., 1995; Gawronski, Ehrenberg, Banse, Zukova, & Klaur, 2003; McConnell & Leibold, 2001; Rudman & Glick, 2001) and psychological abuse of one's spouse (Zayas & Shoda, 1999). These findings suggest that one way in which exposure to violent media may exert an influence on behaviour is via changes in a person's automatic self-concept (i.e. the extent to which one spontaneously associates the self with aggressive traits and actions). No research to date has explored this possibility.

The present study examined the relationship between exposure to violent media and the automatic self-concept on two levels. First, can exposure to violent media – in this case, playing the violent video game Doom in the laboratory – temporarily change the extent to which people associate the self with aggression? Second, does the extent to which a person plays violent video games in their own life predict their automatic self-concept with regard to aggression, above and beyond self-reported aggressiveness? Both short and long-term effects of exposure to violent video games on the automatic self-concept seem likely. Violent video games, because of their interactive nature and because they lead the player to assume a violent role, may be even more likely than violent television and movies to lead to the learning of aggressive scripts, attitudes and self-views (Anderson, 2002). This investigation focuses attention on the possibility that such learning can occur not only deliberatively but unintentionally and automatically as well.

Method

Participants

One hundred and twenty-one introductory psychology students (54 male, 65 female, 2 no answer) volunteered for the experiment in return for course credit. While our participants were all 18 years or slightly older, current definitions of adolescence include not only the late teens but in some cases even the early 1920s, in part because aspects of brain development (e.g. in the frontal lobe) are not yet complete at that point (Feldman & Elliott, 1990; Papalia, Olds, & Feldman, 1998). Thus, while the sample used may be older than is typical for research of this kind, the study seems relevant to understanding the effects of video game play among adolescents.

Materials

Violent game

Doom, a popular 3D shoot-'em-up game was selected as the violent game. Players maneuver through a maze battling soldier-zombies, demons and other monsters. Because pre-testing indicated that naïve participants could not master the controls or mazes in Doom without extensive practice, 5 new Doom levels that were designed to be easy to navigate were created specifically for this experiment. In addition, the controls were simplified so that participants could complete each level using only the mouse and arrow keys.[1]

Non-violent game

The non-violent game selected was "Mahjongg: Clicks", an absorbing puzzle game. Participants attempt to clear their computer screen by clicking on adjacent tiles that match each other in color and design.

Implicit Association Test

Automatic aggressive self-concept was measured using the Implicit Association Test (IAT) developed by Greenwald et al. (1998). The IAT assumes that performing tasks that oblige people to sort well-associated categories together is easier than performing tasks in which the categories to be grouped together are not associated. The aggressive self-concept IAT involves four categories: two contrasted target concept categories (Self and Other) and two contrasted attribute categories (Aggressive and Peaceful). In the critical blocks of the IAT, participants perform two combined categorization tasks that map the four categories of stimuli onto two response keys. In one critical task (Self = Aggressive), participants are instructed to rapidly press one key for both Self and Aggressive stimuli and to press another key for both Other and Peaceful stimuli. In the second critical task (Self = Peaceful), both Self and Peaceful get one response and both Other and Aggressive get the alternative response. (Order of the two critical tasks is counterbalanced across participants.) The IAT effect is the difference between the latencies for the two IAT critical blocks. For participants with an automatically aggressive self-concept, the Self = Aggressive IAT task is expected to be performed substantially more rapidly than the Self = Peaceful IAT task. Error trials (those trials in which participants accidentally miscategorize a word, for example categorizing "gentle" as an "Aggressive" word) tend to show a similar but weaker pattern of effects, and are usually not analysed in research using the IAT (Greenwald et al., 1998; Greenwald & Nosek, 2001). A considerable body of research attests to the reliability and predictive validity of latency based IAT measures of attitude and self-concept (see Greenwald & Nosek, 2001; Fazio & Olson, 2003, for reviews).

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[1] These customized Doom levels are available from the first author.

Following standard procedure for the IAT (Greenwald et al., 1998), the IAT measure of aggressive self-concept used in this study consisted of seven categorization tasks, the two IAT critical blocks along with five practice blocks. In the first practice task, participants were asked to categorize words (using the "d" key for left and the "k" key for right) as either representative of Self (e.g. I, me) or Other (e.g. others, them). In the second practice task, they categorized words as either representative of Aggressive (e.g. aggressive, combat) or of Peaceful (e.g. peaceful, gentle). In the third practice block, these tasks were combined, such that participants pressed the "d" key for either words representative of Aggressive *or* of the Self, and the "k" key for words representative of Peaceful *or* of Other. These pairings were the same in the fourth, critical IAT block. In the fifth block, participants again categorized only Peaceful and Aggressive words, except that participants were now asked to press "d" for Peaceful and "k" for Aggressive. The sixth block combined this with the Self vs. Other task such that participants pressed "d" for words representative of either "Peaceful" or "Self" and "k" for words representative of either "Aggressive" or "Self". These pairings were the same for the seventh, critical IAT block. The critical IAT blocks consisted of 32 trials and the practice blocks of 20 trials.

Feeling thermometers

Participants completed two feeling thermometer measures. On the first, they rated themselves on a scale from 0 (not at all aggressive) to 100 (extremely aggressive). On the second, they rated "other people" on the same scale.

Semantic differentials

Participants also rated themselves and other people on three semantic differential scales ranging from -3 to +3. The scale anchors were "aggressive-peaceful", "fighter-quiet" and "combative-gentle".

Buss and Perry aggression questionnaire

Participants also completed the Buss and Perry (1992) Aggression Questionnaire, a self-report measure of trait aggression. Participants responded on Likert-type scales ranging from 1 (strongly disagree) to 5 (strongly agree), to items such as "If a person hits me, I hit them back".

Previous game exposure

Participants were also asked how often they played video games, on a scale ranging from 0 (I do not play video games) to 6 (I play more than 1 h per day). They were also asked to estimate amount of their time playing video games that was devoted to games with aggressive or violent content, on a scale from 0 (zero) to 10 (100%).

Procedure

Participants first played either Doom or Mahjongg for 10 min. Afterwards, they completed the IAT, feeling thermometers, semantic differentials, Buss and Perry questionnaire and the previous game exposure questionnaire in fixed order.

Results

Implicit Association Test

The two data collection blocks of each IAT were retained and practice blocks discarded. Additionally, the first two trials from each data collection block were deleted because response latencies were typically longer. To correct for anticipatory responses and momentary inattention, latencies less than 300 ms. and greater than 3000 ms were recoded as 300 and 3000 ms, respectively. Finally, participants with unacceptably high error rates (less than 70% accuracy) or overly long average latencies (greater than 1000 ms) were omitted from analysis. The data were then log-transformed to normalize the distribution. This procedure mirrored that of Greenwald et al. (1998).

Participants' IAT effects were calculated by subtracting their mean latency on the Self = Peaceful critical IAT block from their mean latency on the Self = Aggressive critical IAT block. Overall, participants associated themselves more with "Peaceful" than with "Aggressive" on the IAT ($M_{\text{IAT effect}}$ = -166 ms, S.D. = 185 ms), $t(113) = -9.6$, $p < 0.001$. The more positive (or less negative, since most participants had negative scores) a person's IAT score, the greater their association of Aggression with Self.

We expected that playing Doom, relative to playing Mahjongg, would lead participants to automatically associate themselves with aggression to a greater extent. To investigate the effects of game play on the IAT while also taking into account participant gender, we carried out a 2 (game condition: violent vs. non-violent) x 2(gender) ANOVA on participants' IAT scores. Fig. 1 shows the IAT scores of male and female participants in the violent and non-violent game conditions. As expected, participants in the Doom condition were more likely to automatically associate themselves with aggression (M = -130 ms, S.D. = 153 ms) than participants in the Mahjongg condition (M = -201 ms, S.D. = 204 ms), a difference that was statistically significant, $F(1,110) = 4.50$, $p = 0.036$. There was also a main effect of gender on IAT scores, $F(1,110) = 5.35$, $p = 0.023$; with men (M = -126 ms) scoring as more automatically aggressive than women (M = -198 ms). However, there was no interaction between participant gender and game condition ($F < 1$). Thus it appears that playing the violent game did, as hypothesized, increase automatic aggressiveness, and that this effect was equally likely to occur for male and female players.[2]

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[2] One concern we had was that previously playing Doom could have simply made participants more effective at computerized tasks like the IAT, for example by making their responses faster. One way of looking at this was to examine whether

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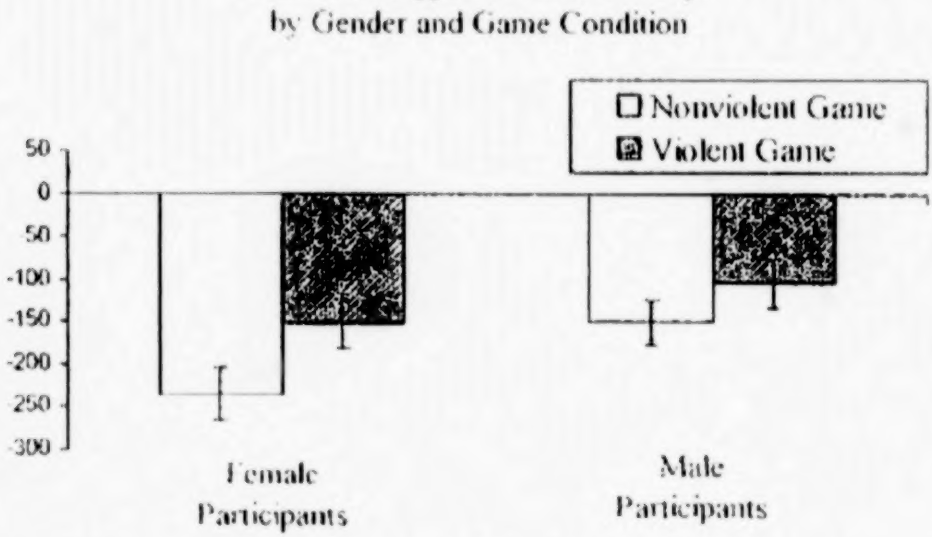

Fig. 1. IAT effects of female and male participants in the non-violent and violent game conditions. The *Y*-axis represents participants' IAT effects in milliseconds. Error bars represent the standard error. Relatively more positive IAT effects reflect a stronger automatic association between the self and aggression.

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playing Doom led to greater speed on the two single-dimension practice blocks of the IAT. On the first practice block (categorizing words as Self or Other related), there was no significant difference between the Doom (M = 738; S.D. = 296) and Mahjongg (M = 716; S.D. = 215) conditions, $t(116)$ = -0.48, p = 0.63. On the second practice block (categorizing words as Aggressive or Peaceful), there was also no significant difference between Doom (M = 683; S.D. = 192) and Mahjongg (M = 709, S.D. = 161) conditions, $t(116)$ = 0.80, p = 0.43.

Self-reported aggressiveness

To create self-report measures that were directly comparable to the IAT difference score, the "self" ratings on the feeling thermometer and semantic differential measures were subtracted from the ratings for "other people". As on the IAT, negative scores reflect a view of oneself as less aggressive than other people, whereas positive scores reflect a view of oneself as more aggressive than other people. Participants saw themselves as less aggressive than other people on both the feeling thermometer ($M_{\text{difference}} = -24$; S.D. = 33), $t(114) = -7.5$, $p < 0.001$; and semantic differential measures ($M_{\text{difference}} = -0.77$; S.D. = 0.79), $t(115) = -10.6$, $p < 0.001$.

Participants also reported a relatively low level of aggressiveness on the Buss and Perry measure, scoring significantly below the scale midpoint of 87 ($M = 68$; S.D. = 16.1), $t(115) = -12.5$, $p < 0.001$. Because splitting the Buss and Perry scale into its component subscales had no significant or substantive impact on our results (e.g. in terms of correlations with other measures, effects of game condition, or moderating the effects of the manipulation), only results with the total score are reported here.

Our main interest was whether playing Doom changed participants' self-reported aggressive self-concept. We carried out a 2 (game condition: violent vs. non-violent) x 2 (gender) ANOVA on participants' scores on the 3 self-reported aggressiveness measures. This revealed no significant effects of game condition on the feeling thermometer measure ($F < 1$), semantic differential measure ($F < 1$) or Buss and Perry scale ($F(1,111) = 3.00$, $p = 0.09$). There were no main effects of gender on the feeling thermometer ($F < 1$) or semantic differentials ($F(1,111) = 2.77$, $p = 0.10$), but a significant gender difference emerged on the Buss and Perry scale, with men scoring as more aggressive ($M = 73$) than women ($M = 64$), $F(1,111) = 9.73$, $p = 0.002$. There were no significant interactions between participant gender and game condition on either the feeling thermometer ($F(1,111) = 1.18$, $p = 0.28$) semantic differentials ($F < 1$) or Buss and Perry scale ($F(1,111) = 1.81$, $p = 0.18$). Overall, our results suggest that exposure to the violent game did not significantly influence the self-reported aggressiveness of either male or female participants.

Prior game exposure

On average, participants reported playing video games relatively infrequently ($M = 1.7$, S.D. = 1.6 on a scale of 0-6), and splitting their time about evenly between violent ($M = 43\%$, S.D. = 29%) and non-violent ($M = 57\%$, S.D. = 29%) games. A measure of prior exposure to violent video games was calculated by taking each participant's time spent playing video games and multiplying it by the amount of that time they spent on video games with aggressive or violent content (M = 20, S.D. = 17).[3] An analogous measure of prior exposure to non-violent video games was calculated by taking each participant's time spent playing video games and multiplying it by the amount of that time they spent on non-violent games (M = 22, S.D. = 14).

Men were more likely than women to play video games (M's = 2.4 vs. 1.0; $t(114) = 5.8$, $p < 0.001$), spent a greater percentage of their time on violent games (M's = 54% vs. 32%; $t(114) = 4.2$, $p < 0.001$), and had greater total exposure than women to violent video games (M's = 29 vs. 12; $t(114) = 6.02$, $p < 0.001$). Men and women did not differ in their exposure to non-violent games (M's = 24 vs. 21), $t(114) = 1.3$, $p < 0.19$).

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[3] We obtained an unexpected condition difference in self-reported prior exposure to violent games, such that participants in the Doom condition reported playing *less* violent games than participants in the Mahjongg condition (M's = 21 and 18, respectively), $F(1,112) = 4.10$, $p = 0.045$. (This effect appeared to be driven by male participants, $F(1,112) = 10.14$, $p = 0.002$). While a failure of random assignment is possible, we think it most likely that playing Doom led participants to set a higher threshold for what they considered to be a violent game (i.e. something as graphic as Doom, as opposed to a moderately aggressive racing game), leading them to self-report less prior exposure to violent games. Regardless, non-random assignment could only have *hurt* our hypothesis of greater aggressiveness in the violent game condition, since participants in the Mahjongg condition reported *greater* prior exposure to violent games (which is associated with a higher degree of automatic aggressiveness). Controlling for self-reported prior exposure to violent games only made the effects of violent game play on IAT scores slightly more significant, $F(1,107) = 6.78$, $p = 0.011$.

We expected that playing violent games in the past would predict participants' degree of automatic and self-reported aggressiveness. Consistent with this, both the IAT and the Buss and Perry Scale were positively correlated with self-reported prior exposure to violent video games and neither correlated with prior exposure to non-violent games (see Table 1). The relationship between the IAT and prior exposure to violent games remained significant in partial correlations controlling for game condition (partial $r(112)=0.32$, $p < 0.001$), scores on the three self-reported aggressiveness measures (partial $r(111) = 0.28$, $p < 0.01$), participant gender (partial $r(112) = 0.22$, $p < 0.02$) and game condition, gender and self-reported aggressiveness simultaneously (partial $r(111) = 0.23$, $p < 0.018$). Likewise, the relationship between scores on the Buss and Perry scale and prior exposure to violent games remained significant after controlling for game condition (partial $r(116) = 0.35$, $p < 0.001$), automatic aggressiveness (partial $r(112) = 0.29$, $p = 0.003$), participant gender (partial $r(116) = 0.23$, $p = 0.02$) and game condition, gender and IAT scores simultaneously (partial $r(112)=0.25$, $p = 0.009$). This suggests that long-term exposure to violent video games makes largely independent contributions to automatic and self-reported aggressiveness.

Discussion

While most video game enthusiasts insist that the games they play have no effect on them, their exposure to scenes of virtual violence may influence them automatically and unintentionally (Bargh & Chartrand, 1999; Greenwald & Banaji, 1995; see also Nisbett & Wilson, 1977; Todorov & Bargh, 2002).[4] In this study, participants who had played the bloody and violent video game Doom for 10 min subsequently associated the self more with aggressive traits and actions on an IAT, but did not associate self with aggressive traits on a variety of self-report measures. These findings suggest that the short-term effects of game exposure on the self-concept, at least in this study, were strongest at an automatic level.[5]

By what mechanism does a single exposure to a violent video game lead to temporary changes in the automatic self-concept? It is easy to imagine how playing a violent video game could temporarily increase the accessibility of aggressive concepts, feelings, and thoughts through priming or spreading activation (Anderson & Dill, 2000; Berkowitz, 1990; Bushman, 1998). But how does it create a tighter cognitive association between the self and aggression? It may be that the repeated pairing of self and aggression related concepts classically conditions new or stronger associations between them (Olson & Fazio, 2001). Another possibility is that exposure to violent games temporarily primes alternative, more aggressive self-representations. According to social cognitive models, the self is a knowledge structure, organized as a network of associations (Greenwald et al., 2002). Contained within this architecture are multiple "possible selves" (Markus & Nurius, 1986), some of which are more chronically accessible than others. A priming episode may temporarily increase the automatic accessibility of a possible self that is otherwise nascent (Wheeler & Petty, 2001; see also Blair, Ma, & Lenton, 2001). Over time, repeated priming of a more aggressive possible self may make it the actual self, as it becomes the most chronically accessible self-representation.

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[4] Interestingly, although most people deny that exposure to violent media has any effect on them personally, they do believe that other people are affected (Innes & Zeitz, 1988).

[5] We recognize that the measures of self-reported trait aggression used in this study are less likely to be affected by an experimental manipulation than measures of more transient states, such as anger or hostile expectations (see Bushman & Anderson, 2002). As a result, the absence of an experimental effect cannot be taken to indicate that there was no effect of violent game play on consciously endorsed aggressiveness. However, that significant effects were found on the automatic (but not the self-report) measures of aggressive self-concept does suggest that changes in self-views that resulted from playing the violent game were strongest at an automatic level.

Supporting the hypothesis that exposure to violent video games also has long-term effects on the automatic self-concept, participants who reported playing video games with aggressive content associated the self more with aggression on the IAT. Moreover, this relationship persisted after controlling for participants' self-reported aggressiveness. Automatic and self-reported aggressiveness were each significantly and independently predicted by game exposure suggesting that violent media may exert their influence through multiple routes, some more amenable to conscious assent than others.

These findings are consistent with models proposing that the effects of aggressive media are often exerted via associative networks in memory (Anderson & Bushman, 2002b; Berkowitz, 1990; Bushman, 1998; Huesmann, 1986). For example, Berkowitz (1990) emphasized the role of environmental priming in his cognitive-neoassociationistic model of aggression. Violent media are replete with aggressive stimuli, which can automatically prime aggressive thoughts, emotions and ultimately behaviours (Anderson & Dill, 2000; Berkowitz, 1970; Bushman, 1998). Huesmann's script-based model (Huesmann, 1986) assumes that associative processing often underlies aggression, for example the automatic links that build up between situations and sequences of behaviours. Anderson and Bushman's (2002b) general aggression model (GAM) incorporates major elements of these and other models, and likewise assumes that automatic associations between situations, emotions, attitudes, beliefs and behaviours play a major role in human aggression.

The automatic self-concept with regards to aggression constitutes a part of this larger network of associations, consisting of the automatic link in a person's mind between the self and aggressive traits and actions. Such automatic associations may be central to how we process information about ourselves and our social world (Greenwald et al., 2002). For example, they may guide how we interpret ambiguous behaviours by others, respond to obvious provocations, and even the environments we decide to exposure ourselves to (Anderson & Bushman, 2002b).

Concluding comment

Despite the misleading debate in the news media over whether exposure to violent television, movies and video games leads to an increase in aggressive behaviour, the empirical evidence that it does so has become overwhelming. Decades of correlational, experimental, longitudinal and demographic studies converge in indicating that exposure to violent media is a cause of aggressive behaviour (Bushman & Anderson, 2001; Singer & Singer, 1983). The current task for researchers is to better understand the mechanisms via which violent media exert their effects. One important way is the deliberative learning of aggressive values (Bandura, 1978). Another is the priming of aggressive thoughts and actions (Anderson & Dill, 2000; Berkowitz, 1990; Bushman, 1998). The results of this study provide initial evidence that violent media may also exert their effects through changes in automatic associations with the self.

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UNITED STATES DISTRICT COURT
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VIOLENT VIDEO GAMES: SPECIFIC EFFECTS OF VIOLENT CONTENT ON AGGRESSIVE THOUGHTS AND BEHAVIOR

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Three experimental studies, one correlational study, and a meta-analysis tested key hypotheses concerning the short-term and long-term impact of exposure to violent video games. Experiment 1 found that violent video games in general increase the accessibility of aggressive thoughts. Experiments 2 and 3 found that playing violent video games increased aggression, even when arousal and affect were controlled. Experiments 2 and 3 also found that trait hostility and trait aggression were positively related to laboratory aggression. Furthermore, there was correlational evidence of a link between repeated exposure to violent video games and trait aggressiveness. Mediational analyses suggested that the trait effects and the violent video game effects on laboratory aggression were partially mediated by revenge motivation. The correlational study uncovered links between habitual exposure to violent video games, persistent aggressive cognitions, and self-reported aggressive behavior. A destructive testing regression approach found that the video game violence/aggression link remained significant even after stressing the link by partialling out sex, narcissism, emotional susceptibility, and Big Five personality factors. However, consistent with prior empirical and theoretical work emphasizing the importance of media violence in the creation of habitual aggressive patterns of thought, partialling out aggressive attitudes reduced the video game violent/aggression link to nonsignificance. The meta-analyses revealed significant effects of violent video games on aggressive behavior, affect, and cognition; on cardiovascular arousal; and on prosocial behavior. A best-practices meta-analytic approach revealed that contrary to media industry claims, better conducted studies tend to yield stronger effects of violent video games on aggression and aggression-related variables than do more poorly conducted studies.

I. Introduction

A. CRITICAL INCIDENTS

Violent video games are popular with adolescent and adult males and females, are marketed to youth in ways that violate the video game industry's own standards, and are easily obtained regardless of age (e.g., Buchman & Funk, 1996; Federal Trade Commission, 2000; Walsh, 1999). School shootings by boys with a history of playing violent video games [e.g., West Paducah, KY (December 1997); Jonesboro, AR (March 1998); Springfield, OR (May 1998), Littleton, CO (April 1999), Santee, CA (March 2001), Wellsboro, PA (June 2003) and Red Lion, PA (April 2003)] heightened public debate about the role played by this relatively new violent entertainment medium, including a hearing by the U.S. Senate Committee on Commerce, Science, and Transportation held on March 21, 2000. Other recent violent crimes linked to violent video games include a violent crime spree in Oakland, California (January 2003); five homicides in Long Prairie and Minneapolis, Minnesota (May 2003); beating deaths in Medina, Ohio (November 2002) and Wyoming, Michigan (November 2002); and the Washington, D.C. "Beltway" sniper shootings (Fall 2002). However, such public incidents and outcries do not constitute scientific evidence of a true causal link. This chapter explores current work by media violence researchers and presents five new studies.

B. BRIEF HISTORY OF VIOLENT VIDEO GAMES

Video games first emerged in the late 1970s, but in the 1990s violent games came of age, with the first-person shooter "Wolfenstein 3D" and the third-person fighter "Mortal Kombat" leading the way. By the end of the 20th century, even more graphically violent games were available to virtually anyone who wanted to play them, regardless of age (Walsh, 1999). As early as the mid-1990s, fourth grade girls reported playing video games more than 5 ½ hours a week, and boys reported playing more than 9 hours a week (Buchman & Funk, 1996). Furthermore, this same sample of fourth graders reported that the majority of their favorite games were violent ones (58.9% for girls, 72.9% for boys). A survey of eighth and ninth grade students found boys playing about 13 hours a week and girls about 5 hours a week (Gentile, Lynch, Linder, & Walsh, 2004).

Data from the Cooperative Institutional Research Program (CIRP, 1998, 1999), which surveys entering college freshmen from more than 600 two- and four-year colleges, reveal that older students also are playing a lot of video games and that their time with such games is also increasing. In 1998 13.3% of the young men reported playing video games at least 6 hours per week during their senior year in high school. By 1999 that figure had increased to 14.8%. Increases are also occurring at the high end of the game playing distribution. In 1998, 2% of the young men reported playing video games more than 20 hours per week. By 1999, that figure had increased to 2.5%.

Another troubling aspect involves the lack of parental or societal oversight. A recent survey of teens in grades 8 through 12 (Walsh, 2000) found that 90% of their parents *never* check the ratings of video games before allowing a purchase, and only 1% reported that their parents had ever kept them from getting a game based on its rating. Furthermore, ratings provided by the video game industry do not match those provided by other adults and game-playing youngsters. Specifically, many games involving violence by cartoon-like characters are classified by the industry as being appropriate for general audiences, a classification with which adults and youngsters disagree (Funk, Flores, Buchman, & Germann, 1999). Also, 89% of the teens in Walsh's survey (2000) reported that their parents never limit the amount of time they are allowed to play video games. Finally, many of the most violent games have "demo" versions on the Internet that can be downloaded for free by anyone. Of the boys in the sample who play video games, 32% reported downloading them from the Internet (Walsh, 2000).

C. MEDIA VIOLENCE RESEARCH

Concern over video game violence would be misplaced if playing such games had little impact on aggression. Decades of research have revealed that viewing television and movie violence can cause short-term increases in aggression and long-term changes in trait aggressiveness (e.g., Bushman & Anderson, 2001; Bushman & Huesmann, 2001; Hearold, 1986; Huesmann & Miller, 1994; Paik & Comstock, 1994; Wood, Wong, & Chachere, 1991). The research literature on video games is smaller and less complete. Despite its relatively small size and the methodological difficulties inherent in the first studies of any "new" phenomenon, a consensus is emerging that violent video games can cause increases in aggressive behavior in children and in young adults (Anderson, 2000; Anderson & Bushman, 2001; Dill & Dill, 1998; Sherry, 2001; Walsh, 2000). We review this literature after considering theoretical issues.

II. The General Aggression Model

Good theoretical reasons support the belief that exposure to violent video games will increase aggressive behavior (Anderson & Dill, 2000; Dill & Dill, 1998). The General Aggression Model (GAM) integrates existing theory and data concerning the learning, development, instigation, and expression of human aggression (Anderson & Bushman, 2002; Anderson & Carnagey, 2004; Anderson & Huesmann, 2003). It does so by noting that the enactment of aggression is based largely on knowledge structures, such as scripts or schemas, created by social learning processes.

In brief, GAM describes a multistage process by which two kinds of input variables lead to aggressive (or nonaggressive) behavior. Figure 1 shows a simplified version of the single-episode portion of GAM. Both personological (e.g., trait hostility) and situational (e.g., recent violent video game play) variables influence behavior by affecting the person's present internal state, represented by cognitive, affective, and arousal variables. Playing a violent video game may influence aggression by means of the cognitive route, for example, if it primes aggressive thoughts or scripts, leading to hostile perception, expectation, and attributional biases (e.g., Bushman & Anderson, 2002; Calvert & Tan, 1994; Crick & Dodge, 1994; Dill, Anderson, Anderson, & Deuser, 1997; Kirsh, 1998). The three aspects of present internal state are themselves interrelated, as indicated by the dashed lines connecting them. For example, priming aggressive thoughts might subsequently increase feelings of anger and a desire for revenge if the person is provoked. In such a case the cognitive effect is regarded as the *primary* route of impact and the affective effect as a *secondary* route of impact.

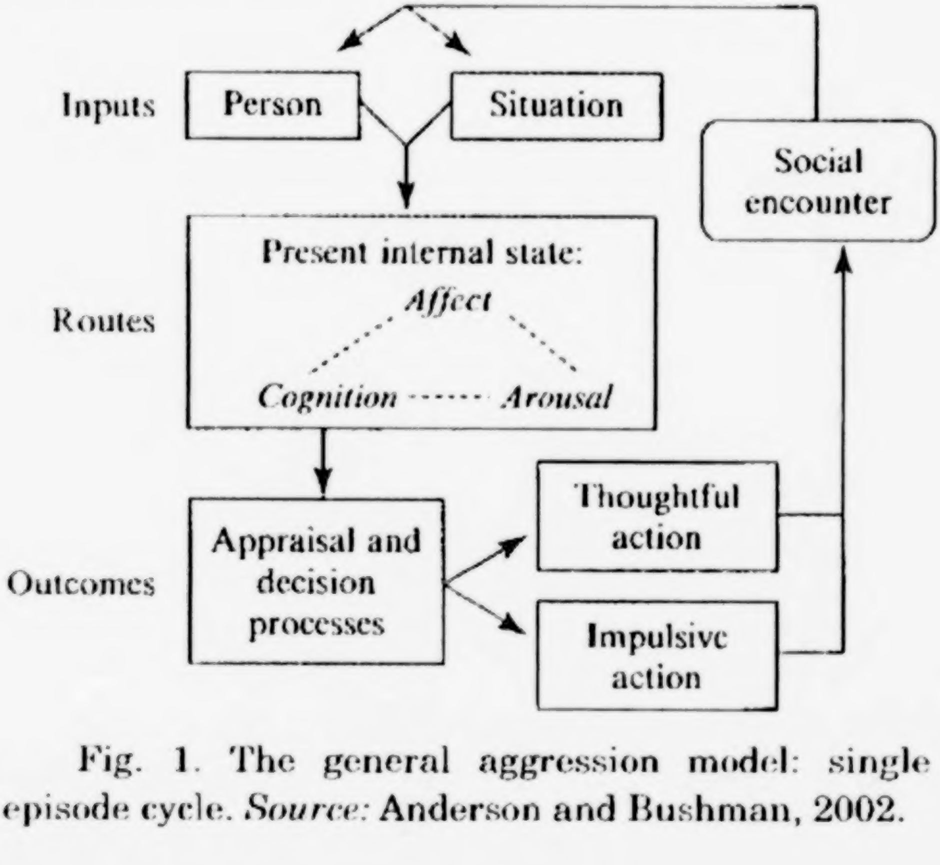
Inputs
Person
Situation
Social encounter
Routes
Present internal state:
Affect
Cognition
Arousal
Outcomes
Appraisal and decision processes
Thoughtful action
Impulsive action

Fig. 1. The general aggression model: single episode cycle. *Source:* Anderson and Bushman, 2002.

The present internal state influences how a person perceives events, interprets their meaning, and chooses behavioral responses. Whatever action the person takes (e.g., aggressive or nonaggressive) influences the present social encounter. This sets the stage for the next round in the social interaction cycle.

Of particular relevance to the present article is the fact that finding significant links between exposure to violent video games and aggression does not by itself reveal the primary route of the obtained effect; it could have occurred via cognition, affect, or arousal, or some combination. However, such fine distinctions are crucial to theoretical development and to the public policy debate over whether parents should be given tools to help them control their children's access to violent games. In both the theory and the public policy domains, the precise route(s) of primary impact are important because of the developmental aspects of GAM.

Long-term effects of media violence involve learning processes, such as learning how to perceive, interpret, judge, and respond to events in the physical and social environment. Various types of knowledge structures (e.g., perception, interpretation, judgment, and action) develop over time and are based on day-to-day observations of and interactions with other people, real (e.g., family) and imagined (e.g., media). Each violent episode, as outlined in Fig. 1, is essentially one more learning trial. Short-term effects become ingrained through the development of aggression-related knowledge structures, which persistently color the person's expectations and perceptions concerning social interactions, especially those with conflictual content.

In a very real sense, a person's set of chronically accessible knowledge structures defines that person's *personality*. Figure 2 displays this developmental aspect of GAM and identifies five types of variables that contribute to the development of an aggressive personality – aggressive beliefs and attitudes, aggressive perceptual schemata, aggressive expectation schemata, aggressive behavior scripts, and aggression desensitization. Four of these variables involve aggressive cognitions. For this reason, short-term effects of violent media on aggression via the cognitive route are particularly important. Temporary mood states and arousal dissipate over time, but rehearsal of aggressive cognitions can lead to long-term changes in multiple aspects of aggressive personality. Furthermore, the literature on the development of behavioral scripts suggests that even a few rehearsals can change a person's expectations and intentions involving important social behaviors (Anderson, 1983; Anderson & Godfrey, 1987; Marsh, Hicks, & Bink, 1998). Figure 3 illustrates the dynamic aspects of the episodic and developmental portions of GAM. Exposure to violent video games can serve as a proximate situational cause, increasing the likelihood that an aggressive behavior will occur shortly after the exposure, but it also can serve as a distal environmental modifier, influencing the development of aggression-related knowledge structures and hence, aggressive personality.

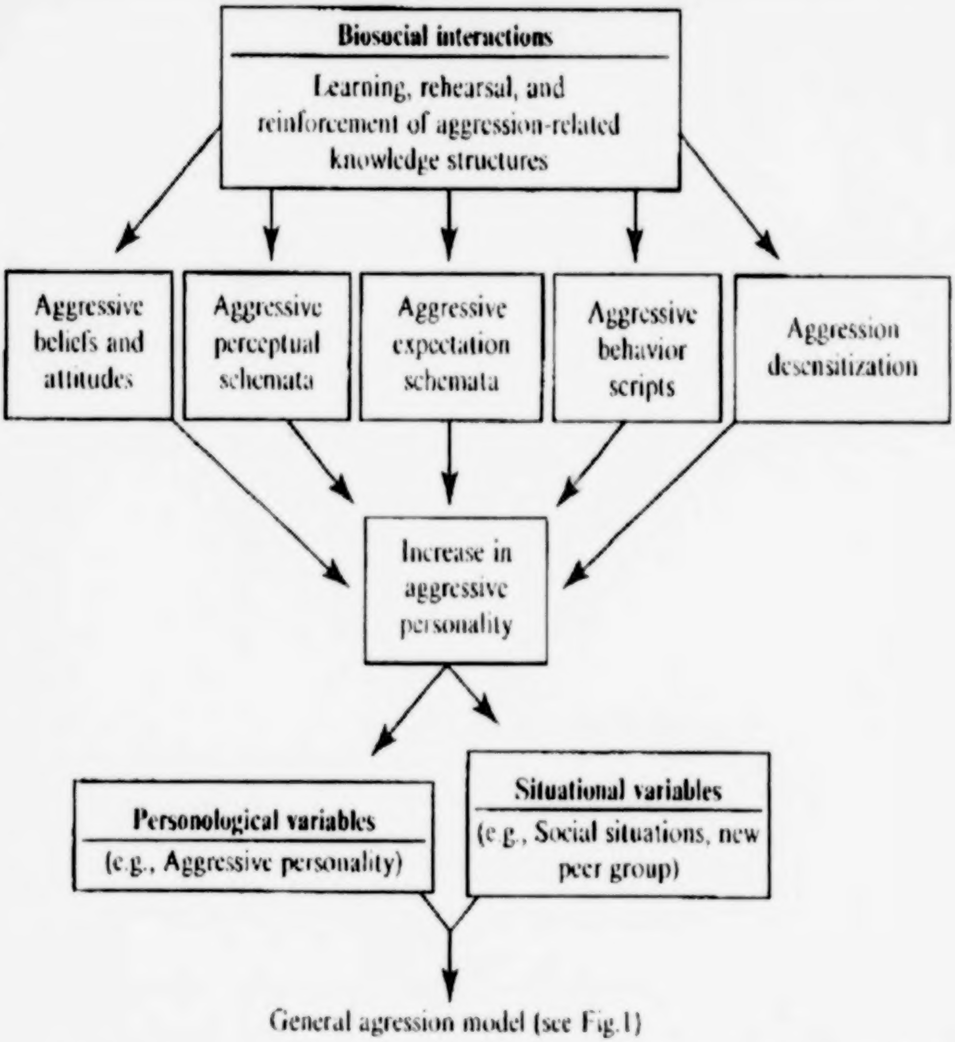
Biosocial interactions
Learning, rehearsal, and reinforcement of aggression-related knowledge structures
Aggressive beliefs and attitudes
Aggressive perceptual schemata
Aggressive expectation schemata
Aggressive behavior scripts
Aggression desensitization
Increase in aggressive personality
Personological variables
(e.g., Aggressive personality)
Situational variables
(e.g., Social situations, new peer group)
General agression model (see Fig.1)

Fig. 2. The general aggression model: developmental/personality processes. *Source*. Anderson and Carnagey, 2004.

III. GAM and Violent Video Games

A. BASIC ISSUES

Two levels of questions emerge from consideration of GAM and violent video games. First, can violent video games cause increases in aggression? Answering this question does not require a careful analysis of the multiple processes by which input variables can influence the expression of aggressive behavior. It merely requires a body of research in which the effects of violent games are compared to nonviolent games or other appropriate control conditions. Much of the existing video game literature is of exactly this nature, and it is at this level that a review of the literature reveals considerable support for the hypothesis that playing violent video games can increase aggression (Anderson & Bushman, 2001). Both experimental and correlational studies, on average, yield significant positive relations between exposure to violent video games and aggressive behavior, with average effect sizes in the $r+ = 0.20$ range (Anderson & Bushman, 2001). The experimental studies demonstrate that a brief exposure to violent video games causes an immediate (and presumably short-lived) increase in aggressive behavior. The correlational studies link repeated exposure to violent video games with a variety of types of real-world aggressive behavior, including violent criminal behavior. In sum, despite its relatively small size and recent history, the research literature has demonstrated that violent video games can increase aggression.

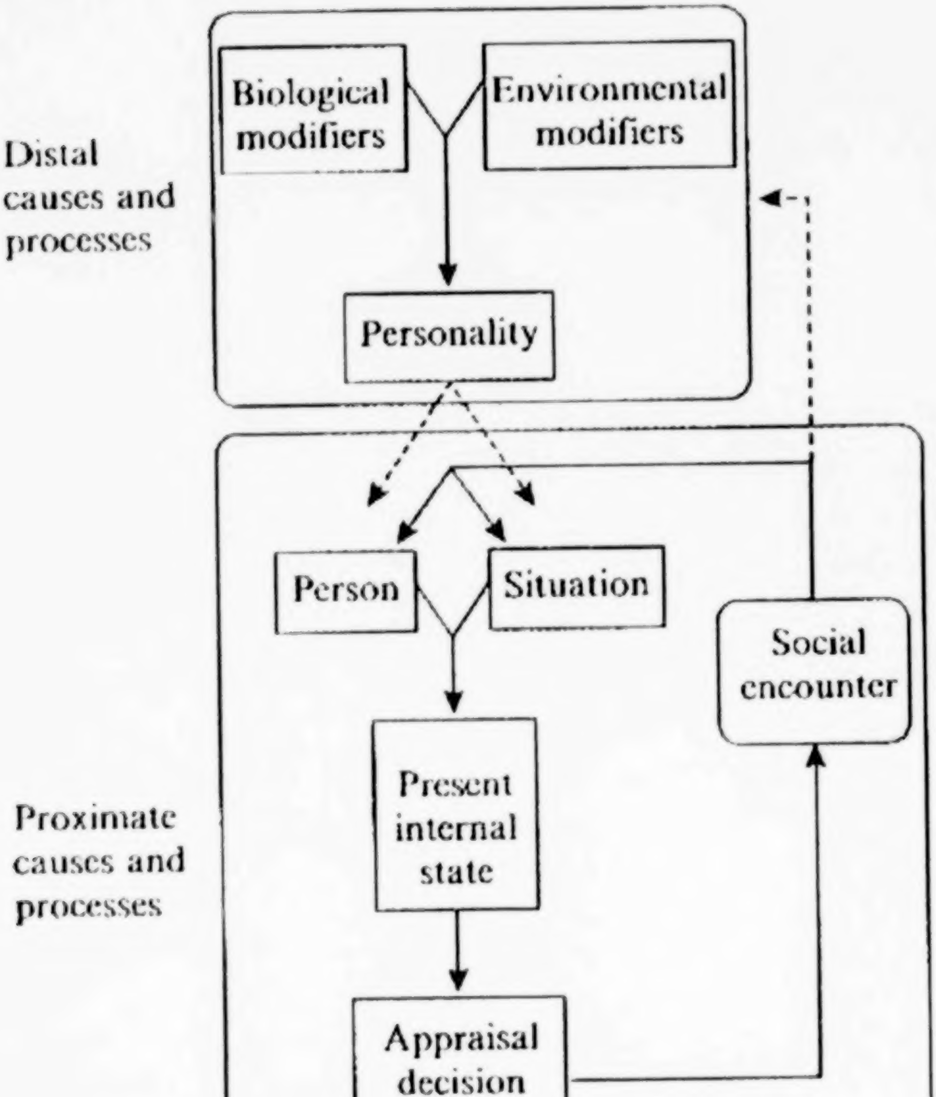
Biological modifiers
Environmental modifiers
Distal causes and processes
Personality
Person
Situation
Social encounter
Present internal state
Proximate causes and processes
Appraisal decision behavior

Fig. 3. The general aggression model: overall view. *Source*. Anderson and Carnagey, 2004.

The second level of questions to emerge concerns specificity of violent content effects on aggression via the cognitive route. Nonviolent games can also increase aggressive feelings if, for example, they produce high levels of frustration. They also can increase arousal, if they are sufficiently demanding and engaging. Thus, both violent and nonviolent games may influence aggression in the immediate situation if they increase aggressive feelings or arousal. The real crux of the debate over effects of violent video games lies in their unique ability to directly increase aggressive cognitions, cognitions that can have a much longer lasting impact if their repeated instantiation (by repeated violent video game play, for instance) leads to persistent changes in key knowledge structures, such as more positive attitudes toward aggression.

B. KEY QUESTIONS

Three key second-level questions remain unanswered by existing research on violent video games. First, do violent video games generally increase aggressive cognitions? Several studies have found significant increases in aggressive thoughts as a function of exposure to violent video games (see Anderson & Bushman, 2001), but most have not explicitly controlled for other potential differences between the target video games, such as differences in affective or arousal properties. In fact, only one published experimental study has successfully controlled for both arousal and affective features (Anderson &

Dill, 2000, Study 2); the violent game yielded higher aggressive cognition scores.

Second, does violent video game content *by itself* cause short-term increases in aggressive behavior tendencies? As GAM makes clear, to cleanly test this specific violent content question in an experimental setting the comparison violent and nonviolent video games should be equated on arousal level and affective factors such as enjoyment, frustration, and state hostility. Such controls can be done by selecting violent and nonviolent games that do not differ on these factors, or by including measures of arousal and affect and using them as statistical controls. Only two published experimental studies meet these criteria. Graybill, Strawniak, Hunter, and O'Leary (1987) pretested several video games and equated them on difficulty, excitement, and enjoyment. Interestingly, this is one of the few experimental studies that failed to find a significant effect of video game violence on aggressive behavior. One potential problem with this study is that the pretest ratings of the various games were done by graduate students, whereas the participant population was second through sixth graders. In other words, the "equating" process was somewhat less than optimal. The other experimental study meeting these control criteria was Study 2 of Anderson and Dill (2000), which found a significant increase in aggression attributable to differential violent content.

Third, is repeated exposure to violent video games associated with higher aggression levels, and is this mediated by persistently elevated levels of aggressive thoughts? To show such an effect, significant positive associations between violent video game exposure, aggressive behavior, and persistent aggressive thoughts would have to be found. Furthermore, the link between video game violence exposure and aggression must be significantly weakened when the persistent aggressive thoughts measure is statistically controlled. As of this writing, there are no published correlational studies of this type.

IV. Overview of the Present Studies

Experiment 1 used 10 video games to examine the effects of violent content on the accessibility of aggressive thoughts, physiological arousal, and aggressive affect. The results of Experiment 1 were used to select a pair of violent and nonviolent video games matched on arousal and affective dimensions but differing in violent content for use in Experiments 2 and 3. Experiment 2 tested whether these two games produce different levels of short-term aggressive behavior. Experiment 3 used two violent and two nonviolent games and a different aggression paradigm in an attempt to replicate the specific violent video game content effect on aggression. It also provided our first test of one factor that might increase or decrease the violent video game effect, specifically the realism of the video game targets of aggression. Experiments 2 and 3 also examined trait hostility and revenge motivation effects on aggression. Correlation Study I assessed violent video game exposure, self-reported aggressive behavior, Big five [sic] personality factors, and attitudes toward violence. It tested a basic-personality-as-artifact hypothesis as well as an aggressive-cognition-mediation hypothesis. The final new study was an updated meta-analysis of violent video game effects on aggressive behavior, thoughts, and affect; physiological arousal; and prosocial behavior. This analysis also compared average effect sizes of the methodologically best studies to those with significant weaknesses.

V. Experiment 1

A. METHOD

1. Participants

Participants were 61 male and 69 female undergraduate students who participated in partial fulfillment of an introductory psychology research requirement. Participants were asked to refrain from alcohol, caffeine, tobacco products, and exercise for 12 hours prior to the study start time. Participants were randomly assigned to play one of 10 video games.

2. Materials

a. Video Games. Ten video games were selected through a review of video game sites on the World Wide Web, popular magazines, and retail outlets. The five violent games were: Dark Forces, Marathon 2, Speed Demon, Street Fighter, and Wolfenstein 3-D. The five nonviolent games were: 3-D Ultra Pinball, Glider Pro, Indy Car II, Jewel Box, and Myst (see the Appendix for a description of the 10 games). We attempted to find games that did not require extensive practice to achieve at least marginal proficiency and that were relatively involving for a college student population. Street Fighter was played on the Super Nintendo Entertainment System, using a 19-inch Sony color television. All other games were played on a Macintosh computer.

b. Video Game Experience. Participants estimated the average number of hours per week spent playing video games in the past few months. Each participant also rated his or her experience with the 10 video games used in this study and an additional four games (SimCity, You Don't Know Jack, Computer Cribbage, A10 Attack) using a 7-point unipolar scale anchored at 1 (Never have played), 4 (Have played some), and 7 (Have played often).

c. Video Game Ratings. After playing the assigned video game, participants completed a 6-item rating scale about the game, rating how difficult the game was to learn, how enjoyable the game was to play, how much action the game had, how violent the game graphics were, how violent the game content was, and how frustrating the game was (Anderson & Ford, 1986). For all items, a response of 1 indicated "low" and a response of 7 indicated "high" on the adjective of interest. Preliminary analyses revealed that the two items measuring the violence of video game content and graphics were highly correlated, so they were averaged to form a composite measure of perceived video game violence.

d. Word Completion Task. The word completion task (Anderson, Carnagey, & Eubanks, 2003; Roediger, Weldon, Stadler, & Riegler, 1992) involves examining a list of 98 words with one or more letters missing, and filling in the missing letters. The missing letters are strategic, such that each item can make more than one word. For instance, one item is "explo_e," which may be completed as "explore" or "explode." Participants were told that their task was to fill in the blanks to make complete words. Participants were given 3 minutes to complete as much of the task as they could. An *accessibility of aggressive thoughts* score was calculated for each participant by dividing the number of aggressive word completions by the total number of completions. Forty-nine of the items can yield an aggressive word when completed.

e. Cardiovascular Measures. Heart rate (HR), systolic blood pressure (SBP), and diastolic blood pressure (DBP) were measured with an A & D Medical automatic digital blood pressure monitor (model UA-751). The blood pressure cuff was attached to each participant's nondominant upper arm, approximately 1 inch above the elbow. All measurements were obtained while the participants were seated. At each of three measurement periods, HR, SBP, and DBP were collected twice, with approximately 1 minute elapsing between the end of the first measurement and the beginning of the second. The first measurement period (baseline) was after signing the consent form but before game play began. The second measurement was during video game play, and the third was after the video game task.

3. Procedure

Participants were told that the study concerned the ways people learn different types of computer tasks. They were informed that we were interested in possible differences between simple and complex tasks. After completing consent procedures, participants entered a cubicle and completed the Video Game Experience questionnaire. Participants then read directions for the assigned game. The experimenter started the game for the participants. Participants played for approximately 20 minutes. Physiological measures were collected before the start of the game, approximately 10 minutes into game play, and immediately after the game. Participants next performed the word completion task and the Video Game Ratings measure. Participants were debriefed and thanked for their participation.

B. RESULTS AND DISCUSSION

This study had two main goals. One was to compare violent and nonviolent video games on key dimensions so that a pair of games, matched on all dimensions except for violence, could be selected for further in-depth research. The second was to test the hypothesis that playing violent video games primes aggressive thoughts. For all analyses we tested a planned contrast that compared the mean score of participants who had played one of the violent games to the corresponding mean of those who had played one of the nonviolent games.

Sex effects were expected to occur on some measures (e.g., cardiovascular measures, enjoyment of the games) and not on others. When preliminary analyses revealed no sex effects, sex was dropped from the statistical model.

1. Cardiovascular Measures

a. Blood Pressure. A 10 (Video game) x 2 (Sex: female vs. male) x 2 (Type: diastolic vs. systolic) x 3 (Time of assessment: before video game vs. during video game vs. after video game) ANOVA, with type and time as repeated factors, revealed several interesting effects. First, there were significant main effects of sex [$F(1, 86) = 26.11$, $P < .001$, $d = 0.43$], time [$F(2, 172) = 9.82$, $P < .001$], and type [$F(1, 86) = 2312.64$, $P < .001$, $d = 4.02$]. Males had higher blood pressure than females (Ms = 93.46 and 86.27).[1] Blood pressure increased from the baseline period (before playing the video game, $M = 89.92$) to the video game play period ($M = 91.73$) and then decreased after game play was complete ($M = 87.94$). Of course, SBP was greater than DBP (Ms = 110.52 and 69.21, respectively). There was no main effect of which game was played [$F(9, 86) = 1.67$, $P > .10$], nor was there any hint of a violent vs. nonviolent game effect [$F(1, 86) = 0.02$, difference not significant]. However, the sex, time, and type main effects were all moderated by various two-way interactions.

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[1] All reported means are the appropriate adjusted means. All P-levels are based on two-tailed tests. Sample sizes differ somewhat in different analyses as the result of occasional missing values. This occurred most frequently for the cardiovascular measures because of occasional equipment malfunctions.

The type X sex interaction [$F(1, 86) = 18.33$, $P < .001$, $d = 0.32$] resulted from the fact that the sex effect was larger for SBP ($M_{\text{males}} = 115.95$ vs. $M_{\text{females}} = 105.8$) than for DBP ($M_{\text{males}} = 70.97$ vs. $M_{\text{females}} = 67.45$). The type X time interaction [$F(2, 172) = 11.88$, $P < .001$] resulted from the fact that SBP remained relatively constant across the three time periods ($M_{\text{before}} = 111.64$ vs. $M_{\text{during}} = 111.09$ vs. $M_{\text{after}} = 108.83$), whereas DBP was highest during video game play ($M_{\text{before}} = 68.21$ vs. $M_{\text{during}} = 72.37$ vs. $M_{\text{after}} = 67.06$).

The omnibus time X game interaction [$F(18, 172) = 1.93$, $P < .02$] is a bit difficult to comprehend. However, the more specific contrast testing the time x violent vs. nonviolent game interaction was also significant [$F(2, 172) = 5.37$, $P < .01$] and accounted for much of the omnibus interaction.[2] On average, participants who played one of the nonviolent games showed a decline in blood pressure across the three time periods ($M_{\text{before}} = 91.41$ vs. $M_{\text{during}} = 90.41$ vs. M_{after}

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[2] In fact, the residual omnibus time x game interaction was nonsignificant [$F16, 172) = 1.50$, $P > .10$].

= 88.07). However, those who played one of the violent games showed an increase in blood pressure during video game play, followed by a decrease (M_{before} = 88.44 vs. M_{during} = 93.04 vs. M_{after} = 87.81). In other words, within the present sample of 10 games the violent ones increased arousal, as measured by blood pressure, whereas the nonviolent ones did not. This point is especially important to remember when selecting pairs of games for more in-depth research on the relation between violent content and aggressive behavior. It is also important to note, however, that the postgame assessment of blood pressure showed nearly identical means for the violent and nonviolent games. Therefore, the potential problem of arousal being confounded with violent vs. nonviolent content may not be as severe as many might assume.

b. Heart Rate. Preliminary analyses yielded no sex effects. A 10 (Video game) X 3 (Time of assessment) ANOVA with time as a repeated factor yielded only one marginally significant effect, the time main effect [$F(2, 190) = 2.82$, $P < .07$]. HR was highest when assessed during game play ($M = 77.50$), and was at about the same relatively low level before ($M = 74.73$) and after ($M = 74.28$) game play. Indeed, a specific contrast comparing HR during game play to the average HR before and after game play was statistically significant [$F(1, 95) = 4.43$, $P < .04$, $d = 0.30$]. None of the video game effects (omnibus or violent vs. nonviolent contrast) approached significance (all P values > .40).

2. *Video Game Ratings*

The mean ratings of the games on difficulty, enjoyment, action, frustration, and violence are shown in Table I. There was considerable variability on all five dimensions, which made selection of a pair of games differing primarily on violent content possible.

Ratings of game difficulty were affected by game [$F(9, 120) = 7.86$, $P < .001$]. The specific contrast comparing violent to nonviolent games was also significant and revealed the violent games to be more difficult ($M = 3.60$) than the nonviolent games ($M = 2.80$) [$F(1, 120) = 8.67$, $P < .01$, $d = 0.52$]. However, there was considerable variability within each game type and considerable overlap between the violent and nonviolent games. The violent game difficulty means ranged from 2.09 (Wolfenstein 3D) to 4.38 (Street Fighter). The nonviolent game difficulty means ranged from 1.54 (Ultra Pinball) to 4.83 (Myst).

Participants' enjoyment ratings were also affected by game [$F(9, 110) = 2.23$, $P < .05$]. However, the comparison between violent and nonviolent games showed that participants enjoyed the violent and nonviolent games equally ($F < 1$). In fact, the nonviolent games were enjoyed slightly more than the violent games. The game x sex interaction was also significant [$F(9, 110) = 1.97$, $P < .05$]. However, the specific contrast testing the sex x game violence interaction was only marginally significant [$F(1, 110)$

= 3.33, $P < .08$]. The slight preference for the nonviolent games was marginally greater for females ($M_{\text{nonviolent}} = 3.81$, $M_{\text{violent}} = 3.53$) than for males ($M_{\text{nonviolent}} = 4.23$, $M_{\text{violent}} = 4.11$).

Ratings of game action were significantly affected by game [$F(9, 120) = 8.35$, $P < .001$]. As shown in Table I, participants found the violent games to contain more action ($M = 4.09$) than the nonviolent games ($M = 2.68$) [$F(1, 120) = 31.67$, $P < .001$, $d = 0.99$].

TABLE I

MEAN RATING OF VIDEO GAME DIFFICULTY, ENJOYMENT, ACTION, FRUSTRATION, AND VIOLENCE AS A FUNCTION OF GAME, AND AVERAGES FOR NONVIOLENT AND VIOLENT GAMES

Nonviolent games	Difficulty	Enjoyment*	Action	Frustration	Violence*
Myst	4.83	3.06	1.67	5.33	1.25
Jewel Box	1.77	4.38	2.62	3.69	1.00
Indy Car II	2.21	3.31	2.71	3.79	1.43
3-D Ultra Pinball	1.54	5.40	4.08	2.69	1.62
Glider Pro	3.62	3.94	2.31	4.75	1.41
Average	**2.80**	**4.02**	**2.68**	**4.05**	**1.34**
Violent games	Difficulty	Enjoyment	Action	Frustration	Violence
Speed Demon	4.00	3.86	3.42	5.33	3.27
Dark Forces	3.27	4.10	3.18	4.27	4.35
Wolfenstein 3D	2.09	3.70	5.36	3.82	5.92
Marathon 2	4.25	3.69	3.67	4.25	4.86
Street Fighter	4.38	3.74	4.81	4.31	4.94
Average	**3.60**	**3.82**	**4.09**	**4.40**	**4.67**
Mean square error	**2.37**	**2.35**	**2.01**	**2.38**	**.97**

*Adjusted for sex effects. Possible range of ratings was 1 to 7.

Participants' ratings of frustration showed a significant game effect [*F*(9, 120) = 3.40, *P* < .001]. However, the contrast between violent and nonviolent video games was nonsignificant, suggesting that participants found the violent games (*M* = 4.40) and nonviolent games (*M* = 4.05) equally frustrating [*F*(1, 120) = 1.61, *P* > .20, *d* = 0.23].

Ratings of the violence of game content showed a significant sex effect [*F*(1, 110) = 4.82, *P* < .05, *d* = 0.40]. Females rated the games as more violent than did males (*M*s = 3.20 & 2.81, respectively). More importantly, the violence ratings also yielded a significant game effect [*F*(9, 110) = 45.81, *P* < .001]. As expected, most of this omnibus game effect (87%) was due to the much higher violence ratings given for the violent games than for the nonviolent games (*M*s = 4.68 & 1.35, respectively) [*F*(1, 110) = 350.75, *P* < .001, *d* = 3.38]. Furthermore, the sex by game type interaction was not significant [*F*(1, 110) = 0.92, *P* > .3], indicating that the sex effect did not systematically vary as a function of whether the game was violent or nonviolent.

3. *Selection of a Matched Pair*

We conducted a number of additional analyses to select a violent/nonviolent game pair most closely matched on irrelevant dimensions (i.e., difficulty, enjoyment, action, and frustration) and differing greatly on violence. Although several pairings appeared to meet our criteria fairly well, we ultimately chose

Glider Pro and Marathon 2. We conducted a 2 (game) x 2 (sex) x 4 (rating dimension) ANOVA on ratings of these two games, treating the four "irrelevant" rating dimensions (difficulty, enjoyment, action, frustration) as a repeated measures factor. Differential effects of game would show up either as a game main effect or a game x rating dimension interaction. The only effect that approached statistical significance was the main effect of rating dimension [$F(3, 72) = 3.93$, $P < .05$]. The adjusted means for difficulty, enjoyment, action, and frustration were 3.96, 3.81, 2.98, and 4.51, respectively. This effect, of course, is irrelevant to the issue of game selection. All other effects had P values $> .15$. We also compared cardiovascular effects of these two games. Differential game effects would appear as an interaction involving the game and time of assessment variables. None of the game x time interactions (2-way or higher) were significant. Finally, we compared these two games on the violence ratings. The only significant effect was a large effect of game on the violence rating [$F(1, 24) = 53.81$, $P < .001$, $d = 2.82$]. Marathon 2 was rated as considerably more violent than Glider Pro [Ms = 4.86 and 1.41, respectively]. The sex main effect approached significance [$F(1, 24) = 4.24$, $P < .06$, $d = 0.79$], with females rating the games as more violent than males [Ms = 3.62 and 2.65, respectively]. The sex x game interaction did not approach significance [$F(1,24) = 0.11$, $P > .70$].

Thus, Glider Pro and Marathon 2 were well matched on the irrelevant dimensions and differed greatly on the desired dimension of violence. Of note, these specific game comparisons were based on a relatively small sample size. Therefore, in Experiment 2 on aggressive behavior (which used these two games), we measured these same rating dimensions, as well as blood pressure and HR, as additional statistical controls.

4. *Accessibility of Aggressive Thoughts*

The second major goal of this study was to test the hypothesis that playing a violent video game can increase the relative accessibility of aggressive thoughts. A series of analyses was conducted to compare the percentage of aggressive word completions after violent versus nonviolent video game play. Each analysis included a specific contrast comparing the average of the nonviolent game conditions to the average of the violent game conditions.

Preliminary analyses indicated that sex of participant did not have any significant impact on the accessibility of aggressive thoughts measure.

a. All 10 Games. Participants produced a significantly higher percentage of aggressive words after violent games ($M = 14.7$) than after nonviolent games ($M = 12.5$) [$F(1, 120) = 4.26$, $P < .05$, $d = 0.37$]. Thus, as predicted by GAM, playing violent games increased accessibility of aggressive thoughts, relative to playing nonviolent games.

We conducted several similar analyses with various covariates added to the model. When we controlled for the rating dimensions of difficulty, enjoyment, action, and frustration in this way, the violent vs. nonviolent contrast was still significant [*F*(1, 116) = 5.29, *P* < .05]. Similarly, the game violence effect was still significant when we controlled for video game experience (hours per week and average experience with 10 specific games) [*F*(1, 110) = 4.54, *P* < .05]. When physiological arousal changes were statistically controlled (baseline to after video game play), the game violence effect was still significant [*F*(1, 103) = 5.74, *P* < .05]. However, when we controlled for rated violence of the games, the game violence effect became nonsignificant [*F*(1, 119) = 2.35, *P* > .12], as expected. In fact, controlling for the rated violence of the games reduced the game violence effect on aggressive thoughts by 45%.

Finally, we performed an analysis that treated the specific games chosen to represent the violent and nonviolent types as random effects, rather than fixed (Winer, 1971). This entails using the between groups sums of squares, within each of the violent and nonviolent game types, to estimate measurement error, with 8 degrees of freedom. This tests the generalizability of the video game violence effect across specific games (Wells & Windschitl, 1999). It also yielded a significant game violence effect [*F*(1, 8) = 8.96, *P* < .05]. These results strongly support the hypothesis that violent content in video games causes increases in the accessibility of aggressive thoughts, independent of arousal and affective influences. This is the first study to conclusively demonstrate this specific effect of violent video game content.

b. *Glider Pro vs. Marathon 2.* We further examined the violent video game effect on aggressive thoughts by using only the two matched games Glider Pro and Marathon 2. Sex effects did not approach significance, so sex was dropped. Despite the small sample size, Marathon 2 participants produced a significantly higher percentage of aggressive words (M = 15.4) than did Glider Pro (M = 10.8) [$F(1, 26) = 6.03$, $P < .05$, $d = 0.95$]. A similar statistical model that included changes in physiological arousal (baseline to after video game play) as covariates yielded similar results. The effect of game was significant [$F(1, 21) = 10.96$, $P < .01$].

We then ran a series of analyses in which each of the video game rating dimensions were entered as covariates. The analyses with difficulty, enjoyment, action, and frustration each yielded a significant game effect on aggressive thoughts [Fs$(1, 25) > 5.00$, P values < .05]. As expected, when rated violence of the game was entered as a covariate the game effect became nonsignificant [$F(1, 25) = 2.42$, $P > .10$], again demonstrating the specificity of violent content effects.

VI. Experiment 2

A. METHOD

1. *Participants*

Ninety-seven female and 93 male undergraduates participated, selected on the basis of their responses to the Trait Hostility (TH) scale, administered at the beginning of the semester as part of a battery of questionnaires. Half of the males and half of the females were selected from the top and bottom thirds of the TH distribution. All participated in return for partial course credit for their introductory psychology class.[3]

2. *Design*

The experiment can be conceived as a 2 (TH: high vs. low) x 2 (Video game: violent vs. nonviolent) x 2

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[3] Six participants were dropped because they reported unusually high levels of video game experience or number of hours per week spent playing video games. Our concern was that participants who had extensive video game experience might respond somewhat differently than the normal population. We used the standard procedures described by Tukey (1971) for identifying outliers and "far outliers." Six far outliers were identified, two on the basis of the video game experience scale, four on the hours per week measure. For example, the far outliers on the latter measure reported playing video games from 18 to 24 hours per week in recent months. Five of the six far outliers were males. Supplemental analyses that included these participants yielded the same patterns of aggression as those reported in the Results section, albeit the effect sizes were slightly smaller.

(Provocation pattern: increasing vs. ambiguous) x 2 (Sex: male vs. female) between subjects design. However, TH was used as a continuous variable in all analyses, rather than a two-level categorical variable. This regression approach is statistically more appropriate and more powerful. For all analyses that included a covariate (e.g., TH), we also tested all possible interaction terms involving the covariate. None of these interactions were statistically reliable, so they were dropped from the final statistical models reported in this article. For dependent variables that were not significantly influenced by sex of participant, the reported results are based on analyses that dropped sex from the statistical model.

3. Materials

a. Trait Hostility. The Trait Hostility Scale is a 30-item self report inventory designed to measure chronic individual differences in aggressiveness or irritability, adapted from the irritability scale developed by Caprara, Cinanni, D'Imperio, Passerini, Renzi, and Travaglia (1985) (see Anderson, 1997; Dill et al., 1997). Sample items include (1) Whoever insults me or my family is looking for trouble, (2) Sometimes I shout, hit and kick and let off steam. The internal reliability of this scale is generally high; in the present sample coefficient alpha = .86.

b. Video Games. As described earlier, Marathon 2 (violent) and GliderPro (nonviolent) were selected because they were similar on a variety of dimensions in Experiment 1.

c. Competitive Reaction Time Task. A modified version of the Taylor Competitive Reaction Time (CRT) task was used to assess aggressive behavior. The CRT is a widely used and externally valid measure of aggressive behavior (Anderson & Bushman, 1997; Anderson, Lindsay, & Bushman, 1999; Carlson, Marcus-Newhall, & Miller, 1989; Giancola & Chermack, 1998). Participants believe they are competing with another person to see who can respond first upon presentation of a tone. In the standard version of the game, after each trial the "loser" receives an aversive punishment (e.g., loud noise), the intensity of which is supposedly set by the opponent. Prior to each trial, each participant sets the punishment level that supposedly will be delivered to the opponent, if the participant wins the trial. The possible settings range from 0 (no noise) to 10 (100 db). These settings constitute the measure of aggressive behavior.

In the present experiment we used a two-phase version of the task (Anderson, Anderson, Dorr, DeNeve, & Flanagan, 2000; Bartholow & Anderson, 2002; Lindsay & Anderson, 2000). In Phase 1 participants were told that their opponent would set the intensity of the noise blast that the participant would receive as "punishment" on "lose" trials, but that the opponent would not be punished on trials that the participant won. It was further explained that in Phase 2, the roles would be reversed so that the participant would set the intensity of the noise blasts for the opponent, but the participant would not receive punishments on "lose" trials. In actuality, a computer program determined wins and losses as well as the noise intensities and durations delivered to participants in Phase 1. After each trial the participant also saw what noise level was "set" by the opponent, displayed on the computer screen. All participants were given sample noise blasts of level "2" (60 db) and "8" (90 db) before beginning Phase 1 of the task.

d. Provocation Pattern Manipulation. In Phase 1 of the CRT task, all participants received the same randomly ordered series of 13 wins and 12 losses determined by the computer program. They also received blasts of noise on the "lose" trials. The pattern of noise blasts was either an ambiguous or an increasing provocation pattern (Anderson et al., 2000). Participants in both provocation conditions saw exactly the same punishment settings – 8 in the low range, 9 in the middle range, and 8 in the high range, and actually received the same punishments (4 in each range). In the *ambiguous provocation* condition the pattern of noise intensities was random, whereas the *increasing provocation* pattern consisted of mostly low noise intensities on the early trials, middle intensities on the middle trials, and high intensities on later trials. On completion of Phase 1, the experimenter reminded participants that in Phase 2 they would set noise intensities to be delivered to their opponent, and that they would not receive noise blasts on any trial in this phase.

4. Procedure

Participants were randomly assigned to one of the four experimental conditions (video game x provocation), with the constraint that equal proportions of males and females and that equal proportions of high and low TH participants were run in each condition. Same-sex pairs were run in individual cubicles. On arrival, they were seated in cubicles and asked to read and sign the consent form and to then read instructions for the video game. Participants were told that the study was concerned with the ways people learn different types of computer tasks. Participants were informed that we were interested in possible differences between simple and complex tasks, and that we would be measuring HR and blood pressure throughout the session. Participants played the assigned video game for 20 minutes. Then the CRT task was explained. All participants were told that their opponent would set the noise blasts in Phase 1 while they would set the noise blasts for their opponent to hear in Phase 2. After the CRT task, participants completed a questionnaire that included a manipulation check, some motivation and affect items, some demographic information, and several suspicion check items.

Blood pressure and pulse were measured at five different points in time: (1) before playing the video game, (2) about 10 minutes into the video game, (3) after playing the video game, (4) after Phase 1 of the CRT task, and (5) after Phase 2 of the CRT task. Finally, the participants were debriefed. Care was taken to ensure that each participant knew it was the computer and not the other participant in the session that set the noise blasts in Phase 1 and that the noise blasts they sent in Phase 2 were received only by the computer.

5. *Measures*

a. Aggressive Behavior. Aggressive behavior was operationalized as the noise intensity (0-10) sent by the participants to their opponents in Phase 2 of the CRT task. As is common with the CRT task, we examined four different intensity measures: intensity setting on the first trial, and the average settings on trials 2-9, 10-17, and 18-25. The early trials are the most important in this two-phase version of the CRT, especially Trial 1, because it is the first opportunity the participant has to retaliate after being provoked. Note that in the standard one-phase version Trial 1 occurs prior to any provocation, provocations continue throughout the 25 trials, and therefore all trials are of theoretical interest.

b. Cardiovascular Arousal. At each of the five measurement periods, blood pressure and pulse were assessed twice, with an interval of 1 minute between the completion of the first measurement and the beginning of the second.[4]

c. Questionnaires. After the last blood pressure and pulse measurements, participants answered a number of questions about the experiment. One item asked participants if they were ever "angry" during the reaction time task. Responses were on a 5-point unipolar scale anchored at 1 (not at all), 2 (a little bit), 3 (somewhat), 4 (quite a lot), and 5 (a lot). Also included were six items on which participants were to "indicate the extent to which this motive describes your motive when deciding on where to set the noise levels." These items used the same 5-point scale described above. The six items were (1) I wanted to impair my opponent's performance in order to win more; (2) I wanted to control my opponent's level of responses; (3) I wanted to make my opponent mad; (4) I wanted to hurt my opponent; (5) I wanted to pay back my opponent for the noise levels he/she set; (6) I wanted to blast him/her harder than he/she blasted me. The first two items represent instrumental reasons for aggressing. Responses to these two items were positively correlated ($r = .57$, $P < .001$), and were combined to form a scale labeled "Instrumental Aggressive Motivation." The latter four items represent a clearly revengeful type of aggressive motive, were highly correlated, and were combined to form a scale labeled "Revenge Motivation." Coefficient alpha for this scale was .74.

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[4] Heart rate and blood pressure were assessed for two reasons. First, it was an important part of the cover story. Second, we wanted to be able to statistically control for any effects of the video game manipulation on aggression that might be due to changes in arousal. As expected, the video games did not produce differential changes in arousal. Including the cardiovascular change measures as covariates in later analyses of aggressive behavior did not alter the pattern of results in any appreciable way (but did reduce the error term and slightly increased the effect sizes of the video game and provocation manipulations). Thus, for the sake of simplicity these arousal measures are not further discussed.

One question asked "Did the pattern of noise levels that you received appear to be increasing, decreasing, or random?" This item was coded as +1 for increasing, -1 for decreasing, and 0 for random. We expected this manipulation check to yield smaller scores in the "ambiguous" than in the "increasing" provocation condition, because the actual pattern was random in the former and increasing in the latter. A 2 (video game) x 2 (provocation pattern) analysis of variance (ANOVA) confirmed this expectation. Those in the increasing provocation conditions reported an increasing pattern of noises ($M = .43$), whereas those in the ambiguous condition reported that the pattern seemed random [($M = .05$), $F(1, 178) = 43.91$, $P < .001$, $d = 0.95$].

An open-ended question asked "What do you think the purpose of this experiment was?" Responses to this item and to the final oral debriefing were used by the experimenter to rate each participant as either not suspicious (0), slightly suspicious (1), or suspicious (2). Fourteen participants were classified as suspicious. However, suspicion was unrelated to performance on the main dependent variables, so all were kept.

Participants then completed a "Background Questionnaire" assessing demographic information including height, weight, age, year in school, academic major, and time since using alcohol, caffeine, and exercising. Participants also estimated how many hours per week they had spent playing video games "in recent months." They then indicated "How much you have ever played each of . . . " 12 specific video games, using a 5-point unipolar scale anchored at 1 (Never have played) and 5 (Have played a lot). The 12 games listed were Wolfenstein 3D, You Don't Know Jack, Civilization II, A-10 Attack, Computer Cribbage, Street Fighter, Dark Forces, Myst, Indy Car II, Speed Demon, 3-D Ultra Pinball, and Jewelbox. Ratings on these 12 items were combined into a Video Game Experience composite, with a coefficient alpha of .63. Finally, a thorough oral debriefing was given, with notes recorded by the experimenter.

B. RESULTS

1. Aggressive Behavior

Four measures of aggressive behavior were based on the noise punishment levels that participants set for their opponents during Phase 2 of the CRT task. Recall that the key behavioral measure was noise intensity on Trial 1, because it was the participant's [sic] first opportunity to retaliate for noise blasts received during Phase 1. The noise settings for the remaining 24 trials were averaged into three blocks of eight trials each.

The key prediction was that exposure to the violent video game would increase aggressive behavior in the two-phase CRT task. We believed that this effect was most likely to occur in the ambiguous provocation condition, especially on the first or early trials (a time x video game x provocation pattern interaction). This is based on an outburst/social justice model of aggressive behavior in the two-phase CRT first described in the Anderson et al. (2000) studies of temperature effects. Experiment 5 of that work used a very similar two-phase CRT task with both an ambigous and an increasing provocation pattern and found that most of the interesting temperature effects occurred in the ambiguous pattern condition, especially on the early trials.

We also expected that TH would be positively related to aggression. All of these predictions were borne out.

We conducted a 2 (video game) x 2 (provocation pattern) x 4 (time: trial 1 vs. block 1 vs. block 2 vs. block 3) ANOVA, with the last factor as a repeated measures factor, and with TH as a covariate. We then conducted a set of planned contrasts examining the violent video game effect separately for the two provocation conditions, for each of the four aggression measures. Both the provocation and the TH main effects were significant [*F*s(1, 179) = 5.81 and 4.69, respectively, *P*s < .05]. Participants in the increasing provocation condition set lower noise punishments than those in the ambiguous provocation condition (*M*s = 5.06 and 5.51, respectively, *d* = 0.18). Trait hostility was positively related to noise punishment level (*b* = 0.23). This latter finding provides additional evidence that the two-phase CRT task validly assesses aggressive behavior.

There was also a significant time effect, a time x provocation pattern interaction, and a time x video game x provocation pattern interaction [*F*s(3, 537) = 27.90, 19.81, and 4.06; *P*s < .01]. Figure 4 illustrates both the time main effect and the time x provocation pattern interaction. A simple summary of these effects is that participants tended to produce the same pattern of noise punishments for their opponents in Phase 2 as they had received from their opponents in Phase 1. On average, those in the ambiguous condition gave moderate punishments across the four times, whereas those in the increasing provocation condition delivered punishments that started low and increased across time. Interestingly, this same aggression pattern has occurred in the other two experiments that used the two-phase CRT and both the ambiguous and the increasing provocation pattern (Anderson et al., 2000, Experiment 5; Lindsay & Anderson, 2000, Experiment 4).

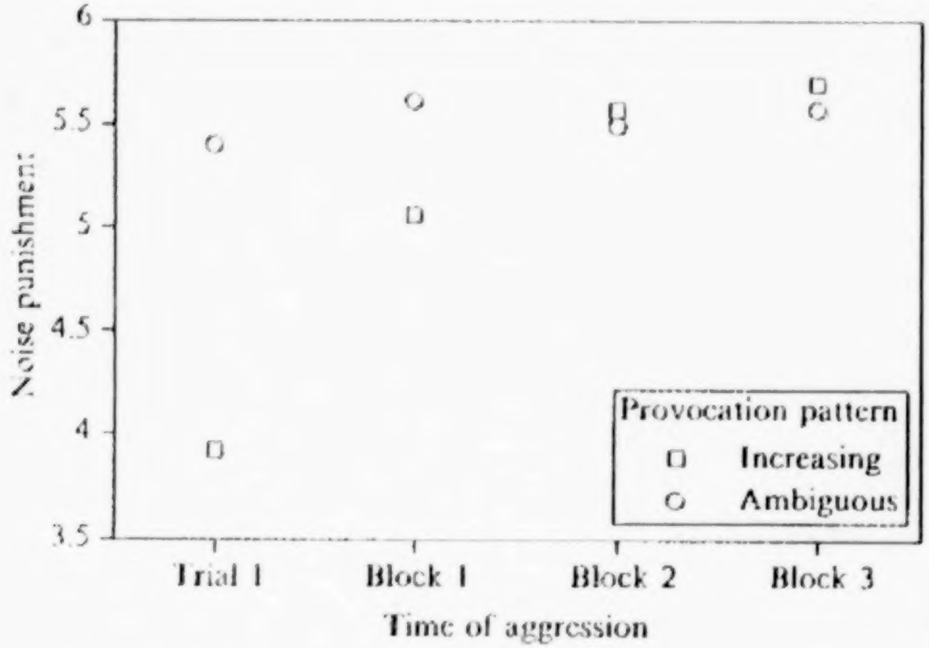

Fig. 4. Noise punishment settings as a function of provocation pattern and time of aggression in Phase 2 of the competitive reaction time task, Experiment 2.

TABLE II

AGGRESSIVE BEHAVIOR (AVERAGE NOISE PUNISHMENT SETTINGS) AS A FUNCTION OF VIDEO GAME, PROVOCATION PATTERN, AND TIME OF AGGRESSION

Video game	Provocation pattern	n	Trial 1	Block 1	Block 2	Block 3
Violent	Ambiguous	44	5.93	5.64	5.52	5.66
Nonviolent	Ambiguous	46	4.86	5.55	5.48	5.47
Video game effect		–	**1.07**	**0.08**	**0.04**	**0.19**
Violent	Increasing	46	3.87	5.16	5.75	5.57
Nonviolent	Increasing	48	3.98	4.96	5.38	5.81
Video game effect		–	**-0.11**	**0.20**	**0.38**	**-0.24**

To more thoroughly examine the video game effects in the context of our main predictions as well as in context of the three-way interaction, we conducted 2 (video game) x 2 (provocation pattern) ANOVAs with TH as a covariate on each measure of aggressive behavior separately, along with two planned contrasts testing separately the video game effect in ambiguous and increasing provocation pattern conditions. Table II presents the adjusted means. Figure 5 plots the mean differences between the violent and nonviolent video game conditions.

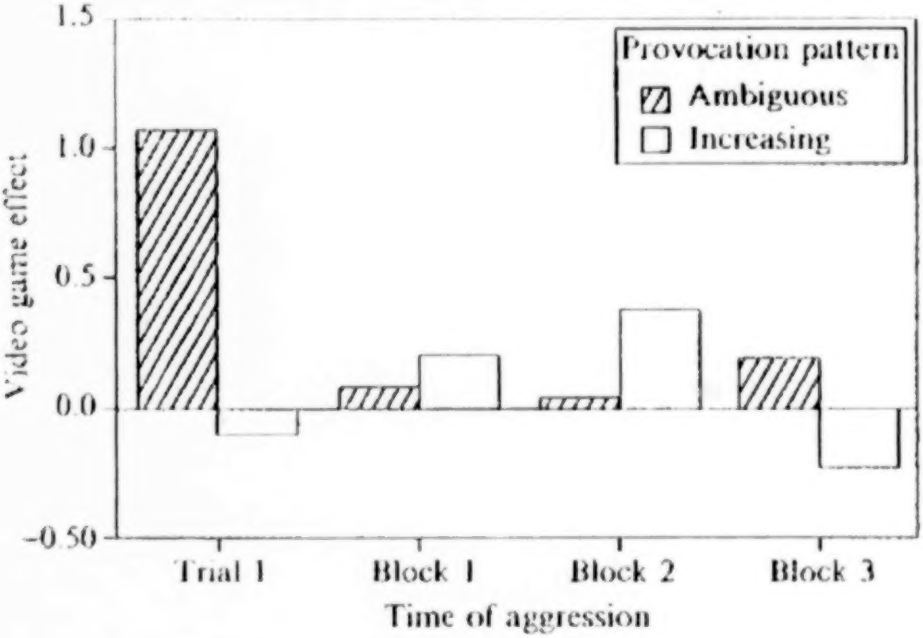

Fig 5. Violent video game effect on noise punishment settings (violent-nonviolent game conditions) as a function of provocation pattern and time of aggression, conrollilng for trait hostility, experiment 2.

As can be seen, the pattern was essentially as predicted. On Trial 1, there were significant main effects of provocation pattern and trait hostility, and a marginally significant video game x provocation pattern interaction [*F*s(1, 179) = 22.35, 4.03, and 3.56, *P*s < .001, .05, & .07, respectively]. The ambiguous provocation pattern led to more aggression than the increasing pattern (*M*s = 5.39 and 3.92, *d* = 0.70). Trait hostility was positively related to aggression (*b* = 0.35). The specific planned contrasts testing the video game effect separately for the ambiguous and increasing provocation pattern conditions revealed that those who played the violent video game and who had received the ambiguous provocation pattern delivered significantly higher noise punishments to their opponents than did those in the corresponding nonviolent game condition [*F*(1, 179) = 5.72, *P* < .02, *d* = 0.5]. Interestingly, those who received the increasing provocation pattern were unaffected by the video games (*F* < 1, *d* = -.05).

In Block 1 (Trials 2-9) only the provocation and TH main effects were even close to significant. Those in ambiguous provocation conditions delivered greater punishments to their opponents than those in the increasing provocation conditions [*M*s = 5.60 and 5.06, respectively; *F*(1, 179) = 7.02, *P* < .01, *d* = 0.39]. Trait hostility was again positively related to aggression [*b* = 0.29, *F*(1, 179) = 6.67, *P* < .02]. The video game effect was not significant under either provocation condition (*F*s < 1). In Blocks 2 and 3, none of the effects of video game, provocation, or TH were significant (*P*s > .10).

2. *Supplementary Analyses.* Table III presents the correlations among questionnaire variables. The most interesting findings involved the measure of revenge motivation. Revenge motivation correlated positively with feeling angry during the CRT task, instrumental aggressive motivation, and experience with the 12 video games included in the questionnaire. To further explore the latter relationship we split the video game experience scale into two subscales and correlated each with revenge and instrumental aggressive motivation. Experience with the six violent video games correlated significantly with revenge motivation ($r = .21$, $P < .01$), and with instrumental aggressive motivation ($r = .15$, $P < .05$). Experience with the six nonviolent video games did not correlate significantly with either type of motivation (Ps $> .5$).

TABLE III

CORRELATIONS AMONG QUESTIONNAIRE VARIABLES

Variable	Revenge motivation	Video game experience	Hours per week	Angry	Instrumental aggressive motivation
Trait hostility	.25*	.02	.05	.06	.09
Revenge motivation	–	.15†	.08	.44*	.26*
Video game experience		–	.46*	.05	.15‡
Hours per week			–	.06	.12
Angry				–	.07

Hours per week indicates hours per week spent playing video games.

*$p < .001$. NS range from 174 to 184.
$^{\dagger}p < .01$.
$^{\ddagger}p < .05$.

Revenge motivation also correlated positively with TH, which was measured several weeks prior to the laboratory session. This suggests that the TH effect on aggressive behavior may have been mediated by revenge motivation. To test this we ran the same regression ANOVAs on the four measures of aggression but with revenge motivation as a covariate. The TH effect disappeared. In the repeated measures ANOVA the main effect of revenge motivation was highly significant [$F(1, 178) = 52.08$, $P < .001$], but the TH effect did not approach significance ($F < 1$). Similarly, on both of the individual aggression measures that had previously yielded significant effects of TH (Trial 1, Block 1) the revenge motivation effect was quite strong [Fs$(1, 178) = 26.83$ and 35.52, bs = 0.89 & 0.65, respectively; Ps $< .001$], and the trait hostility effects became nonsignificant (Ps $> .2$). These results suggest that trait hostility influenced aggression through its effect on revenge motivation.

Interestingly, revenge motivation was not affected by the video game manipulation ($F < 1$). Furthermore, the violent video game effect seen on Trial 1 aggression in the ambiguous provocation condition was not diminished by the inclusion of revenge motivation in the statistical model [$F(1, 178) = 6.96$, $p < .01$]. The difference in adjusted means between the violent and nonviolent video game conditions was essentially the same when revenge motivation was in the model (Ms = 5.89 vs. 4.80) as when it was not in the model (Ms = 5.93 vs. 4.86). Thus, revenge motivation did not mediate the video game effect on aggression.

C. DISCUSSION

This experiment has four main findings. First and foremost, playing a violent video game for 20 minutes led to significantly more aggression than did playing a nonviolent game, in exactly the circumstances expected – on the first retaliation opportunity after an ambiguous pattern of provocations. This video game effect on aggression was specifically due to violent content; both the affective and arousal routes were controlled by the selection of games that do not differ on these two dimensions. Second, TH was positively related to aggressive behavior in the CRT task. Third, this effect was mediated by revenge motivation. Finally, the positive correlations between past experience with violent video games and both of the aggressive motive measures (revengeful and instrumental) suggest that repeated exposure to violent video games might increase the likelihood that minor provocations will elicit revengeful and instrumentally aggressive responses.

It is important to note that the violent video game effect occurred only on the first trial in the ambiguous provocation condition. This is the most critical set of circumstances for testing the violent content hypothesis in the two-phase CRT. The lack of video game effects in the increasing provocation condition confirms earlier reports that in the two-phase CRT the ambiguous provocation pattern results in more sensitive tests of other effects than does the increasing provocation pattern (Anderson et al., 2000; Lindsay & Anderson, 2000). Therefore, the lack of a video game effect in the increasing provocation pattern condition should not be seen as a disconfirmation of the violent content hypothesis. Nonetheless, additional tests of the violent content hypothesis are needed. Experiment 3 was conducted in part to provide such a test.

VII. Experiment 3

One major goal was conceptual replication. We made several changes to maximize the gain from this replication test. First, we added two modified games (one violent and one nonviolent) that have not been used in previous studies, in addition to the two games used in Experiment 2 (Wells & Windschitl, 1999). Second, we used the standard one-phase version of the CRT task in which the participant and the "opponent" set punishment levels for each other on the same set of 25 trials. In this paradigm, aggressive behavior emitted during all 25 trials is relevant, unlike the later trials in the two-phase version.

Two additional changes allowed for a reasonable correlational test of the hypothesis that exposure to media violence is positively associated with aggressive behavior. We used the physical aggression subscale of the Buss-Perry Aggression Questionnaire (Buss & Perry, 1992) as a measure of "trait aggressiveness." We also created an overall media violence exposure variable by combining a shortened version of the violent video games measure used by Anderson and Dill (2000) with a measure of exposure to TV violence.

Finally, Experiment 3 provided a first attempt to examine the effects of varying the realism or the "humanness" of the targets of aggression within a game. It has often been assumed that cartoon-like characters in violent video games (as well as television and movies) would elicit less aggression than human characters, especially among participants older than 10 or 12 years (i.e., participants who can clearly distinguish between the fantasy world of cartoons and the real world). Half of the violent game participants played the original version of Marathon 2, in which the targets are humanoid aliens with green blood. The other half played the same game except that the targets were given a human appearance and spouted red blood when shot.

A. METHOD

1. Participants

Two hundred fourteen undergraduate female and male students enrolled in an introductory psychology class participated for course credit. Participants were randomly assigned to one of four conditions. Two of the conditions involved playing a violent video game; the other two involved playing a nonviolent video game. Ten participants were dropped for a variety of reasons, including failure to complete the materials, high confusion about how to play the games, declining to play the assigned video game, and giving impossible answers to some questionnaire items. For instance, one participant reported watching 70 hours of television per week while taking a full course load. Thus, the total final sample size consisted of 134 females and 70 males. The ratio of female/male participants was approximately equal across experimental conditions.

2. *Materials & Design*

a. Video Games. All video games were played on G3 Power Macintosh computers. The CRT task was conducted with LCIII Macintosh computers. Two of the games were essentially the same as those played in Experiment 2 (the green-blooded alien version of Marathon 2, labeled "Alien" hereafter in this article, and Glider Pro). One minor change was made in the Alien version; the human allies that appeared in the opening scene were removed. The other two games were major modifications of Marathon 2. The violent modified version (labeled "Human") was identical to Alien except that human figures with red blood replaced the green-blooded aliens. The nonviolent version consisted of the same "world" as Marathon 2, but there were no enemies at which to shoot, and the player's main task was to explore the world, find replacement oxygen cylinders, and eventually find the transporter in order to return to the ship. This game had a time element built into it, such that the player could "die" if he or she failed to find sufficient oxygen supplies while searching for the transporter. This was labelled the "Explore" condition.[5]

b. Aggression Paradigm. After playing the assigned video game, the participants performed a standard version of the CRT task. Participants were led to believe that they were competing against another college student, and that they would be setting punishment levels for each other prior to each trial. They were to click the mouse button as quickly as possible after hearing a tone. Participants were told, "Once you both have hit the mouse button and the winner is determined, the computer will display a sign that says either 'YOU WON!' or 'YOU LOST!' If you lose the trial, you will receive the noise your partner chose for you." There were 25 such trials, the outcomes of which were actually controlled by the computer. The ambiguous win/loss and punishment patterns (described in Experiment 2) were used for all participants. The main measure of aggression was the average noise intensity level set by the participant.

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[5] We also modified the opening scenes of the Alien and Human versions to make it somewhat easier, so that novice game players didn't "die" right away. We thank Brian C. Anderson for making these various changes to the Marathon 2 games. Note that to maximize the power of the comparisons of the two violent game conditions (Alien vs. Human), we set up our randomization schedule so that there would be about twice as many participants in the violent conditions as in the nonviolent conditions. The final sample sizes were: Alien = 70, Human = 62; Glider Pro = 36, Explore = 36.

c. *Questionnaire.* A questionnaire was administered at the end of the CRT task. It contained the following measures that were used in Experiment 2: revenge motivation (coefficient alpha = .85), instrumental aggressive motivation (two items r = .40), and angry feelings. Trait hostility was replaced by the nine-item Physical Aggression subscale of the Buss-Perry Aggression Questionnaire (coefficient alpha = .84). The format and style of the items is very similar to the TH scale used in Experiment 2, with scores ranging from 1 to 5. Sample items are "There are people who pushed me so far that we came to blows" and "I get into fights a little more than the average person." Although previous research has shown that this scale loads on the same general factor as the TH scale used in Experiment 2 (Dill et al., 1997), the advantage of the Buss-Perry physical aggression subscale is that all nine items involve aggressive behavior, whereas the TH scale used in Experiment 2 includes several different types of items.

Video game experience was replaced with a composite measure of exposure to video game and television violence. To assess exposure to violent video games, we used a shortened version of the measure reported in Anderson and Dill (2000). Participants listed up to three favorite video games, indicated how often they have played each in recent years, and rated the level of violence in the games. The video game violence exposure measure is created by multiplying the violence rating for each game by the amount of time spent playing that game, and averaging across the three games. Participants also estimated how many hours per week they watch television, and what proportion of time they watch violent television shows. The television violence measure is simply the product of those two estimates. To create the media violence exposure composite, we standardized the video game and television violence scores and summed them.

d. Design. The overall design is thus a 2 (Sex: male vs. female) x 2 (Content: violent vs. nonviolent) x 2 (Game version: Old (Alien & Glider Pro) vs. New (Human & Explore). The Physical Aggression scale was used as a covariate.[6]

3. Procedure

Participants were escorted into the laboratory on arrival. After being seated by the video game equipment, participants read and signed a consent form. The cover story explained that the study involved examining how people learn simple and complex computer tasks. They were also told that they would be playing two games, one a single-player game and the other a competitive two-person game. Each participant was given an explanation of how the controller worked and how to play the single-player game, followed by instructions on how to play the CRT task. They were then told that they had been randomly assigned to play the single-player game first and were instructed to play the designated game for 20 minutes. After playing for 20 minutes, the participant completed the CRT task. Participants were told that they would not meet, see, or learn who their opponent was, but that their opponent was the same sex. After completion of the CRT task, a questionnaire was administered to assess a number of affective and motivational variables, as well as suspicion. During the final debriefing, the experimenter probed for suspicion, explained all procedures, answered any questions, and thanked the participant.[7]

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[6] This scale was not administered at the beginning of the session because we believed that doing so would increase suspicion about the true purpose of the study. To check on the possibility that the experimental manipulations might have systematically influenced scores on this "trait" measure, we conducted a 2 (Content: violent vs. nonviolent) x 2 [Game version: Old (Alien & Glider Pro) vs. New (Human & Explore)] ANOVA on the trait physical aggression scores. None of the effects approached significance [all Fs < 0.15, all Ps > 70]. Thus, using this variable as a trait physical aggression covariate seemed appropriate.

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[7] As in Experiment 2, the final questionnaire included items asking participants about the true purpose of the study. In addition, the Experimenter conducted a structured interview designed to detect suspicion as well as to ease into the debriefing. The second author later examined the participants' written comments and the Experimenters' notes and rated each participant on a four-point suspicion scale (0-3). Twenty-two participants indicated that they knew (or strongly believed) that the study was about video games and aggression. These participants were excluded from all analyses. During the year in which this experiment was conducted, a number of stories about violent video games appeared in national, regional, and student newspapers and in a wide array of electronic media, which may account for the increased suspicion rate. Unlike Experiment 2, in which only a few participants were so suspicious and in which

(Continued on following page)

B. RESULTS

1. Aggressive Behavior

The main measure of aggressive behavior in this experiment was the average noise intensity level that participants set as punishments for their opponent, averaged across all 25 trials of the CRT task. Both the trait physical aggression effect and the main effect of video game violent content were significant, replicating the main findings of Experiment 2. Trait physical aggression was positively associated with aggression [$F(1, 195) = 15.32$, $P < .001$, $b = .42$]. More importantly, as shown in the left two columns of Fig. 6, participants who had played a violent video game set higher punishment levels than those who had played a nonviolent game [$F(1, 195) = 7.17$, $P < .01$, $d = .38$, Ms $= 5.41$ and 4.83, respectively]. None of the other main effects or interactions were significant [all Fs$(1, 195) < 3.20$, all Ps $> .07$].

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suspicion was unrelated to the key dependent variables, in the present study suspicion was highly related to the key measure of aggression. Specifically, the 22 highly suspicious participants produced significantly lower levels of aggression than did the remaining participants [$F(1, 238) = 26.47$, $P < .0001$, $d = .67$]. This finding is similar to other research on suspicion in aggression studies, in which suspicious participants tend to be relatively unaffected by experimental manipulations and tend to display low levels of aggression, presumedly as a result of their deciding to not display aggressive inclinations (Berkowitz & Donnerstein, 1982; Carlson, Marcus-Newhall, & Miller, 1990; Kruglanski, 1975). Fortunately, there was no systematic relation between condition of the study and suspicion level [$F(7, 238) = 1.04$, $P > .40$].

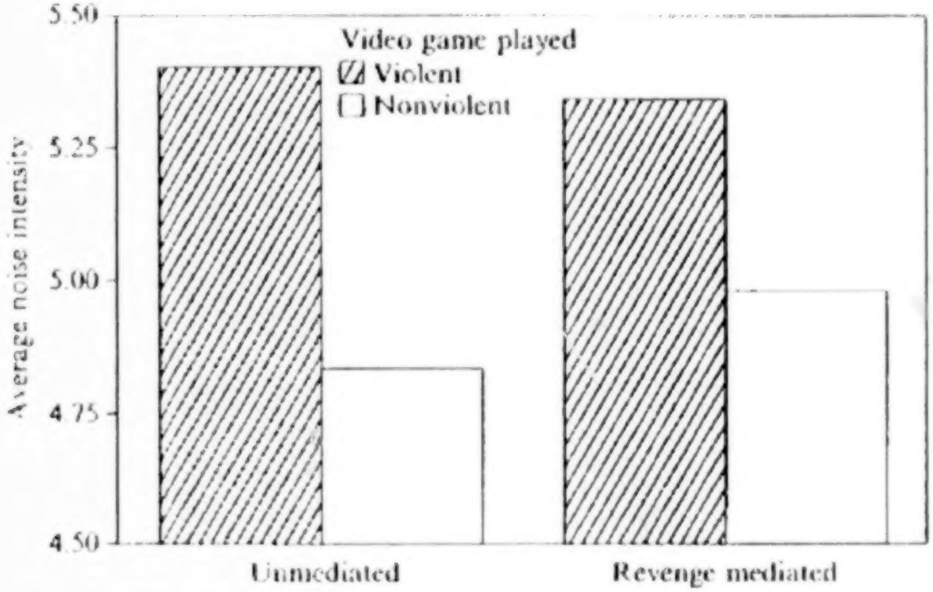

Fig. 6. Covariate adjusted average noise intensity settings as a function of video game violence, without (unmediated) and with revenge motivation as a mediating variable, Experiment 3.

2. *Supplementary Analyses*

a. Correlations. Table IV presents the correlations among the key questionnaire measures. The pattern of correlations was very similar to that found in Experiment 2. Revenge motivation was positively correlated with feeling angry, instrumental aggressive motivation, and trait physical aggression. The latter suggests that the trait physical aggression effect on aggressive behavior reported earlier may have been mediated by revenge motivation, similar to the TH effect in Experiment 2. We return to this idea shortly.

One of the most interesting correlational findings concerned the relation between media violence exposure and the trait physical aggression measure. As shown in Table 4, the correlation was positive, statistically significant, and in the small to medium range. Trait physical aggression also correlated positively with the number of hours spent with electronic entertainment in general. To further test the hypothesis that violent content is most important in this relation, rather than simply number of hours spent on electronic entertainment, we conducted a simple regression analysis that included media violence exposure and number of hours per week spent on video games and television as predictors of trait physical aggression. The media violence measure remained a significant predictor [$F(1, 200) = 18.79$, $P < .001$, $b = .43$]. When sex was also added to the model, the media violence effect remained significant [$F(1, 199) = 6.68$, $P < .02$, $b = .27$].

TABLE IV

CORRELATIONS AMONG KEY QUESTIONNAIRE VARIABLES

Variable	Revenge motivation	Hours per week	Angry	Instrumental aggressive motivation	Media violence
Trait physical aggression	.39*	.23*	.13	.10	.36*
Revenge motivation	—	.05	.48*	.49*	.07
Hours per week	—	—	-.04	-.02	.55*
Angry	—	—	—	.18†	-.00
Instrumental aggressive motivation	—	—	—	—	-.03

Hours per week indicates hours per week spent playing video games and watching television.

*$P < .001$. NS range from 203 to 204.

†$P < .01$.

‡$P < .05$.

b. Mediation by Revenge. Revenge motivation was further analyzed with a 2 (Sex: male vs. female) x 2 (Content: violent vs. nonviolent) x 2 (Game version: Old (Alien and Glider Pro) vs. New (Human and Explore) ANCOVA, with trait physical aggression as a covariate. There was a significant main effect of violent content on revenge motivation [$F(1, 195) = 8.24$, $P < .01$, $d = .41$]. Participants in the violent game conditions reported higher levels of revenge motives than did those in the nonviolent game conditions [$Ms = 1.97$ and 1.63, respectively]. There was also a significant effect of trait physical aggression [$b = .43$, $F(1, 195) = 31.83$, $P < .001$]. This suggests that both the trait physical aggression effect and the video game effect on aggression may have been mediated by revenge motivation.

To test the mediation hypothesis, we added revenge motivation to the ANCOVA model and examined the change in aggression score variance accounted for by trait physical aggression and by the video game violence manipulation. In both cases, the proportion of unique variance attributed to the predictor dropped significantly. Revenge motivation accounted for 77% of the variance attributed to the trait physical aggression [$F(1, 194) = 13.27$, $P < .001$]. Nonetheless, the unique variance accounted for by trait physical aggression still remained statistically significant [$F(1, 194) = 3.92$, $P < .05$]. Thus, it appeared that revenge motivation mediated most but not all of the trait physical aggression effect on aggression.

Revenge motivation accounted for 61% of the the violent video game variance [$F(1, 194) = 4.89$, $P < .05$]. However, when revenge motivation was partialled out, the video game effect was still marginally significant [$F(1, 194) = 3.16$, $P < .08$]. Revenge motivation appeared to mediate much but not all of the video game effect on aggression. The two right columns of Fig. 6 show the video game violence effect after revenge motivation is partialled out of the adjusted means.

c. Alien vs. Human Targets. The two violent versions of Marathon 2 used in this experiment differed only in whether the enemy targets were green-blooded aliens or red-blooded humans. Supplemental analyses were performed on these two violent game conditions. The first set involved ratings of the games provided by participants on the standard dimensions used to select games in Experiment 1: difficulty, enjoyment, violence of graphics and content (averaged), frustration, and action. The 2 (sex) x 2 (game) ANCOVAs with trait physical aggression as a covariate yielded no significant game main or interaction effects. Indeed, the only reliable effects to emerge from these analyses were main effects of sex on the enjoyment, violence, and frustration ratings [$Fs(1, 127) = 6.78$, 8.94, and 4.06, respectively; all $Ps < .05$]. Males enjoyed these two violent games more than females ($Ms = 3.88$ and 3.09). They also rated the games as less violent ($Ms = 4.03$ and 4.87) and less frustrating ($Ms = 3.76$ and 4.38) than females. In sum, the two violent games were essentially equal on these game dimensions, although men and women viewed them somewhat differently.

The most important question concerning the two violent game conditions is whether the substitution of human characters with red blood increased aggression in this short-term context. It did not [$F(1, 127) = 0.36$, $P > .50$], although the means were slightly in that direction (Ms = 5.49 and 5.33 for the Human and Alien conditions, respectively).

C. DISCUSSION

Experiment 3 replicated the main findings of Experiment 2 using two similar violent games (the Alien and Human versions of Marathon 2) versus two nonviolent games (Glider Pro and the exploration version of Marathon 2) and did so with the more standard version of the CRT task. This replication strengthens the hypothesis that violent content in a video game can increase aggressive behavior after a minor provocation, even when the arousal and affective sequela are controlled. Furthermore, the positive association between trait physical aggression and CRT aggression further validates this noise-aggression paradigm. Finally, the trait physical aggression effect on aggressive behavior was partially mediated by revenge motivation, similar to the TH effect in Experiment 2.

Experiment 3 also found essentially equivalent effects of the two violent versions of Marathon 2 – the green-blooded alien or red-blooded human enemies

This strongly contradicts conventional wisdom and some research on television violence, both of which suggest that more realistic violence would have a relatively greater impact. Of course, failure to find a statistically significant effect is not sufficient to claim that the effect does not exist. Two alternative explanations for the lack of a "realism" effect are quite plausible. First, it may be that the realism effect occurs in repeated exposure long-term contexts but not in a short-term context. This would be true if the realism effect operates as a kind of systematic desensitization effect (Carnagey, Bushman, & Anderson, under review). Second, the high realism condition in Experiment 3 (i.e., the Human-red blood version of Marathon 2) may not have been sufficiently realistic. Further work (not speculation) is needed on the realism effect.

Finally, Experiment 3 found additional correlational support for the link between exposure to media violence and general level of trait physical aggression. By themselves, such correlational data are not conclusive regarding causality, but they lend support for the hypothesis that repeated exposure to violent media leads to relatively high levels of trait aggressiveness.

VIII. Correlation Study 1

A. OVERVIEW

The primary purpose was to test the hypothesis that repeated exposure to violent video games would be positively associated with aggressive behavior and persistent aggressive cognitions (e.g., attitudes toward aggression), and that these persistent aggressive cognitions would at least partially mediate the violent video game exposure-aggression link. A secondary purpose was to examine associations between violent video game exposure and several key personality indicators. Specifically, we included Goldberg's Big Five scales, the Narcissism scale, and Caprara's Emotional Susceptibility scale. If repeated exposure to violent video games does influence basic personality development, then associations should be found between such exposure and personality indicators known to be related to habitual aggressive behavior tendencies, such as Goldberg's agreeableness and conscientiousness factors, narcissism, and emotional susceptibility. Of course, such associations could reflect the opposite causal direction. That is, basic personality factors favoring aggressiveness might well predispose some individuals to enjoying and playing violent video games. A cross-sectional correlation study of this type cannot, by itself, conclusively rule out this alternative. However, this alternative further implies that any significant correlations between violent video game exposure and aggression should become nonsignificant when basic personality factors are statistically controlled.

In sum, strong support for the hypothesis that repeated exposure to violent video games increases aggressive behavior tendencies and does so through changes in persistent aggressive cognitions would consist of three parts. First, there must be significant associations between violent video game exposure and aggressive behavior tendencies. Second, these associations should persist even when basic personality factors are statistically controlled. Third, these associations should be substantially reduced when persistent aggressive cognitions are statistically controlled. Adequate testing of these ideas requires a large sample size, so that lack of statistical power does not lead to type 1 inferential errors.

B. METHOD

1. *Participants*

Three hundred seventeen male and 489 female college students at a large midwestern university participated in a large mass testing questionnaire session for partial credit toward introductory psychology course requirements.

2. *Measures*

a. Video Game Violence Exposure. Video game violence exposure (VGV) was assessed using the same shortened version of the Anderson and Dill (2000) measure described earlier in Experiment 3. Across the three video game items, coefficient alpha was .83, only slightly lower than the .86 alpha reported by Anderson and Dill (2000) for their five-game version of this measure.

b. Basic Personality. We measured seven basic personality factors, the Big Five as well as two more specific factors that have been theoretically and empirically related to aggression (narcissism and emotional susceptibility). Goldberg's (1992) Big Five measure of basic personality structure consists of 20 items for each factor. Coefficient alphas were: surgency (extraversion) = .87; agreeableness = .91; conscientiousness = .89; emotional stability (neuroticism) = .80; intellect (openness) = .85. The 40-item Narcissism scale (Raskin & Terry, 1988) yielded an alpha of .84. The 27-item Emotional Susceptibility scale (Caprara et al., 1985) yielded an alpha of .91.

c. Attitudes towards Violence. Two measures of attitudes toward violence were used. One was the recently revised 39-item Attitudes towards Violence scale (ATVS; Anderson, Benjamin, Wood, & Bonacci, in press), with an alpha of .92. The other was the 15-item Adolescent Attitudes towards Violence scale (AATVS; Funk, Elliott, Urman, Flores, & Mock, 1999), with an alpha of .76.

d. Aggressive Behavior. Three measures of trait aggressive behavior were used. The nine-item physical and the five-item verbal aggression subscales of the Aggression Questionnaire (Buss & Perry, 1992) yielded alphas of .85 and .79, respectively. We also used the same standardized 10 physical aggression items used by Anderson and Dill (2000) from the National Youth Survey (Elliot, Huizinga, & Ageton, 1985), which includes behaviors that would be considered criminal if known to police (e.g., assault, robbery). For ease of exposition, the Buss-Perry physical aggression measure will be referred to as *mild physical aggression*, whereas the National Youth Survey measure will be referred to as *severe physical aggression*.

C. RESULTS AND DISCUSSION

1. *Zero-order Correlations*

As expected, VGV was positively related to each of the three aggression measures and to both attitudes towards violence measures, as can be seen in Table V. VGV was also negatively associated with the Big Five factors of agreeableness and conscientiousness, as expected. VGV was also slightly positively correlated with the Big Five factor of emotional stability. Finally, VGV was positively correlated with narcissism and negatively correlated with emotional susceptibility. There are a number of additional interesting correlations in Table V, but because they are less central to the main hypotheses we leave them for the reader to discover.

TABLE V
CORRELATIONS AMONG KEY QUESTIONNAIRE VARIABLES

Variable	MPA	VA	SPA	ATVS	AATV	B5Su	B5Ag	B5Co	B5ES	B5In	NPI	ES
VGV	.312*	.196*	.166*	.237*	.321*	-.012	-.161*	-.121*	.076'	.029	.159*	-.170*
MPA	—	.438*	.315*	.478*	.696*	-.012	-.319*	-.202*	-.080'	-.043	.197*	.070'
VA	—	—	.131*	.209*	.358*	.180*	-.223*	-.078'	-.091'	.055	.296*	.068
SPA	—	—	—	.250*	.322*	-.003	-.187*	-.130*	-.021	-.100'	.112'	.039
ATVS	—	—	—	—	.527*	-.097'	-.307*	-.137*	-.009	-.220*	.132*	-.007
AATV	—	—	—	—	—	-.068	-.357*	-.235*	-.026	-.108'	.167*	.045
B5Su	—	—	—	—	—	—	.320*	.198*	.137*	.380*	.499*	-.098'
B5Ag	—	—	—	—	—	—	—	.607*	.205*	.489*	-.048	-.066
B5Co	—	—	—	—	—	—	—	—	.222*	.415*	.087'	-.146*
B5ES	—	—	—	—	—	—	—	—	—	.055	.056	-.566*
B5In	—	—	—	—	—	—	—	—	—	—	.262*	-.050
NPI	—	—	—	—	—	—	—	—	—	—	—	-.212*

VGV, Video game violence exposure; *MPA*, mild physical aggression; *VA*, verbal aggression; *SPA*, severe physical aggression; *ATVS*, Attitudes towards Violence scale; *AATV*, Adolescent Attitudes towards Violence scale; *B5Su*, surgency; *B5Ag*, agreeableness; *B5Co*, conscientiousness; *B5ES*, emotional stability; *B5In*, intellect; *NPI*, narcissism; *ES*, emotional susceptibility.

*$P < .001$.

'$P < .05$.

n = 806.

2. *VGV-Aggression Link and Basic Personality*

If the strong correlation between VGV and aggression is due solely to spurious relationships with basic personality factors, such that aggressive people also happen to like violent video games, then statistically controlling for basic personality factors should eliminate the VGV-aggression relationship. We used the destructive testing approach to assess this question (Anderson & Anderson, 1996; Anderson & Dill, 2000). In this approach, one first determines whether a specific predicted relationship exists (e.g., the VGV-aggression correlation). If so, then theoretically meaningful competitor variables (e.g., Big Five) are entered into the regression mode to determine whether these competitors break the target relation. Of primary interest is not whether the initial target link can be broken (i.e., made nonsignificant), because even strong causal links between measured variables can eventually be broken by adding more correlated competitors into the model. Instead, the focus is the durability of the link, with consideration given to the theoretical and empirical strength of the competitor variables.

Table VI presents the results of this destructive testing procedure, displaying the raw slopes linking VGV to each of the three aggression measures, when only VGV is in the model (first column of slopes) and when other competitor variables are partialled out (columns 2-5). We first added sex to the model. The slopes decreased in magnitude but remained statistically significant.[8] In turn, we added the Big Five factors, then the narcissism measure, and finally the emotional susceptibility measure. As shown in Table VI, the VGV-aggression link survived all of these competitor variables. These results support the view that the VGV-aggression link is not a spurious artifact of basic personality structure.

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[8] Because sex is highly correlated with exposure to violent video games, partialling out sex effects likely overcorrects for gender differences. Thus, the resulting estimate of the VGV-aggression relation is an extremely conservative one.

TABLE VI

DESTRUCTIVE TESTING RESULTS ON THE VGV/AGGRESSION RELATION

	VGV slopes with various predictor variables in the model				
Aggression measure	VGV	+Sex	+Big 5	+NPI	+ES
Mild physical aggression	.0286*	.0098†	.0082†	.0078‡	.0081†
Verbal aggression	.0182*	.0098†	.0075‡	.0068‡	.0071‡
Severe physical aggression	.0097*	.0058‡	.0056‡	.0053‡	.0055‡
df for *F* test of VGV effect	1, 804	1, 803	1, 798	1, 797	1, 796

VGV, Video game violence exposure; *Big Five*, five basic personality factors; *NPI*, narcissism personality inventory; *ES*, emotional susceptibility.

*$P < .001$.

†$P < .01$.

‡$P < .05$.

n = 806

3. *Persistent Aggressive Thoughts as a Mediator*

Our next analysis used the same destructive testing approach, but here the meaning is considerably different because the "competitor" variables are potential mediators of the long-term VGV effect on aggressive tendencies. Our application of GAM to the video game domain explicitly states that the content of violent video games can create long-term changes in a host of aggression-related knowledge structures, many of which can be indexed by measures of general attitudes toward violence. Thus, we expected that adding such attitude measures to the statistical model would result in substantial reductions in the VGV-aggression relation.

Once again, we began with a model having only VGV as the predictor, and then added sex to the model (see columns 1 and 2 of Table VI). Next, we added both attitudes toward violence measures to the model (instead of the personality factors). As anticipated, the VGV-aggression slope decreased substantially for each of the three aggression measures. For mild physical aggression the VGV slope dropped from a significant .0098 ($P < .005$) to a nonsignificant .0013 [$F(1, 801) = 0.28$], an 87% decrease in the slope [(.0098-.0013)/.0098]. For verbal aggression the VGV slope dropped from a significant .0098 ($P < .01$) to a nonsignificant .0055 [$F(1, 801) = 2.44$], a 44% decrease. For severe physical aggression the VGV slope dropped from a significant .0058 ($P < .02$) to a nonsignificant .0031 [$F(1, 801)1.96$], a 47% decrease.

In sum, these results support the hypothesis that long-term effects of repeated exposure to violent video games on aggressive behavior tendencies are at least partially mediated by changes in persistent aggressive cognitions. Of course, as noted earlier the correlational nature of these results warrants some interpretative caution and further integrative research.

IX. Updated Meta-Analysis

A number of new studies have become available since Anderson and Bushman's (2001) meta-analysis of violent video game effects. We added all of the new studies we could locate to our database and made a few procedural changes to address two specific questions. One question concerned the possibility (frequently offered by media representatives and other critics) that the average effect sizes reported in prior meta-analyses might be inflated by the inclusion of studies with potentially important methodological weaknesses. In the present meta-analytic study, we identified nine methodological weaknesses found in at least some violent video game studies, and we categorized each sample as having none of them (the "Best Practices" studies) or at least one ("Not Best Practices" studies). We compared the average effect size results of this distinction. The second question concerned potential differences between experimental studies (which allow stronger causal statements on the basis of even a few studies) and correlational studies (which typically involve more serious and realistic forms of aggression, and address the long-term effect issue).

A. METHODS

1. *Study Sample*

A complete list of included studies can be found at the following web page: http://www.psychology.iastate.edu/faculty/caa/abstracts/2000-2004/04AESPref.pdf. We included all studies that we could locate that had data testing a possible link between exposure to violent video games and one of five types of outcome variables: aggressive behavior (defined as behavior intended to harm another person), aggressive cognition, aggressive affect, helping behavior, and physiological arousal. A given "study" might contain more than one independent "sample" of research participants. For example, some studies reported results separately for male and female participants. We used one effect size for each sample for each of the available five dependent variables. For example, if a sample had three different (and valid) measures of aggressive behavior and a composite of the three, we used the composite measure. If a composite could not be obtained, we used the average of the three separate effect sizes.

2. *Best Practices Coding*

The following potential methodological problems were examined for each sample:

1. Nonviolent video game condition contained violence, and there was no suitable nonviolent control condition.

2. Violent video game condition contained little or no violence.

3. In a correlational study, the measure of video game exposure was not specifically tied to violent video games (e.g., the amount of time spent on any kind of video game was measured instead of time spent on violent video games).

4. Evidence that the violent and nonviolent conditions differed significantly in ways that could contaminate the conditions, such as the nonviolent condition being more difficult, boring, or frustrating than the violent condition.

5. A pre-post design was used, but only the average of the pre- and postmanipulation measures was reported.

6. Each research session involved both a video game player and an observer, but only the average of the player-observer measures was reported.

7. The aggressive behavior measure was not aggression against another person (e.g., aggression against a non-human character, or against objects).

8. The outcome variable was physiological arousal, but arousal differences between the violent and nonviolent video game conditions

were already controlled by pretesting, game selection, or both (i.e., equally arousing violent and nonviolent games were intentionally chosen by the researchers to control for potential arousal effects on other outcome measures such as aggressive behavior).

9. The outcome variable was aggressive affect, but affective differences between the violent and nonviolent video game conditions were already controlled by pretesting, game selection, or both (i.e., violent and nonviolent games were intentionally chosen by the researchers to have the same affective impact, to control for potential affective influences on other outcome measures such as aggressive behavior).

Some of these "weaknesses" are actually strengths for other aspects of the same research. For example, if one wants to study whether violent video game content (relative to a nonviolent video game) can increase aggressive behavior even when there are no arousal differences between the games, pretesting and selecting violent and nonviolent video games that produce equivalent levels of arousal is an excellent methodological feature (as in our Experiments 1-3). However, that same sample does not allow a good test of whether violent video games on average increase arousal. Thus, for aggressive behavior this sample would be coded as a "best practice" one, whereas it would be coded as a "not best practice" sample for physiological arousal.

For several samples it was possible to get effect sizes for both a best practices procedure and a not best practices procedure on the same outcome variable. For example, several correlational studies reported both a *best practices* measure of time spent on violent video games and a *not best practices* measure of time spent on any type of video game.

B. RESULTS AND DISCUSSION

1. Best vs. Not Best Practices

Figure 7 presents the best vs. not best practices results. In each case the methodologically best samples yielded average effect sizes that were larger than methodologically weaker samples. This was especially pronounced for aggressive behavior and aggressive affect, wherein the 95% confidence intervals for the best and not best samples did not overlap. These results suggest that effect size estimates that include methodologically weaker studies (e.g., Anderson & Bushman, 2001) underestimate the true effect sizes of exposure to violent video games.

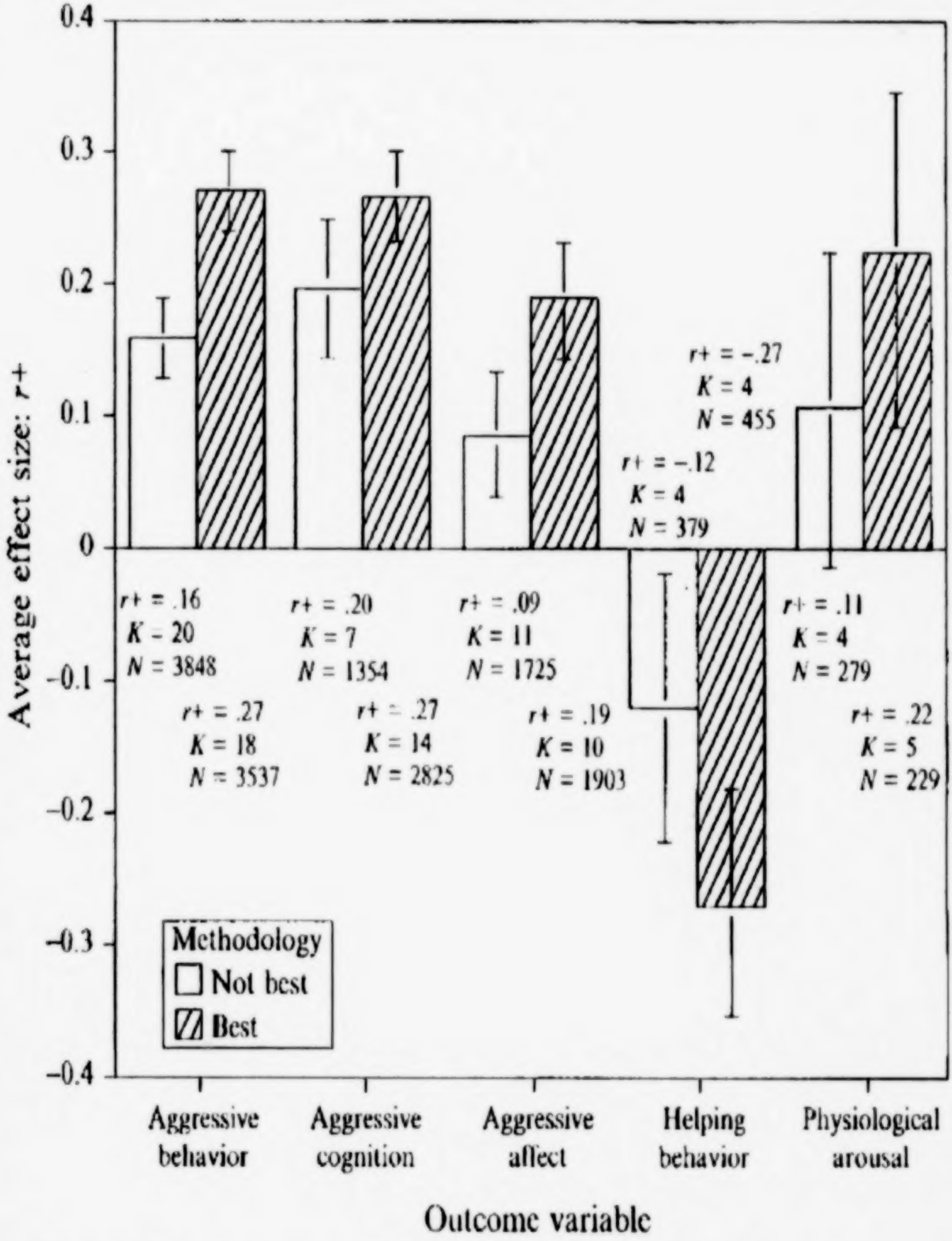

FIG. 7. Effects of violent video games on aggressive behavior, aggressive cognition, aggressive affect, helping behavior, and physiological arousal by best practices methodology. *r+*, average effect size; *K*, number of independent samples; *N*, total number of participants. Vertical capped bars are the upper and lower 95% confidence intervals.

2. *Best Practices Samples: Experimental vs. Correlational*

Figure 8 presents the average effect sizes of the best practices samples categorized by type of study. There are no consistent differences in effect sizes for the experimental versus correlational samples. Correlational studies yielded a slightly larger average effect on aggressive and helping behavior than did experimental studies, whereas the opposite was true for aggressive cognition and affect. In all four of these cases the experimental and correlational 95% confidence intervals overlap. Furthermore, both the experimental and correlational effect sizes were significantly different from zero for each outcome variable except physiological arousal, and that was because there are no best practices correlational studies of this type. In sum, despite the relatively small size of this research domain, there is considerable correlational and experimental evidence linking exposure to violent video games with increases in aggressive behavior and to several aggression-related variables.

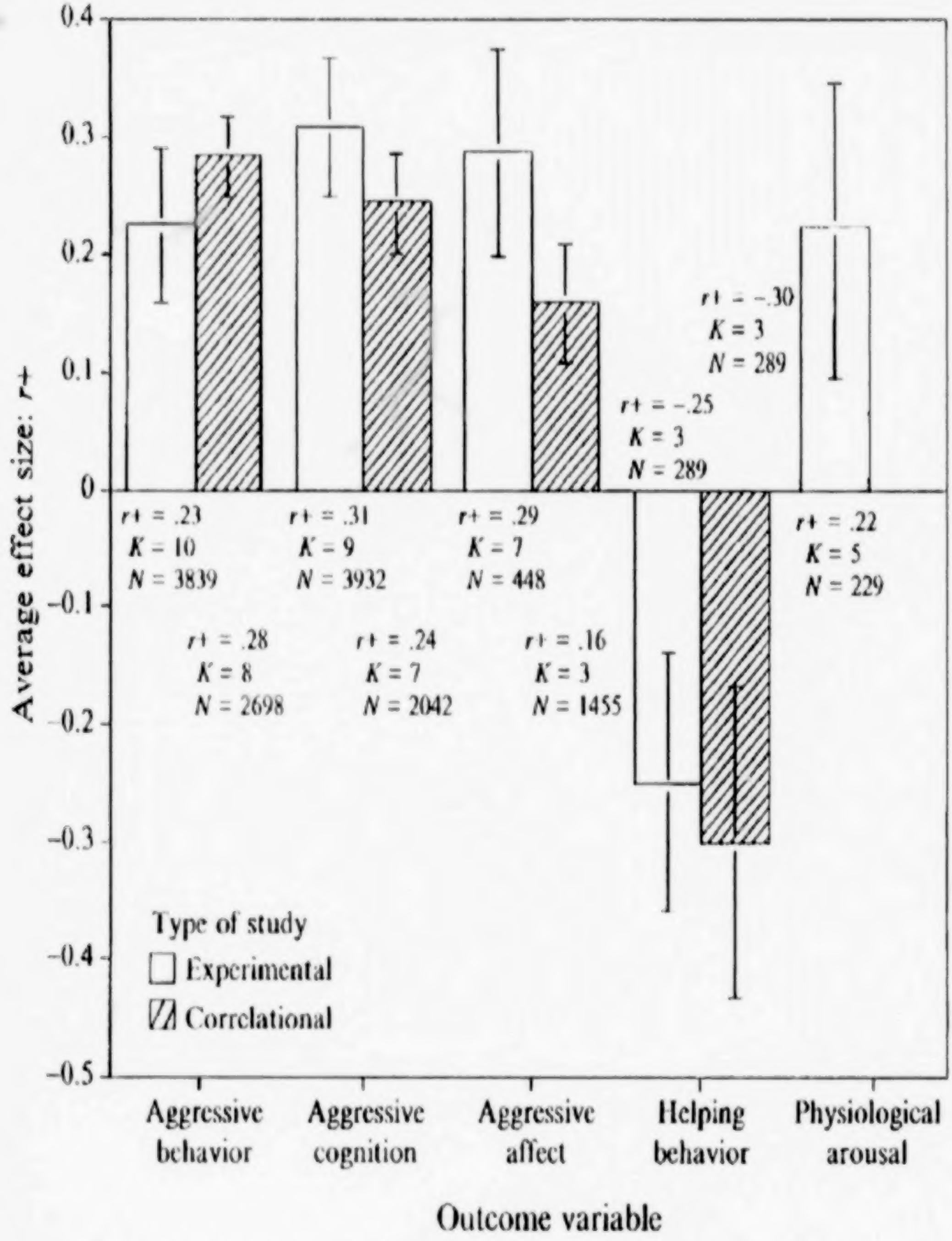

FIG. 8. Effects of violent video games on aggressive behavior, aggressive cognition, aggressive affect, helping behavior, and physiological arousal by type of study for best practices samples. r+, average effect size; K, number of independent samples; N, total number of participants. Vertical capped bars are the upper and lower 95% confidence intervals.

X. General Discussion

These five studies (three experiments, one correlational study, one meta-analytic study) contribute to our understanding of human aggression from both a personality processes and a situational effects perspective. We believe these results can best be understood within the GAM theoretical framework described earlier.

A. SITUATIONAL EFFECTS

The main situational finding was that brief exposure to violent video games increased aggressive behavior relative to nonviolent video games matched on arousal and affective dimensions. This occurred in both experiments that measured aggression, regardless of whether the violent game had green-blooded aliens or red-blooded humans as the enemy targets, and occurred in both versions of the CRT task. The lack of reliable sex X game violence interactions suggests that the effect was similar in men and women.

A second situational finding concerns the cognitive effects of violent video games. Experiment 1 demonstrated that violent games in general produce increases in the relative accessibility of aggressive thoughts. The present findings make a very strong case for the hypothesis that violent video games can (and do) cause increases in aggression because of the violent content of such games, not just because of their arousal or affective properties. The present empirical results in combination with our theoretical analysis also lend support to the concern that repeated exposure to violent video games (or other violent media) might lead to development of an increasingly aggressive personality, and that much of this developmental effect may be the direct result of the violent content. In short, repeatedly thinking about violent characters, choosing to be aggressive, enacting that aggressive choice, and being rewarded for it can be conceived as a series of learning trials influencing a variety of types of aggressive knowledge structures. Violent video games may well teach players to become more aggressive people.

One interesting difference between the results of Experiments 2 and 3 concerns revenge motivation. There was little evidence that the video game effect in Experiment 2 was mediated by an increase in desire for revenge, but there was considerable evidence that much of the video game effect was mediated by revenge motivation in Experiment 3. The various procedural differences between the two studies may account for these differences, particularly the timing of various measurements in the two-phase versus the standard one-phase CRT task. In any case, it may be useful in future research to explore the possibility that the violent content of violent video games may increase aggression by first priming aggressive cognitions, which in turn increase desire for revenge when mildly provoked.

B. PERSONALITY EFFECTS

Experiments 2 and 3 yielded several findings of general interest from a personality perspective. First, trait hostility (Experiment 2) and trait physical aggression (Experiment 3) were positively related to aggression in the CRT task. This further validates these trait measures and the two versions of the CRT task. Second, both of these effects were largely mediated by revenge motivation. Thus, it appears that one way in which highly hostile people are predisposed to be aggressive against others is through increased revenge motives that are aroused when mildly provoked. We believe that this is the first demonstration that such trait effects on aggressive behavior operate through increases in desire for revenge.

A third finding concerns the question of who is most susceptible to violent video game effects. There is some evidence from the television/movie violence literature that highly aggressive people tend to be more strongly influenced by exposure to violent media than nonaggressive people (e.g., Bushman & Huesmann, 2001). Such person x situation interactions do not always occur in the media violence literature; sometimes the opposite pattern occurs (e.g., Anderson, 1997). Also, even when this pattern occurs, it is not the case that nonaggressive people are entirely unaffected. A common claim of skeptics and media industry representatives is that only a very few disturbed individuals might be affected at all. In the present studies neither trait hostility (Experiment 2) nor trait physical aggressiveness (Experiment 3) interacted with the violent video game manipulation. That is, the violent video game effect on aggression was not reliably bigger (or smaller) for those participants who scored high on these traits than for those who scored low. Along these same lines, we did not obtain significant sex x video game violence interactions on aggressive behavior. We suspect that with larger sample sizes such person x situation interactions will emerge in some contexts. Nonetheless, the lack of such interactions in the present studies suggests that violent video games influence a sizeable proportion of people.

A fourth finding of interest, from Experiment 2, was that experience with violent video games correlated positively (and significantly) with both revenge motivation and instrumental aggressive motivation, whereas experience with nonviolent video games did not. Although Experiment 2 was not explicitly designed to test these relations, it is interesting that this pattern fits exactly what would be expected if repeated exposure to violent video games does create more aggressive individuals. It also fits with prior research designed to test such effects (e.g., Anderson & Dill, Study 1, 2000).

Fifth, the correlational findings of Experiment 3 that general media violence exposure is positively associated with trait physical aggression, even when time spent on electronic entertainment and sex were statistically controlled, support a long and increasingly strong line of research on media violence effects (e.g., Bushman & Anderson, 2001).

The correlational study provided support for the hypothesized link between repeated exposure to violent video games and increased aggressive tendencies, and did so for three types of aggression: mild physical, verbal, and severe physical aggression. This study also provided the first correlational support for the contention that such long-term effects on aggressive behavior are mediated by persistent aggressive thoughts, here indexed by two different attitudes toward violence measures. Furthermore, this study provided the first correlational evidence that the violent video game exposure link to aggression persists even when a host of basic personality factors are statistically controlled.

Finally, the meta-analysis further revealed consistent effects of violent video game exposure on aggressive behavior, cognition, and affect, as well as on arousal and prosocial behavior. The fact that these effects were stronger in the methodologically strongest studies, and occurred in both experimental and correlation designs (with the exception of arousal), lends further support for our application of GAM to both long- and short-term media violence effects.

C. IMPLICATIONS

There are many questions requiring additional empirical work. One is the need to identify specific features of violent video games that increase or decrease their impact on aggressive thoughts. feelings, and behaviors. Experiment 3 provided one test of the hypothesis that the realism or "humanness" of the game target might exacerbate the effect. It yielded no support for that hypothesis. Further tests using more extremely realistic and gory graphics are needed.

A second question concerns the long-term effects of repeated exposure to violent video games, especially on children and teens. Based on over 40 years of research on television and movie violence, one reasonable expectation is that repeatedly exposing youth to violent video games over a period of years will have a sizeable negative impact on their development. Indeed, there is reason to believe that the video game violence effect will be larger than television violence effects because of the highly engaging and active nature of video games compared with the relatively passive nature of watching TV. Nonetheless, longitudinal research is badly needed to test this prediction and to delineate protective and exacerbating factors.

A third set of questions concerns possible positive effects of games designed to promote prosocial behaviors. Do such games increase prosocial and decrease antisocial behavior? Virtually no research exists on this topic. However, video games are going to remain a major source of entertainment. Therefore we believe it is important to offer empirical evidence and quality theory on which types of features promote a prosocial gaming experience, as well as highlighting the potential antisocial effects of games with violent themes.

XI. Appendix

A. VIOLENT GAME DESCRIPTIONS

- Dark Forces. This is a standard first-person shooter. The player assumes the role of a special ops guy in the Rebellion with the objectives of stealing the Death Star plans and getting out alive. This game has a fairly high level of violence, with weapons like a blaster rifle and laser pistol to kill enemy guards and stormtroopers.
- Marathon 2. This is a standard first-person shooter, in which the player assumes the role of a space marine trapped in a base that has been taken over by aliens. Your main goal is to retake it and not die. This game has a high violence level, with the basic, underlying premise of the game being to shoot anything that moves and kill or be killed. The targets are mainly aliens, with some "compilers" or robots that the aliens use as slaves.
- Speed Demon. This is a 3D combat driving game. The player drives a heavily armed vehicle in a race with other similarly armed vehicles, shooting at and crashing into them as they do likewise. One gets points for destroying other vehicles.
- Street Fighter. This is a third-person fighting game, similar in many ways to Mortal Kombat. The player chooses a character and then engages in a series of fights with other characters. Each character has specific strengths and weaknesses.

- Wolfenstein 3D. This is a first-person shooter. The player assumes the role of B. J. Blascowitz, an American soldier caught and taken prisoner trying to infiltrate a top-secret Nazi experimentation lab. The goal is to shoot your way out of the prison and kill everything that moves. You can pick up various weapons, including various guns. There is a very high violence rate, with you shooting dogs and Nazi guards, with gory bullet hits and "death poses."

B. NONVIOLENT GAME DESCRIPTIONS

- 3D Ultra Pinball. This is simply an electronic version of a pinball game, complete with flippers, buzzers, bells, and various visual and auditory effects.

- Glider Pro. Players of this game control the forward and backward motion of paper airplanes through a house. By flying over air ducts one can gain lift. The glider can turn various items on and off (such as light switches, computers). One can earn points by flying over certain objects. If the glider hits the floor or certain other items, it crumples and is replaced by another glider.

- Indy Car 2. The player assumes the role of driver in an Indy car race with the goal of winning the race. If you bump other cars or drive too fast on turns, you crash. This game can be played from the keyboard, but is much easier with a steering wheel and pedals.

- Jewel Box. This game is a colorful version of Tetris. Variously colored shapes drop from the top of the screen. The player manipulates the objects as they fall, trying to create filled rows. When a row is completely filled, it disappears and the player receives points.
- Myst. This is a nonviolent exploration/mystery/adventure game with a first-person perspective. It begins on the Island of Myst. Players begin by appearing on the island with no knowledge of how or why they ended up there, or how to proceed. In an ancient library, players discover two mysterious books, which lay out the basic mystery. Players must then travel to several different worlds ("ages") to unravel the mystery.

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An update on the effects of playing violent video games

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Abstract

This article presents a brief overview of existing research on the effects of exposure to violent video games. An updated meta-analysis reveals that exposure to violent video games is significantly linked to increases in aggressive behaviour, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behaviour. Experimental

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studies reveal this linkage to be causal. Correlational studies reveal a linkage to serious, real-world types of aggression. Methodologically weaker studies yielded smaller effect sizes than methodologically stronger studies, suggesting that previous meta-analytic studies of violent video games underestimate the true magnitude of observed deleterious effects on behaviour, cognition, and affect.

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An update on the effects of violent video games

For many in the general public, the problem of video game violence first emerged with school shootings by avid players of such games at West Paducah, Kentucky (December, 1997); Jonesboro, Arkansas (March, 1998); Springfield, Oregon (May, 1998), and Littleton, Colorado (April, 1999). More recent violent crimes that have been linked to violent video games include a school shooting spree in Santee, California (March, 2001); a violent crime spree in Oakland, California (January, 2003); five homicides in Long Prairie and Minneapolis, Minnesota (May, 2003); beating deaths in Medina, Ohio (November, 2002) and Wyoming, Michigan (November, 2002); school shootings in Wellsboro, Pennsylvania (June, 2003) and Red Lion, Pennsylvania (April, 2003); and the Washington, DC. “Beltway” sniper shootings (Fall, 2002). Video game related violent crimes have also been reported in several other industrialized countries, including Germany (April, 2002), and Japan (Sakamoto, 2000).

Of course, anecdotal accounts of such incidents do not provide a solid scientific basis for public policy decisions or for the testing and development of relevant scientific theories of aggression. But there is considerable theory and research on both the immediate impact of a single brief exposure to media violence and the long term impact of repeated exposure to such violence (e.g. Donnerstein, Slaby, & Eron, 1994; Huesmann & Miller, 1994; Anderson & Bushman, 2001; Bushman & Huesmann, 2001; Anderson & Bushman, 2002a; Anderson et al., in press; Anderson & Huesmann, 2003). A number of meta-analytic reviews have also been conducted, with the major focus on television and movie violence (e.g. Hearold, 1986; Wood, Wong, & Chachere, 1991; Paik & Comstock, 1994; Bushman' & Anderson, 2001; Anderson & Bushman, 2002b). Basically, the scientific debate over *whether* media violence has an effect is over, and should have been over by 1975 (Bushman & Anderson, 2001). There are a number of negative behavioural, cognitive, and affective consequences of exposure to violent entertainment media, in both the immediate context as well as developmentally across time (for an excellent and current overview, see Gentile, 2003).

Past research on violent video games

The research literature on violent video games is considerably smaller than the literature on violent television and movies, in part because such games are a relatively recent phenomenon but also because there has been little government funding for such research (none in the US, to date). But as this special issue demonstrates, the pace of high quality research on violent video games is increasing, and there is a sufficiently large research base for some clear answers to basic questions. The first comprehensive *narrative* review of violent video game research found evidence that emerging concerns were well founded, but that there were many unanswered questions (Dill & Dill, 1998).

The first comprehensive *meta-analytic* review found considerably clearer support for those concerns. Specifically, Anderson and Bushman (2001) used modern meta-analytic techniques to combine the results of empirical studies of violent video game effects on five types of outcome variables: aggressive behaviour, aggressive cognition, aggressive affect, helping behaviour, and physiological arousal. They found significant effects of violent video games on each of these five variables. Exposure to violent video games increases aggressive thoughts, feelings, and behaviours, increases arousal, and decreases helping behaviour. There was no evidence of moderator effects. That is, these effects appeared to be about the same for males and females, for youths less than 18 years as well as older participants, and for experimental and correlational studies.

One meta-analysis cannot resolve all relevant issues, of course, especially when conducted on a relatively small and somewhat new research domain. Furthermore, the usual meta-analytic procedure is to include every relevant study that can be found, even those with serious methodological shortcomings. Using all studies contributes to one strength of meta-analysis, specifically, that the results do not depend on the arbitrary (and potentially biased) decisions of the reviewer concerning which studies to include and weight heavily (because of their methodological soundness) and which to exclude or weight lightly (because of their methodological weaknesses). If the research literature being reviewed is sufficiently large, then specific methodological weaknesses can be coded and statistically analysed as well. The violent video game literature was not sufficiently large for Anderson and Bushman (2001) to conduct such a detailed meta-analyses of specific methodological features, and this is still the case. Thus, including all studies regardless of methodological features could bias the results in either a positive or negative direction, depending on whether the weaker studies tended to give spuriously positive or negative results. However, one can create a list of important methodological weaknesses, categorize each study according to whether or not it has at least one such shortcoming, and then examine the average effect size of the "best" studies to see whether they tend to yield larger or smaller effects than do "all" studies (see Anderson, 2002, 2003, for a similar approach).

Video game industry representatives and their "experts" have criticized the existing violent video game research literature, much as the tobacco industry found "experts" to criticize all research on the possible causal links between smoking and lung cancer. And of course, the "perfect" study doesn't exist in any domain of science, including video game research. Furthermore, there are very serious methodological problems with some video game studies, especially some of the earlier ones conducted with children. This is not uncommon in new areas of research because the researchers have to learn about a wide array of potential pitfalls in any new research domain. So it is important to examine criticisms of the research domain as a whole for two related reasons. First, we need to know whether methodological shortcomings are producing apparent effects that are in actuality artifacts. Second, future research can benefit by the identification of problems uncovered by past work. Indeed, the Call for Papers for this special issue specifically mentioned several such problems to be avoided.

The most common methodological complaints highlighted by the video game industry and associated critics have been effectively dealt with in multiple ways, many times by an earlier generation of media violence scholars (see Gentile & Anderson, 2003). Ironically, they have largely missed true key existing problems that should be taken into account when evaluating the research on violent video games. The present meta-analysis of "best" practice studies takes these problems into account.

The updated meta-analysis

Methods

Study sample

Relevant studies from this special issue as well as all other empirical reports of violent video game effects were included in the sample. A complete list of included studies can be found at the following web page: http://www.psychology.iastate.edu/faculty/caa/abstracts/2000-2004/03A2ref.pdf. Relevant studies were those that included data testing a possible link between exposure to violent video games and one of five types of outcome variables: aggressive behaviour (defined as behaviour intended to harm another person), aggressive cognition, aggressive affect, helping behaviour, and physiological arousal. These are the same five variables examined in Anderson and Bushman's (2001) earlier meta-analysis of violent video game effects. A given "study" might contain more than one independent "sample" of research participants. For example, some studies reported results separately for male and female participants.

For each sample, one effect size was calculated for each of the available five types of dependent variables. Therefore, if a sample had three different valid measures of aggressive behaviour, the effect of exposure to violent video games on aggressive behaviour used in the present meta-analysis was the average of the three separate effect sizes.

Best practices coding

The following potential methodological problems were examined for each sample:

1. Non-violent video game condition contained violence, and there was no suitable non-violent control condition.
2. Violent video game condition contained little or no violence.
3. Evidence that the violent and non-violent conditions differed significantly in ways that could contaminate the conditions, such as the non-violent condition being more (or less) difficult, boring, or frustrating than the violent condition.
4. A pre-post design was used, but only the average of the pre- and post-manipulation measures was reported.
5. Each research session involved both a video game player and an observer, but only the average of the player-observer measures was reported.
6. The aggressive behaviour measure was not aggression against another person (e.g. aggression against a non-human character, or against objects).
7. The outcome variable was physiological arousal, but arousal differences between the violent and non-violent video game conditions were already controlled by pretesting and/or game selection (i.e. equally arousing violent and non-violent games were intentionally chosen by the researchers to control for potential arousal effects on other outcome measures such as aggressive behaviour).

8. The outcome variable was aggressive affect, but affective differences between the violent and non-violent video game conditions were already controlled by pretesting and/or game selection (i.e. violent and non-violent games were intentionally chosen by the researchers to have the same affective impact, to control for potential affective influences on other outcome measures such as aggressive behaviour).
9. In a correlational study, the measure of video game exposure was not specifically tied to violent video games (e.g. the amount of time spent on any kind of video game was measured instead of time spent on violent video games).

Samples that had none of these weaknesses were classified as "best practices" samples, whereas those with at least one weakness were classified as "not best practices" samples. Note that some of these "weaknesses" are actually strengths for other aspects of the same research. For example, if one wants to study whether violent video game content can increase aggressive behaviour (relative to a non-violent video game) even when there are no arousal differences between the games, then pretesting and selecting violent and non-violent video games that produce equivalent levels of arousal is an excellent methodological feature. However, that same sample (and pair of video games) does not allow a good test of whether violent video games on average increase arousal more than non-violent ones. So, for the aggressive behaviour outcome variable this sample would be coded as a "best practice" one, whereas it would be coded as a "not best practice" sample for the physiological arousal outcome variable (see Anderson & Dill, 2000, Study 2).

For several samples it was possible to get effect sizes for both a best practices procedure and a not best practices procedure on the same outcome variable. For example, several correlational studies had both a best practices measure of time spent on violent video games and a not best practices measure of time spent on any type of video game, each of which was correlated with a measure of aggressive behaviour. For all analyses that did not explicitly compare best and not best practices samples, only the best practice effect size estimates were used.

Effect size, age, study type

Effect sizes were converted to the form of Pearson's *r*, regardless of whether they were from true experiments or from correlational designs. Age of participants was coded into samples that were primarily younger than 18 years versus those that were 18 or older. For aggressive behaviour, aggressive cognition, and helping behaviour, the majority of participants were under 18; for aggressive affect and physiological arousal the majority were 18 or older. The 18 and older samples were composed mostly of college students in the 18-21 age range, so overall, the samples can be characterized as being overwhelmingly composed of children and adolescents. There still is not a large enough body of samples in this domain for truly sensitive tests of potential age differences in susceptibility to violent video game effects. And, similar to Anderson and Bushman's (2001) results, preliminary analyses of the present data suggest no strong differences in effect size. Therefore, potential age differences will not be further explored in this article.[1]

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[1] Interestingly, there was a hint that the aggressive behaviour results might be slightly larger for the 18 and over group. However, in my view standard meta-analysis techniques are not the best way to assess age as a moderating factor. There are several reasons for this, all based on what people mean when they ask whether the effect of some factor (e.g. media violence) is larger for younger than for older individuals. Implicit in this question is a more precise question of the form, "Does the exact same independent variable have a bigger effect on the exact same dependent variable for younger versus older participants?" One problem with standard meta-analytic procedures for comparing older with younger participants in different studies is that the independent variables may be systematically different for different age samples. For example, in experiments younger samples tend to be exposed to fairly tame violent video games, whereas older samples tend to be exposed to very violent video games. Similarly, a second problem is that the dependent variable (e.g. aggression) may be systematically associated with the age of participants in different samples. A third problem concerns the use of standardized indicators of effect size (such as *r*). This is necessary when the specific independent and dependent variables differ, as they do when summarizing results across multiple studies. But the implicit question focuses on differences in raw slopes, not correlations, and raw slope is only one of three components of a correlation (variance of the independent variable and prediction error are the other two). The bottom line is that the best way to answer the more precise implicit question is to include multiple ages in the same study, using the same independent and

(Continued on following page)

Anderson and Bushman (2001) also found no evidence of differences between the average effects from experimental versus correlational types of studies. Nonetheless, this distinction is important because of differing strengths and weaknesses. Experimental studies allow strong causal statements because they effectively rule out plausible alternative interpretations. Correlational studies are important for two very different reasons: (1) they provide a falsification opportunity for the theory and hypotheses under consideration; (2) they typically use dependent measures that are more extreme and realistic than the kinds of aggression typically assessed in the lab. If both types of studies yield evidence of significant effects, then the case can be made that the effects are real, causal, and consequential. Therefore, type of study was coded and analysed.

Results

All samples

Fig. 1 presents the average effect of violent video games on each of the five target outcome variables,

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dependent variables, and then testing for an age X media violence interaction. This can be done in both experimental and correlational designs. In other words, age needs to be a within study factor, not a between study factor. Once a sufficient number of such studies have been conducted and reported, one could then estimate the interaction effect size for each study, and then use meta-analytic procedures to test whether or not the set of within study age X media violence interactions was (on average) positive, negative, or fairly close to zero.

for all samples (ignoring the best/not best and the experimental/correlational distinctions). For each outcome variable, there was a significant effect of exposure to violent video games. Playing violent video games was associated with increases in aggressive behaviour, aggressive cognition, aggressive affect, and physiological arousal, and with decreases in helping behaviour. For example, the average effect size on aggressive behaviour was $r+=0.20$, with a lower and upper 95% confidence interval of 0.17-0.22. These aggressive behaviour results were from 32 independent samples involving 5240 research participants.

As can be seen in Fig. 1, none of the 95% confidence intervals came close to including zero, indicating that overall the results are quite robust. In brief, a simple summary of the extant research literature on violent video game effects is that they are quite statistically significant.

Best practices

The results in Fig. 1 include studies known to have potentially serious weaknesses. A sceptic might reasonably ask whether the weak studies are producing artifactually strong effects, effects which would disappear if only the methodologically best samples were used. Fig. 2 presents the results broken down by best vs. not best practices samples. Interestingly, in every case the methodologically best samples yielded average effect sizes that were larger than methodologically weaker samples. This was particularly pronounced for aggressive behaviour and aggressive affect. In both of these cases, the 95% confidence intervals for the best and not best samples did not overlap. In essence, these results suggest that effect size estimates that include methodologically weaker studies (e.g. Anderson & Bushman, 2001; present Fig. 1) underestimate the true effect sizes of exposure to violent video games. There is no evidence that the weak studies produce artifactually large effects in this research domain.

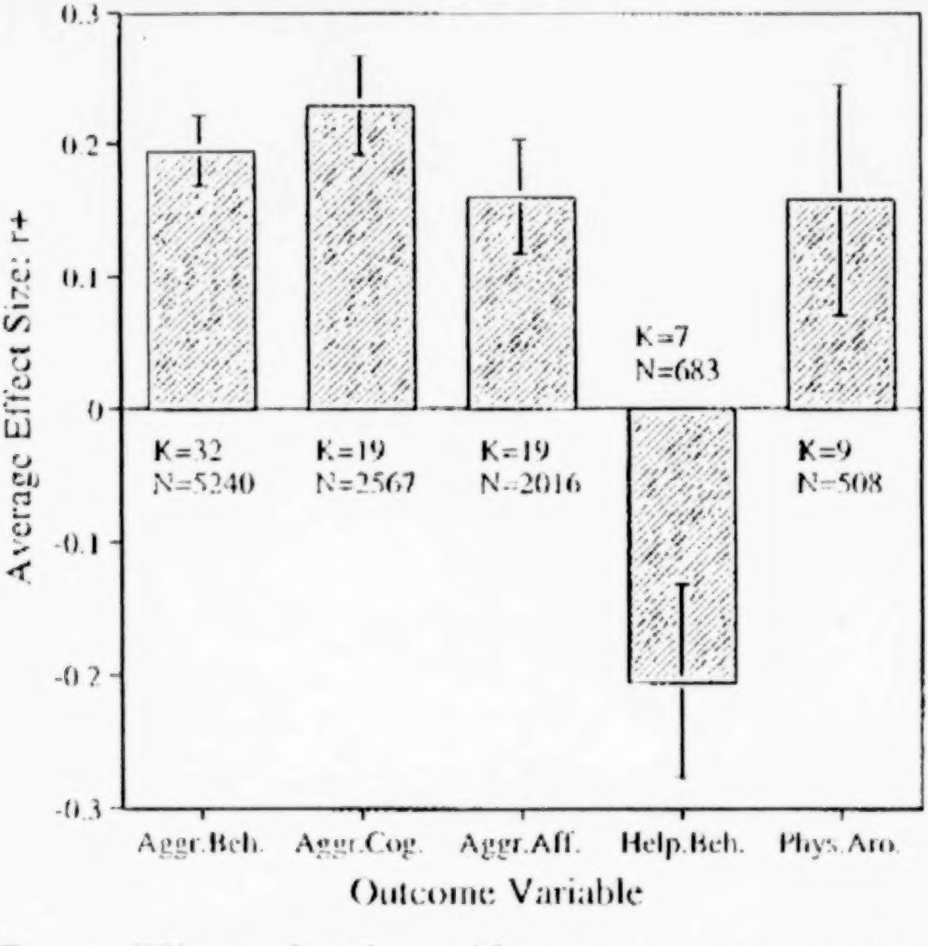

Fig. 1. Effects of violent video games on aggressive behaviour, aggressive cognition, aggressive affect, helping behaviour, and physiological arousal, all

samples. *K* = number of independent samples. *N* = total number of participants. Vertical capped bars are the upper and lower 95% confidence intervals.

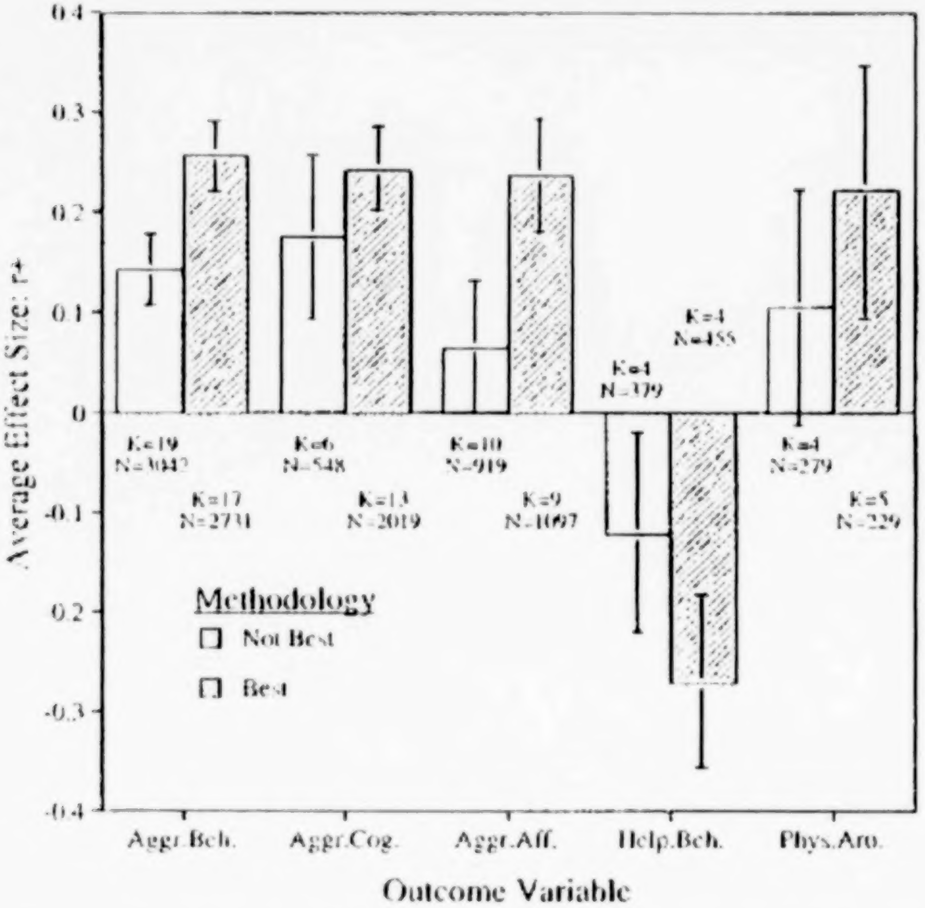

Fig. 2. Effects of violent video games on aggressive behaviour, aggressive cognition, aggressive affect, helping behaviour, and physiological arousal by best practices methodology. *K* = number of independent samples *N* = total number of participants. Vertical capped bars are the upper and lower 95% confidence intervals.

Type of study, best practices samples

Fig. 3 presents the average effect sizes of the best practices samples broken down by type of study. There is little evidence of consistent differences in effect sizes of experimental versus correlational samples. For instance, correlational studies produced a slightly larger average effect on aggressive behaviour than did experimental studies, but there is considerable overlap in their 95% confidence intervals. Furthermore, for four of the five outcome variables the violent video game effect was individually significant for both experimental and correlational studies, despite the relatively small number of samples (*K*s) and participants (*N*s). The only exception was that there were no correlational studies of violent video game effects on physiological arousal.[2]

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[2] The *K* and *N* totals from Fig. 3 do not always match the *K*s and *N*s from the best practices effects in Fig. 2. This results from the fact that 2 best practice samples had both an experimental and a correlational effect size on the same type of outcome variable. The experimental and correlational effects were averaged for the Fig. 2 analyses, but were not averaged for the Fig. 3 analyses.

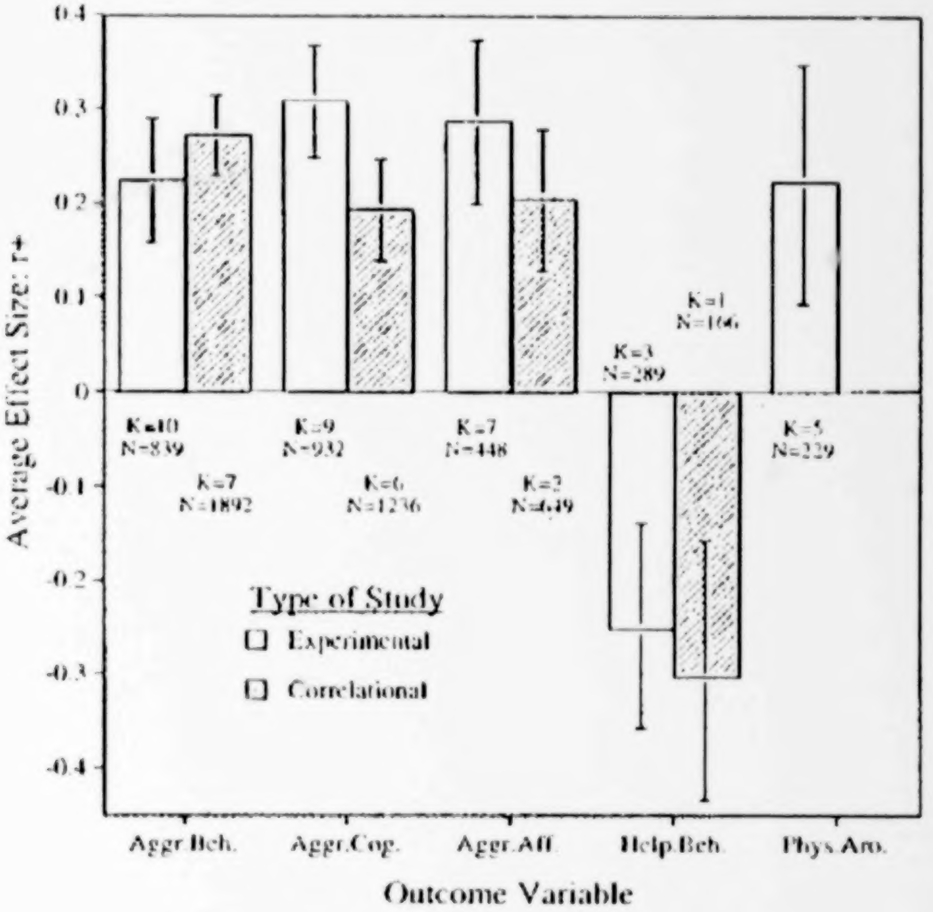

Fig. 3. Effects of violent video games on aggressive behaviour, aggressive cognition, aggressive affect, helping behaviour, and physiological arousal by type of study (experimental vs. correlational) for best practices samples. *K* = number of independent samples. *N* = total number of participants. Vertical capped bars are the upper and lower 95% confidence intervals.

Discussion

Three findings are particularly important. First, as more studies of violent video games have been conducted, the significance of violent video game effects on key aggression and helping-related variables has become clearer. Second, the claim (or worry) that poor methodological characteristics of some studies has led to a false, inflated conclusion about violent video game effects is simply wrong. Third, video game studies with better methods typically yield bigger effects, suggesting that heightened concern about deleterious effects of exposure to violent video games is warranted.

The magnitude of these effects is also somewhat alarming. The best estimate of the effect size of exposure to violent video games on aggressive behaviour is about 0.26 (Fig. 2). This is larger than the effect of condom use on decreased HIV risk, the effect of exposure to passive smoke at work and lung cancer, and the effect of calcium intake on bone mass (Bushman & Huesmann, 2001). As a society, we have taken massive and expensive steps to educate the public about these smaller medical effects, but almost none to deal with the larger violent video game effects.

In assessing the potential societal harm of a risk factor, one must take into account the risk factor dosage as well as the effect size. In other words, if youths spent only a little time playing violent video games (e.g. less than 30 min per week), or if only a few youths spent a lot of time playing such games (e.g. 1 in 10,000), then the overall cost to society would likely be fairly small. But as documented in several articles in this special issue as well as in other recent reports, a lot of youths are playing violent video games for many hours per week. When large numbers of youths (including young adults) are exposed to many hours of media violence (including violent video games), even a small effect can have extremely large societal consequences (see Abelson, 1985; Rosenthal, 1986, 1990).

A thorough understanding of any risk factor requires several key developments: (a) converging evidence from multiple empirical methods that the risk factor (e.g. exposure to violent video games) influences the main outcome variable (e.g. aggressive and violent behaviour); (b) a good theoretical model of the underlying processes; and (c) empirical evidence linking key theoretical processes and variables (e.g. aggressive cognitions) to the main outcome variable. At a general level, the huge media violence research literature has all of these components in place (Anderson et al., under review). Three major types of studies have clearly and consistently linked media violence to aggressive and violent behaviour: experimental, cross-sectional (correlational); and longitudinal. Social-cognitive models of human aggression clearly link exposure to media violence to subsequent aggressive and violent behaviour at both the theoretical and empirical levels (e.g. Huesmann, 1988; Anderson & Bushman, 2002a; Anderson & Huesmann, in press).

The same theoretical structure works for understanding violent video game effects. But when one considers violent video game research by itself, a glaring empirical gap emerges: the lack of longitudinal studies. It is a mistake to dismiss existing longitudinal studies of media violence effects, of course, because they are highly relevant to understanding and predicting the effects of repeated exposure to violent video games. Nonetheless, it is imperative that future video game research includes longitudinal designs.

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The effects of violent video game habits on adolescent hostility, aggressive behaviors, and school performance

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Abstract

Video games have become one of the favorite activities of American children. A growing body of

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research is linking violent video game play to aggressive cognitions, attitudes, and behaviors. The first goal of this study was to document the video games habits of adolescents and the level of parental monitoring of adolescent video game use. The second goal was to examine associations among violent video game exposure, hostility, arguments with teachers, school grades, and physical fights. In addition, path analyses were conducted to test mediational pathways from video game habits to outcomes. Six hundred and seven 8th- and 9th-grade students from four schools participated. Adolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school. Mediational pathways were found such that hostility mediated the relationship between violent video game exposure and outcomes. Results are interpreted within and support the framework of the General Aggression Model.

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Keywords Video games; Media violence; Aggression

> "Whenever we separate kids from their parents and take them to a children's shelter they're always excited that they will get to play video games, since there is a Nintendo in the shelter" (Child Welfare Worker, Oklahoma).

Introduction

Video games have become one of the favorite activities of children in America (Dewitt, 1993). Sales have grown consistently with the electronic entertainment category taking in between $7 billion and $7.5 billion in 1999, surpassing theatrical box office revenues for the first time (Come in and play, 2000). Worldwide video game sales are now at $20 billion (Cohen, 2000), fueled in part by the more than 100 million Gameboys and 75 million PlayStations that have been sold (Kent, 2000). The average American child aged 2-17 years plays video games for 7 h a week (Gentile & Walsh, 2002). This average masks wide differences between boys and girls and children of different ages. In the present study, for example, adolescent girls played video games for an average of 5 h a week whereas boys averaged 13 h a week.

Over the past 25 years, a number of studies have looked at the effects of video games on children and adolescents. A majority of this research has examined associations between video game use and aggressive behavior, but there has also been some interest in the effects of video games on school performance. There are at least two aspects of video game use that are of interest to researchers – amount and content. With respect to content, researchers have been most interested in violent games compared with non-violent games. Although not all studies have differentiated between violent and non-violent content, this is an important distinction, as it is likely that the effects of amount of play and the content of games may be independent of each other. For example, most evidence suggests that amount of play affects school performance, whereas violent content affects aggressive outcomes.

Effects of amount of video game play on school performance

A number of studies have shown a negative association between amount of video game play and school performance for children, adolescents, and college students (e.g. Harris & Wiliams 1985; Creasey & Myers, 1986; Lieberman, Chaffee, & Roberts, 1988; van Schie & Wiegman, 1997; Roberts, Foehr, Rideout, & Brodie, 1999; Anderson & Dill, 2000; Walsh, 2000). In general, a preponderance of studies show a fairly consistent negative correlation between recreational video game play and grades. For example, high-school students who report spending more time playing video games or who report spending more money on video games had poorer grades in English classes (Harris & Wiliams, 1985). Others have documented a similar negative correlation with college students between amount of time playing video games and grades (Anderson & Dill, 2000; Paschke, Green, & Gentile, 2001).

The content of the games being played certainly could affect the relationship between amount of play and school performance. If, for example, students played only educational games, they would probably be less likely to show a corresponding deficit in school performance. Lieberman et al. (1988) have shown that children who use computers to play games frequently perform more poorly in school, whereas those who use computers for schoolwork perform better in school. However, regardless of content, the amount of play could affect grades negatively by displacing time spent in other educational and social activities. This "displacement hypothesis" suggests that electronic media can influence learning and social behavior by taking the place of activities such as reading, family interaction, and social play with peers (Huston et al., 1992). If the average child plays video games for 7 h a week, those are 7 h that the child is not engaged in reading, homework, or participating in creative activities. Therefore, it is important to examine video game play in the context of other media habits, such as television viewing and reading for pleasure.

Effects of violent video game content on aggression

Although video games are designed to be entertaining, challenging, and sometimes educational, most include violent content. Recent content analyses of video games show that as many as 89% of games contain some violent content (Children Now, 2001), and that about half of the games include serious violent content towards other game characters (Dietz, 1998; Children Now, 2001; Dill, Gentile, Richter, & Dill, 2001). Therefore, among the games being purchased and played by youth, a majority contain violence. The popularity of video game violence has spurred much research on the possible harmful effects on children and adolescents.

A meta-analysis by Anderson and Bushman (2001) found that across 54 independent tests of the relation between video game violence and aggression, involving 4262 participants, there appear to be five consistent results of playing games with violent content. Playing violent games increases aggressive behaviors, increases aggressive cognitions, increases aggressive emotions, increases physiological arousal, and decreases prosocial behaviors. These effects are robust; they have been found in children and adults, in males and females, and in experimental and non-experimental studies. This is not to say that no studies have failed to find evidence of an effect. However, the majority of studies have found such evidence.

Possible moderators of the effects of video game violence

Some of the existing research may be difficult to interpret because most studies of violent video games do not measure individual differences that may moderate the effects. Indeed there have been some intriguing research findings demonstrating individual differences in response to the effects of violent video games. For example, a few recent studies have shown that trait hostility may moderate the effects of playing violent video games (Lynch, 1994; Lynch, 1999; Anderson & Dill, 2000). Lynch (1994, 1999) has found that the physiological effects of playing violent video games may be even greater for children who already show more aggressive tendencies. Adolescents who scored in the top quintile for trait hostility showed greater increases in mean arterial pressure, epinephrine, and nor-epinephrine levels in the blood than those in the lower quintiles. Additionally, a correlational study by Anderson and Dill (2000) found that associations between violent video game play and aggressive behavior and delinquency were stronger for those who were characteristically aggressive. This interaction of violent content with trait hostility is important because it suggests that the harmful effects of playing violent games may be even greater for children who are already at higher risk for aggressive behavior.

A second variable that may moderate the effects of video game play is parental monitoring and limiting. Research regarding limits, coviewing, and mediation of television messages has shown that each of these strategies can have beneficial effects (e.g. Gadberry, 1980; Austin, 1993; Strasburger & Donnerstein, 1999). Parent-imposed limits have been shown to be effective in reducing time with television (Truglio, Murphy, Oppenheimer, Huston, & Wright, 1996). Active parental involvement, such as rules limiting media use and active mediation (both positive encouragement to watch "positive" media and discouragement of "negative" messages), can be effective in influencing children's viewing, understanding, reactions to, and imitation of program content (Lin & Atkin, 1989; Dorr & Rabin, 1995). Parental mediation is correlated with better academic performance, and has been shown to increase beliefs in social norms (both positive and negative), and to decrease fear (Corder-Bolz, 1980; Austin, Pinkleton, & Fujioka, 2000).

Few studies have looked at parental limits with video games. In a nationally representative study of parents, 55% say they "always" or "often" put limits on the amount of time their children may play computer and video games, and 40% say they "always" or "often" check the video game rating before allowing their children to buy or rent computer or video games (Gentile & Walsh, 2002). Even though these numbers are not particularly high, they may overestimate the amount of parental monitoring of children's video game play. In one study, nine out of ten teenagers said that their parents "never" check the ratings before allowing them to rent or buy games (Walsh, 2000). Funk, Hagan, and Schimming (1999) found that most parents could not correctly identify their 3rd- to 5th-grade child's favorite game. In 70% of the cases where parents named an incorrect game (or could not name any), children described their favourite game as violent. Active parental limits in children's game selection and amount of play could play an important moderating role in the effects of video games on children.

The evolution of video game violence

When reviewing the existing research, it is important to note that some studies may be somewhat outdated in an environment that is continually evolving in terms of violent content. In the late 1970s and early 1980s when Atari dominated the market, the graphic capability of games was very simplistic to the point that video game violence was largely abstract and rarely involved violence between humans (Dill & Dill, 1998). With the introduction of Nintendo in the mid-1980s, and later the Sony PlayStation in the mid-1990s, violence became more graphic and realistic. For example, the game *Soldier of Fortune*, which was released for personal computer in 2000, features 26 different "killing zones" in the body and employs the first-person mode, which allows the player to view violence through the eyes of the video game character. With this in mind, it is likely that studies carried out 10-15 years ago on the effects of violent video games underestimate the effects of modern violent games on children today.

Although the existing research provides some support for links between both violent video game content and amount of play with aggressive and academic outcomes, there is a need for additional research. The current study expands upon and adds to the literature in the following three ways: (1) It measures video game effects in the advanced technological video game environment of 2000; (2) it measures trait hostility and parental limits as possible moderators of the effects of violent video game play; (3) it measures amount of play and violent video game content separately.

A theoretical model for the effects of violent video game content

Anderson and colleagues (Anderson & Dill, 2000; Anderson & Bushman, 2002) have developed the General Aggression Model (GAM) to explain theoretical links between violent video game exposure and aggressive cognitions, attitudes, and behaviors. This model describes a "multi-stage process by which personological (e.g. aggressive personality) and situational (e.g. video game play and provocation) input variables lead to aggressive behavior by influencing several related internal states and the outcomes of automatic and controlled appraisal (or decision) processes" (Anderson & Dill, 2000, p. 773).

GAM differentiates between short- and long-term effects of video game violence on the game player. With regard to the short-term effects of violent video games, GAM predicts that both kinds of input variables, person and situation, can influence the present internal state of the person. Summarizing GAM's predictions for the effects of violent video games on behavior, Anderson and Dill drew the following conclusions. "Short-term violent video game increases in aggression are expected by [the model] whenever exposure to violent media primes aggressive thoughts, increases hostile feeling or increases arousal" (Anderson & Dill, 2000, p. 774). This suggests that in the short term, trait hostility may be a moderator of the effects of violent content, because aggressive thoughts and feelings may be more easily accessible for more hostile individuals.

With respect to long-term exposure to violent content, GAM suggests that this may result in the development, over-learning, and reinforcement of aggression-related knowledge structures. These knowledge structures include vigilance for enemies (i.e. hostile attribution bias), aggressive action against others, expectations that others will behave aggressively, positive attitudes towards use of violence, and the belief that violent solutions are effective and appropriate. Repeated exposure to graphic scenes of violence is also postulated to be desensitizing. Furthermore, it is predicted that long-term game players become more aggressive in outlook, perceptual biases, attitudes, beliefs, and behavior than they were before the repeated exposure. Therefore, trait hostility may play a different role in the long term. Over time, increases in trait hostility may result from video game play, and therefore trait hostility may become a mediator of the effects of violent game content on aggressive behaviors (in contrast to being a moderator).

The current research tested four hypotheses regarding video game content derived from GAM: (1) exposure to violent video games is positively correlated with trait hostility, (2) exposure to violent video games is positively correlated with aggression in naturalistic settings, namely arguments with teachers and physical fights, (3) trait hostility moderates the effects of violent video game exposure on aggressive behaviors, and (4) trait hostility mediates the effects of violent video game exposure on aggressive behaviors. In addition, two hypotheses were tested with respect to amount of video game play: (1) amount of video game play is negatively related to academic performance, namely grades, and (2) amount of video game play is not associated with aggressive behaviors. Because parental limits have not been studied systematically, these data were treated as exploratory and no a priori hypotheses were advanced.

Method

Participants

Six hundred and seven 8th-grade (*n* = 496) and 9th-grade (*n* = 111) students participated in the study. Students were recruited from four Midwestern schools, including one urban private school (*n* = 61), two suburban public schools (*n* = 350), and one rural public school (*n* = 196). Students were recruited from mandatory classes within their schools. The mean age of respondents was 14 years (S.D. = 0.64). Fifty-two percent of respondents were male. Eighty-seven percent of the respondents classified themselves as Caucasian (which is representative of the region of the country from which they were recruited). Participants were treated in accordance with the

"Ethical Principles of Psychologists and Code of Conduct" (American Psychological Association, 1992).

Procedure

Data were collected between 4 April and 2 May 2000. Letters were mailed directly to the parents of students in participating classrooms informing them about the study and requesting consent. Consent levels were greater than 90% for all classrooms. Interested teachers volunteered their classrooms for inclusion in the study. Each of the participating classrooms was a mandatory class (i.e. not elective) to reduce the likelihood of self-selection bias.

Each participant completed an anonymous survey that gathered descriptive data about students' habits, attitudes, and knowledge about video games, as well as school performance, demographic data, and a measure of trait hostility. The survey was pretested with 143 7th- through 12th-grade students (Walsh, 2000). The classroom teachers were trained to administer the surveys, which were administered during one class period. The students were instructed that video games included any games played on computer, video game consoles (such as Nintendo), on hand-held game devices (such as Gameboy), or in video arcades.

Variables

Violent video game exposure. Similar to Anderson & Dill's (2000) approach, participants were asked to name their three favorite video games. For each named game, participants were asked to rate how frequently they played the game on a 7-point Likert scale (1 = "rarely", 7 = "often"). Participants were also asked to rate how violent each game is on a 7-point Likert scale (1 = "little or no violence", 7 = "extremely violent"). A video game violence exposure score was computed for each participant by multiplying the frequency of play for each game by its violence, and taking the mean of the three products. Cronbach's alpha for this three-item scale was 0.68, which is lower than the 0.86 alpha Anderson and Dill (2000) obtained. However, Anderson and Dill used five items rather than three, and we would predict reliability to drop somewhat with fewer items.[1] Participants were also asked to indicate how much violence they prefer to have in their video games on a 10-point scale (1 = "no violence", 10 = "extreme violence"), and how much violence they prefer to have in their video games compared to 2-3 years ago on a 5-point scale (1 = "a lot less", 5 = "a lot more").

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[1] It is unclear whether we should even expect the video game violence exposure scale to have high reliability. Calculating violence exposure from favorite games appears to be an empirically appropriate approach. However, it is entirely likely that some players would like both violent and non-violent games, which would make the scale appear unreliable, when in fact the scale is measuring exactly what it is intended to measure – that some people play only violent games, some play only non-violent games, and some play a mix of violent and non-violent games.

Amount of video game play. Participants were asked the amount of time they spent playing games during different time periods on weekdays and weekends. Weekly amount of game playing was calculated from these responses.

Trait hostility. Hostility was measured using the Cook & Medley Hostility Scale (Cook & Medley, 1954), a commonly used reliable instrument. Because the items for the Cook & Medley are taken from the MMPI, some were inappropriate for young adolescents. The instrument was modified by deleting seven items and changing the wording of some items to make them easier for 8th graders to understand. These modifications were based on those made by Matthews and colleagues (e.g., Woodall & Matthews, 1993).

Parental limits. Participants were asked how often their parents put limits on how much time they are allowed to play video games, and how often their parents check the ratings before allowing them to buy or rent video games. Responses were rated on a 5-point Likert scale (ranging from "always" to "never"). Participants were also asked whether their parents had ever kept them from getting a game because of its rating, and whether their parents knew what games they had. A parent involvement scale was created by averaging the frequency with which parents check the ratings before allowing students to purchase or rent games and the frequency with which parents put limits on the amount of time students can play video games (these two items were correlated with each other at $r = 0.36$, $p < 0.001$).

Arguments with teachers. Participants were asked how often they had gotten in arguments with their teachers in the past year. Responses were rated on a 4-point Likert scale (ranging from "Almost daily" to "Less than monthly"). Responses were coded such that higher scores indicate higher incidence of arguments with teachers.

Grades. Participants were asked to report their average school grade, ranging from A+ through F. Answers were coded such that higher scores indicate higher grades in school.

Physical fights. Participants were asked if they had been in a physical fight in the last year. This question yielded a dichotomous response (yes/no).

Results

Descriptive statistics

Descriptive statistics of media habits, including video game use, can be seen in Table 1. The average amount of time 8th- and 9th-grade students spent playing video games was 9 h per week. Males spent significantly more time playing video games each week than females (13 and 5 h per week, respectively; $t(585) = 8.6$, $p < 0.001$). Compared to time spent playing video games, adolescents spent more time watching television and listening to music, but less time reading for pleasure. Video game play was widespread in this sample; only 6% of 8th and 9th graders said they never play video games, and 59% reported playing at least once a week.

When asked to rate how much violence they like to have in video games on a scale from 1 to 10 (1 = no violence, 10 = extreme violence), youth reported preferring a moderate amount of violence (*M* = 5.4; S.D. = 2.73). There were significant sex differences on this variable, with boys (*M* = 6.7; S.D. = 2.3) preferring higher levels of violence than girls (*M* = 3.8; S.D. = 2.3), ($t(551) = 14.2$, $p < 0.001$). Two-thirds (68%) of boys chose the scale point six or higher, whereas only 22% of girls preferred this much violence in their video games. Only 1% of boys and 16% of girls said they preferred to have no violence in video games.

Table 1
Amounts of media use (hours/week)

	Boys and girls (n = 607)		Boys (n = 311)		Girls (n = 290)	
	M	S.D.	*M*	S.D.	*M*	S.D.
Playing video games	9.0	11.9	12.9[a]	13.3	4.9[a]	8.6
Watching TV	25.3	15.4	27.4[b]	16.4	23.2[b]	14.0
Listening to music	20.7	24.4	18.6	23.3	21.9	23.0
Reading for pleasure	3.4	4.3	3.0[c]	4.2	3.8[c]	4.4

Note. Not all participants indicated their sex, therefore, the number of boys and girls is not equal to the sum of boys and girls.

[a] Means significantly different from each other at $p < 0.001$.
[b] Means significantly different from each other at $p < 0.01$.
[c] Means significantly different from each other at $p < 0.05$.

Overall, when asked to rate the amount of violence in their three favorite games, 62% of the games named were rated as having some violence on a 7-point scale, and 37% were rated as including violence at or above the midpoint of the scale. Boys were less likely to name games with no violence as their favorite games (30% of the favorite games named by boys include no violence, compared to 50% of the favorite games named by girls). Boys were also more likely to name games that they rated as having high violence (rated at or above the scale midpoint) as their favorite games. Almost half (49%) of the favorite games named by boys had high violent content, compared to 20% of the favorite games named by girls.

Parents are not heavily involved with their adolescents video game playing. Only 13% of young adolescents who play video games said their parents "always" or "often" put limits on the amount of time they are allowed to play video games, while 43% say they "never" do. Only 31% of young adolescents think that their parents understand the video game ratings system, and only 15% said their parents "always" or "often" check the ratings before allowing them to buy or rent video games (53% "never"). Fewer than one in five parents (19%) have ever kept their children from getting a game because of its rating. Eighty-eight percent of respondents own their own games, and 10% of these admitted that they have games their parents would not approve of if they knew the content of the games.

Overall, 23% of children reported getting into arguments with their teachers "almost weekly" or "almost daily", and 34% reported getting into a physical fight within the past year. Again, there were sex differences. Boys were more likely to be aggressive, with 28% saying they get into arguments with teachers "almost weekly" or "almost daily", whereas only 17% of girls get into arguments with teachers that frequently ($X^2(3, N = 435) = 9.69, p < 0.05$). Forty-seven percent of boys reported getting into fights in the past year, whereas only 19% of girls reported getting into physical fights ($X^2(1, N = 589) = 51.07, p < 0.001$). Girls also reported slightly higher average grades than boys (mean grade equivalents = B+ and B, respectively; $t(578) = 4.53, p < 0.001$).

As shown in Tables 2 and 3, there were significant, though moderate, intercorrelations among the outcome measures (Table 2) and among the predictor variables (Table 3).[2]

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[2] The full intercorrelation matrix is available at http://www.mediafamily.org/research/VGEA.shtml.

Table 2

Intercorrelations among arguments, school grades, hostility, and fights (n = 427-584)

	Hostility	Fights	Grades
1. Arguments with teachers	0.31***	0.32***	-0.36***
2. Trait hostility	–	0.29***	-0.24***
3. Physical fights		–	-0.29***
4. School grades			–

*** $p < 0.001$.

Table 3

Intercorrelations among predictor variables (n = 529-587)

	VGV	Par. Inv	Sex
1. Amount of video game play	0.55***	-0.08^{+}	-0.34***
2. Violent video game exposure (VGV)	–	-0.12**	-0.45***
3. Parental involvement		–	-0.02
4. Sex[a]			–

$^{+}$ $p < 0.10$; ** $p < 0.01$; *** $p < 0.001$

[a] 1 = male, 2 = female.

Associations between video game habits and parental limits and outcomes

Zero-order correlations between video game habits and parental limits and the outcomes (trait hostility, arguments with teachers, physical fights, and school grades) can be seen in Table 4.[3] Exposure to violent video game content and amount of video game play were both positively associated with adolescents' trait hostility, the frequency with which they get into arguments with teachers, and whether or not they have been in a physical fight, and negatively associated with school grades.

Parental limits were correlated negatively with arguments with teachers and trait hostility, and were positively correlated with school performance. *T*-tests of independent samples were conducted to test for differences in parental limits between adolescents who had or had not been involved in physical fights the previous year. Adolescents who had been involved in physical fights were less likely to have had parents check the ratings before allowing them to buy or rent video games ($t(539) = 4.9$, $p < 0.001$, means = 1.6 and 2.2 on a 5-point verbally anchored "never" to "always" scale). Similarly, adolescents who had been involved in physical fights were less likely to have had parents put time limits on their video game play ($t(551) = 2.1$,

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[3] Note that because physical fights is a dichotomous variable (yes/no), this correlation should be interpreted as a point-biserial correlation

$p < 0.05$, means = 1.9 and 2.1 on a 5-point verbally-anchored "never" to "always" scale).

Adolescents' trait hostility levels were significantly correlated with their media habits. Adolescents who were more hostile tended to consume more electronic media, played more violent video games, prefer more violent content, and have fewer parental limits on the content of their video games.

Table 4
Correlations between media habits and parental limits and outcomes (n = 399-586)

	Trait hostility	Arguments with teachers	Physical fights	Grades
Amount variables				
Amount of video game play	0.20***	0.12*	0.21***	-0.25***
Amount of time watching TV	0.20***	0.10*	0.12***	-0.20***
Amount of reading for pleasure	-0.08†	-0.17***	-0.07	0.07†
Violent content variables				
Violent video game exposure	0.21***	0.20***	0.32***	-0.23***
Preferred violence in video games	0.31***	0.25***	0.36***	-0.34***
Preferred violence compared to 2 or 3 years ago	0.23***	0.16**	0.19***	-0.14**
Parental involvement scale	-0.14**	-0.27***	-0.18***	0.27***

† $p < 0.09$; * $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$.

Exposure to video game violence

Given the high intercorrelations among trait hostility, media habits, sex, and aggression variables (e.g. physical fights), it would be reasonable to question whether video game violence contributes any independent variance to fights. Perhaps trait hostility is the only factor that matters, and that all other correlations reflect their associations with hostility. To test this, we conducted logistic regressions predicting physical fights in the past year (dichotomous variable). We entered trait hostility (Ho), video game violence exposure (VGV), and their interaction (Ho x VGV) as independent variables. The two main effects were significant independent predictors of fights, although the interaction did not predict a significant amount of variance. These variables in combination predicted 20% of the variance in physical fights ($p < 0.001$). Table 5 displays this effect graphically. When Ho and VGV are split into quartiles, an increase in either predicted an increase in the percent of students who have been involved in physical fights. The students with the lowest hostility (Ho 1) and lowest exposure to violent video games (VGV 1) also had the lowest incidence of physical fights (4%). The highest hostility students (Ho 4) with low exposure to violent video games had relatively low incidence of physical fights (28%). However, the lowest hostility students (Ho 1) who expose themselves to the greatest amount of video game violence (VGV 4) had a higher incidence of physical fights (38%). Sixty-three percent of high hostile (Ho 4) and high video game violence (VGV 4) students have been involved in physical fights.

To provide a stricter test of whether VGV contributes independently to fights, we conducted a logistic regression in which we entered sex, trait hostility, and amount of video game play per week in Step 1. In Step 2, we entered violent video game exposure. In Step 3, we entered the parent involvement scale. Exposure to violent video games contributed a significant amount of variance even when controlling for sex, trait hostility, and amount of play; parental involvement contributed a significant amount of additional variance. These five variables accounted for 24% of the variance in physical fights ($X^2(5, N = 512) = 97.54, p < 0.001$). This regression can be seen in Table 6.

Table 5
Percentage of students who have been involved in a physical fight in the past year split by hostility and exposure to violent video games

Hostility quartiles	Exposure to violent video games – quartiles				
	1 – Lowest exposure	2	3	4 – Highest exposure	Average
1 – Lowest hostility	4%	26%	15%	38%	14%
2	16%	33%	27%	58%	31%
3	24%	42%	44%	54%	41%
4 – Highest hostility	28%	37%	58%	63%	50%
Average	14%	34%	39%	55%	

Table 6
Logistic regression predicting physical fights ($N = 512$)

Predictor	B	S.E.	Wald statistic	df	R^2
Step 1: Sex[a]	-0.77	0.24	10.94**	1	
Trait hostility	0.06	0.02	15.65***	1	
Amount of video game play	0.01	0.01	0.38	1	0.18***
Step 2: Violent video game exposure	0.04	0.01	10.66**	1	0.21***
Step 3: Parental involvement	-0.42	0.12	12.78***	1	0.24***

** $p < 0.01$; *** $p < 0.001$
[a] 1 = male, 2 = female.

A similar analysis using multiple regression was conducted using arguments with teachers as the dependent variable (see Table 7). Sex, trait hostility, and amount of video game play per week were entered in Step 1. In Step 2, we entered violent video game exposure. It contributed a non-significant amount of variance when controlling for sex, trait hostility, and amount of play. In Step 3, we entered the parent involvement scale, which contributed a significant amount of additional variance. These five variables accounted for 17% of the variance in arguments with teachers ($F(5, 376) = 14.91, p < 0.001$).

A similar analysis was conducted using school grades as the dependent variable (see Table 8). However, because amount of play is more likely to predict grades than game content, predictors were entered in a slightly different order. Sex, trait hostility, and violent video game exposure were entered in Step 1. In Step 2, we entered amount of video game play. It contributed a significant amount of variance even when controlling for sex, trait hostility, and violent game exposure. In Step 3, we entered the parent involvement scale, which also contributed a significant amount of additional variance. These five variables accounted for 14% of the variance in school grades ($F(5, 497) = 16.51, p < 0.001$).

Table 7
Hierarchical multiple regression predicting arguments with teachers ($N = 381$)

Predictor	ß	R^2	ΔR^2	$\Delta R^2 F$	df
Step 1: Sex[a]	-0.02				
Trait hostility	0.29				
Amount of video game play	0.04	0.12***	0.12***	17.43	3, 378
Step 2. Violent video game exposure	0.06	0.13***	0.01	1.49	1, 377
Step 3: Parental involvement	-0.21	0.17***	0.04***	18.26	1, 376

*** $p < 0.001$
[a] 1 = male, 2 = female.

Table 8
Hierarchical multiple regression predicting grades ($N = 502$)

Predictor	ß	R^2	ΔR^2	$\Delta R^2 F$	df
Step 1: Sex[a]	0.06				
Trait hostility	-0.15				
Violent video game exposure	-0.03	0.08***		13.83	3, 499
Step 2: Amount of video game play	-0.15	0.09***	0.01**	9.72	1, 498
Step 3: Parental involvement	0.22	0.14***	0.05***	27.80	1, 497

** $p < 0.01$; *** $p < 0.001$
[a] 1 = male, 2 = female.

Path analyses predicting physical fights, school grades, and arguments with teachers

Fig. 1 shows a model for the prediction of the dichotomous outcome of physical fights, testing the hypothesis that hostility may mediate the effects of video game habits. A series of logistic regressions were conducted in order to test this model. The model was significant ($X^2(3, N = 514) = 76.24, p < 0.001$) and explained a moderate amount of the variance in physical fights. As can be seen from Fig. 1, trait hostility was associated with both amount of play and violent video game exposure. Violent video game exposure was both *directly* associated with physical fights and *indirectly* associated, with trait hostility mediating the effects of violent video game exposure on physical fights.

The same path model was tested using multiple regression and the two continuous outcomes – school grades and arguments with teachers (Fig. 2). The model was significant and explained a moderate amount of the variance in school grades ($F(3, 534) = 18.94, p < 0.001$) and arguments with teachers ($F(5,401) = 18.64, p < 0.001$). Trait hostility was associated with both amount of play and violent video game exposure. Violent video game exposure, controlling for amount of play, was not *directly* associated with grades, and was marginally *directly* associated with arguments with teachers. Both *indirect* pathways were significant, with trait hostility mediating the effects of violent video game exposure on the outcomes. Amount of play, controlling for violent video game exposure, was still *directly* and negatively associated with school grades. However, the effect of amount of play on arguments with teachers was indirect and mediated through trait hostility.

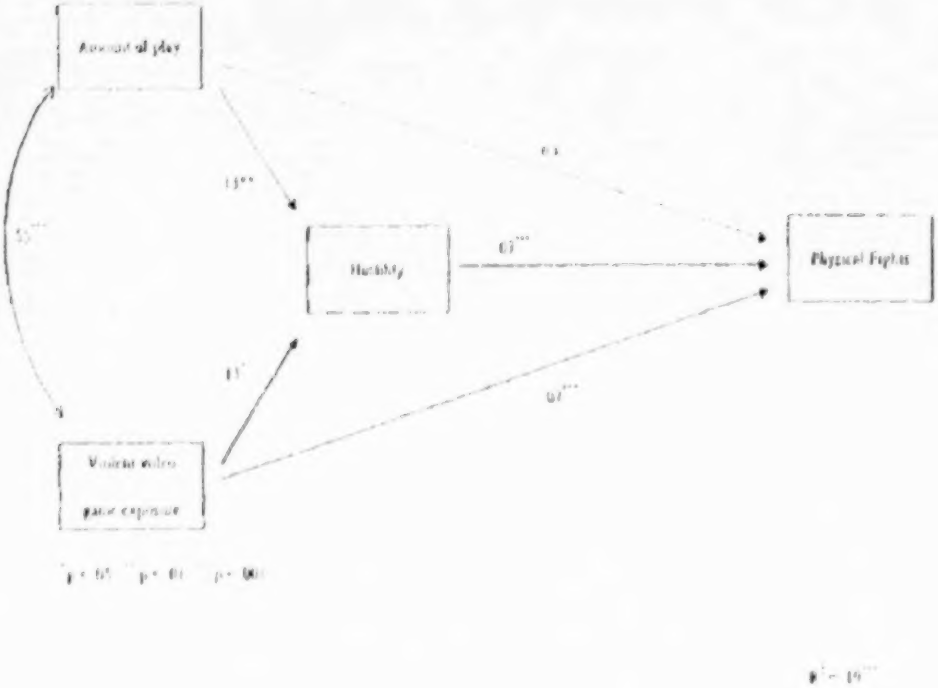
Amount of play
Hostility
Physical Fights
Violent video
game exposure
*p < .05 **p < .01 ***p < .001
R² = .19***

Fig. 1. Path analysis for model predicting fights (*n* = 514).

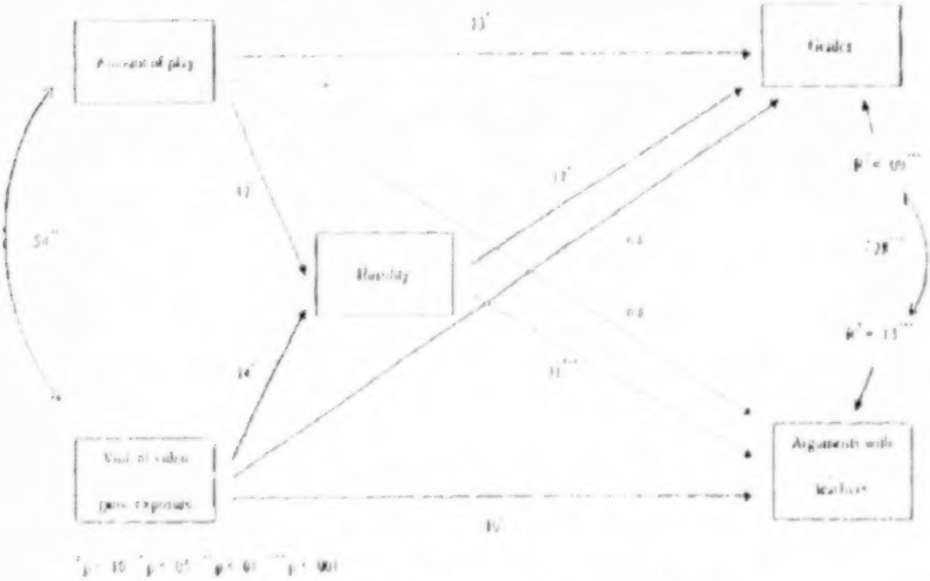
Amount of play
Grades
Hostility
Arguments with
teachers
Vol. of video
game exposure
R² = .09***
-.28***
R² = .13***
°p < .10 *p < .05 **p < .01 ***p < .001

Fig. 2. Path analysis for model predicting grades and arguments with teachers (*n* = 404).

Discussion

Each of the hypotheses was supported by the results of the study. Based on the GAM, it was hypothesized that exposure to video game violence would be positively correlated with trait hostility. This hypothesis was generally confirmed. Hostility was correlated significantly with three measures of violent content: the amount of violence adolescents like to have in video games, whether they like more or less violence now compared to 2 or 3 years ago, and the amount of video game violence they expose themselves to.

It was hypothesized that exposure to video game violence would be positively related to aggressive behaviors, such as arguments with teachers and physical fights. This hypothesis was confirmed. Students who play more violent video games are more likely to have been involved in physical fights and get into arguments with teachers more frequently. The relation between violent video game exposure and physical fights is stronger than that between violent game exposure and arguments with teachers. There are several possible reasons for this, including (1) arguing is less aggressive than fighting, (2) the target of arguing is an authority figure, rather than peers, and (3) there is very little arguing modelled in violent video games whereas there is a great deal of physical aggression modelled in violent games.

That youth who are more hostile also play more violent video games raises questions of causality. Are young adolescents more hostile and aggressive because they expose themselves to media violence, or do previously hostile adolescents prefer violent media? Due to the correlational nature of this study, we cannot answer this question directly. Some studies have suggested that there is a bidirectional relationship (see Donnerstein, Slaby, and Eron (1994) for a review). GAM predicts a bidirectional effect, in which personological variables such as hostility affect media habits, which in turn reinforce and can modify the personological variables. Huesmann and colleagues (Lefkowitz, Eron, Walder, & Huesmann, 1972) have shown in long-term longitudinal studies that early media violence consumption habits predict later aggressive behaviors, but that early aggressive behaviors do not predict later media violence consumption habits. In the present research, video game violence exposure was a significant predictor of physical fights, even when sex, trait hostility, and weekly amount of video game play were statistically controlled. Clearly, hostility is not the whole story. If it were, then we would expect that children with the lowest hostility scores would not get into physical fights regardless of their video game habits. Following this logic, we would also expect that children with the highest hostility scores would get into physical fights regardless of their video game habits. Yet, *low-hostile* students who have the highest exposure to violent video games are *more* likely to have been involved in fights than *high-hostile* students who have the lowest exposure to violent video games (38% compared to 28%, respectively).

Some studies have suggested that personality traits such as hostility may moderate the effects of media violence (e.g. Lynch, 1994, 1999; Anderson & Dill, 2000). Indeed, GAM is designed to accommodate these moderator variables. This is an important issue to consider. It is possible that the people who are most affected by violent media are those who are most naturally aggressive, thus putting the most vulnerable at the greatest risk for increased aggression. There have not been very many studies designed to test this hypothesis, nor have the results been consistent. The present research found no interaction between trait hostility and exposure to video game violence. Instead, an additive effect was found, such that a combination of high hostility and video game violence places an adolescent at an increased risk for higher levels of aggression.

We recommend approaching the question of media violence from a risk factors perspective (Gentile & Sesma, 2003). Clearly, media violence is not the sole cause of aggression. But it is likely that it is one of several causes leading to it. Indeed, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, and the American Medical Association recently issued a joint statement that there is a "causal connection" between media violence and aggressive behavior, but that it is a complex effect (AAP, APA, AACAP, & AMA, 2000). We hypothesize that children with multiple risk factors for violence are more likely to exhibit aggressive behavior. The present data lend support to this hypothesis. Children with high levels of hostility are more likely to be involved in fights than low-hostile children. If they expose themselves to more video game violence, their odds of being involved in fights increase even more. This approach may also be fruitful when considering differential effects correlated with sex. This study clearly shows that even after controlling for sex, video game violence exposure is a significant factor related to physical fights for both boys and girls. However, boys are generally at greater risk for aggressive behaviors, and they compound that risk by playing more violent games for greater amounts of time than girls play.

In addition to examining trait hostility as a possible *moderator* of the effects of violent video game play, this study addressed GAM's prediction that in the long term, trait hostility is a *mediator* of the effects of violent video games on aggressive behavior. The path analyses clearly showed this mediating effect of hostility, in which hostility mediates the effects of both amount of play and violence exposure on grades and aggressive behaviors. Because correlational studies are more likely to show long- than short-term effects, this pattern of results is perhaps not surprising. Short-term effects studies (such as experimental studies) are probably more likely to find moderator effects than long-term effects studies (such as correlational studies).

It is worth noting that the Cook and Medley Hostility Scale includes measures of hostile actions, attitudes, and beliefs. Therefore, controlling for trait hostility is a very conservative procedure when testing predictors of antisocial (e.g. arguments) and aggressive (e.g. fights) behaviors. It is likely that partialling out hostility underestimates any true direct effect of violent video game exposure on antisocial and aggressive behaviors.

Two hypotheses were advanced regarding the amount of video game play – that amount would be negatively related to school performance and that it would not be related to aggressive behaviors. The first hypothesis was supported and the second was partially supported. As shown in Fig. 1, amount of play is both directly and indirectly (mediated by hostility) related to grades. This result is consistent with the displacement hypothesis and with previous research both with video games (e.g. Anderson & Dill, 2000) and television (e.g. Williams, Haertel, Haertel, & Walberg, 1982). Amount of play was not directly related to arguments with teachers or physical fights, but it was indirectly (mediated by hostility) related to arguments with teachers (but not fights). It is possible that the amount is related to arguments indirectly because hostile children play more and are also more likely to play violent games when they do play.

Parent involvement in video game habits appears to act as a protective factor. Parental limits to violent video game play are negatively correlated with fights and arguments, and positively correlated with school performance. In a recent intervention study, 3rd- and

4th-grade students received classroom instruction designed to reduce media consumption (Robinson, Wilde, Navracruz, Haydel, & Varady, 2001). The intervention focused on limiting the amount of TV, video game, and video use at home, but did not focus specifically on changing habits regarding violent media. After 6 months of instruction, students who had received the intervention (and had reduced their media consumption) displayed lowered peer ratings of aggression and lower observed verbal aggression compared to matched samples of students. The results of the present study are consistent with the findings of Robinson and colleagues. Limits on amount of video game play by parents were related to fewer arguments with teachers and lower incidence of physical fights. In addition, the present study offers a hint that limiting content may also bring beneficial effects. Students who reported that their parents more frequently checked the ratings before allowing them to buy or rent video games were also less likely to argue with teachers or get into physical fights. In fact, statistically controlling for respondent sex, hostility, weekly amount of video game play, and video game violence exposure, the frequency with which parents monitor their adolescents' video game habits added a significant amount of predictive power when predicting physical fights. Parents who are involved in video game selection and monitor hours played are more likely to have children who get into fewer physical fights. However, it is unclear whether these results are due to parents' media-specific behaviors (monitoring) or whether they are due to a broader pattern of more-involved parenting styles. Future research on this issue is needed.

GAM also describes the etiology of aggressive behavior over the long term. GAM hypothesizes that playing violent video games over time leads to increases in aggressive personological and behavioral variables. The pattern of intercorrelations among personological variables (e.g. hostility, preference for violent content) and behavioral variables (e.g. arguments and physical fights) and the path analyses predicting aggressive behaviors are both consistent with this prediction of the model.

It is important to note, however, that this study is limited by its correlational nature. Inferences about causal direction should be viewed with caution. However, these results suggest that concern about exposure to violent video games is not misplaced. This study is also limited by a reliance on self-report and by not being able to assess the type of violence (e.g. realistic vs. cartoon-style). However, it is likely that if the participants did not report truthfully, they would have been likely to try to portray themselves positively (e.g. underestimate their aggressive behaviors). This would have only reduced our ability to find significant results. Similarly, given that other research suggests that realism in media violence is linked with greater effects (e.g. Potter, 1999), our inability to separate realistic from cartoonish portrayals only serves to weaken our ability to find significant results. Associations were found among video game habits, aggressive behaviors, and school performance. These results are consistent with the substantial amount of other media violence research, video game research, and the predictions from the GAM. Furthermore, the findings regarding parental involvement are consistent with other research on parental monitoring and limits, both in terms of how few parents monitor or set rules, and the beneficial effects of such monitoring and limits (e.g. Lin & Atkin, 1989; Huston et al., 1992; Austin, 1993; Dorr & Rabin, 1995; Strasburger & Donnerstein, 1999). Additional experimental and longitudinal research is needed. Yet, it is hoped that youth, parents, and educators can begin to use the results of this research to modify children's video game habits in ways that promote children's health and school success.

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Violent Video Game Exposure and Aggression: A Literature Review

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Abstract

Over the last thirty years, the video game industry has grown into a multi-billion dollar business. More children and adults are spending time playing computer games, consoles games, and online games than ever before. Violence is a dominant theme in most of the popular video games. This article reviews the current literature on effects of violent video game exposure on aggression-related variables. Exposure to violent video games causes increases in aggressive behavior, cognitions, and affect. Violent video game exposure also causes increases in physiological desensitization to real-life violence and decreases in helping behavior. The current video game literature is interpreted in terms of the General Aggression Model. Differences between violent video game exposure and violent television are also discussed.

Violent Video Game Exposure and Aggression: A Literature Review

Development and Advances of Video Game Industry

In 1972, a product was released to the American market that would open the door for the development of a multi-billion dollar industry. *Pong*, the first commercially available video game, had entered the homes of America. In *Pong*, two players tried to "hit" an electronic "ball" back and forth with electronic paddles. In less than thirty years, this humble beginning of the video game industry has grown into countless companies with annual sales totaling $20 billion worldwide (Cohen, 2000). The PlayStation video game console, which began as a side project at Sony, now represents $6 billion of the company's $20 billion in annual sales (Cohen, 2000). In recent years, video game annual sales have steadily been higher than movie ticket sales (Elmer-Dewitt, 1993; Hettrick, 1995; Walsh, 2001b).

The history of video games can be divided into three eras (Gentile & Anderson, in press). The first era (1977-85) was the "Atari era," due to the fact that Atari consoles dominated the video game market. These first video games contained little violence. The little violence in these early games was quite abstract. Nolan Bushnell, the founder of Atari, said, "We had an internal rule that we wouldn't allow violence against people. You could blow up a tank or you could blow up a flying saucer, but you couldn't blow up people" (Kent, 2000). Another reason for the relatively low amount of violence in the early video games was that the graphical ability of the Atari games was so low that only simple graphics could be displayed.

Over the next decade computers became more sophisticated, enabling more complex video game graphics. As graphics developed, so did the potential for profits. Violence also began to appear more, even in children's games. The second era (1985-95), also known as the "Nintendo era," was dominated largely by Nintendo console games. The Nintendo console introduced a more powerful platform than its Atari predecessor and began introducing violent themes in numerous games. Even the seemingly innocuous *Super Mario Brothers* games included the capacity to destroy harmful creatures by jumping on top of them or by throwing fireballs at them.

The increased computing power of the second era consoles enabled more complicated graphics, including more realistic portrayals of violence. It was also during this era that video games became common on desktop computers and in hand-held mini-game systems such as Game Boy. As it became apparent to manufacturers that violent games sold well, the level of violence in the games also increased. Truly violent video games came of age in this era with the killing games *Mortal Kombat*, *Street Fighter*, and *Wolfenstein 3D* (Anderson & Dill, 2000). *Mortal Kombat* led the way in 1993 by becoming the most popular video game of the year (Elmer-Hewitt, 1993). In *Mortal Kombat*, the player controls a character enrolled in a fighting tournament where the only way to advance is to kill your opponent. Players also receive extra rewards for using extreme violence (e.g., ripping opponent's spine out or decapitating opponent). Both Sega and Nintendo released home console versions of the popular arcade game *Mortal Kombat* at about the same time. However, Nintendo sold a sanitized version of the game, removing the most graphically violent features, depictions of blood, and the worst of the fatal moves. Sega released the full version and outsold the Nintendo version by about three to one. When Nintendo released *Mortal Kombat 2*, it included all of the blood, gore and fatal moves of the Sega version. This time, the Nintendo version outsold the Sega version, probably because Nintendo consoles were already dominant in the marketplace.

Some of the basic characteristics and labels of video games also emerged in this era. *Mortal Kombat* represents a type of game now known as "third-person fighting" games. It is a "third-person" game because the player can see the character that he or she is controlling. It is a "fighting" game because virtually all of the game action consists of fighting other game characters. A variety of third-person fighting games were very popular in this era. *Street Fighter* is one such game. As in *Mortal Kombat*, the main theme is that the player engages in a series of fights with various opponents. Another interesting feature of many third-person fighting games is that the player can choose who he or she wants to "be" from a variety of male and female characters. In part, this was an attempt to attract more female consumers.

First-person shooter games were another type of violent video game that developed during the "Nintendo era." In these games, the player sees the scenario through the eyes of the main character. The player can see his or her own hands and arms, as well as the weapons being used, but does not see his or her whole character. The games are referred to as "shooters" because most of the action involves shooting enemies with one kind of weapon or another. *Wolfenstein 3D* was one of the first very popular three-dimensional "first-person shooters." In one version of *Wolfenstein 3D*, the player assumes the role of B.J. Blascowitz, an American soldier caught and taken prisoner as a prisoner of war by the Nazis during World War II. The player's job is to escape the prison and shoot his or her way through Castle Wolfenstein, killing everything that moves (both prison guards and guard dogs), with the ultimate goal of assassinating Adolph Hitler. The graphics of this game were very violent for this era. A successful player would see multiple bloody murders and hear victims scream and groan. In *Wolfenstein 3D* the human hero can choose from an array of weaponry including a revolver, automatic weapons, a flamethrower, and a knife.

We currently are in the third video game era (1995-present). The console game market is largely dominated by the Sony Playstation and the most current platform, Playstation 2. Their graphic capabilities have been greatly enhanced not only by improvements in computer technology but also by Sony's decision (emulated by others) to switch from cartridge-based systems to CD-ROM, and even more recently, DVD-ROM based systems. Currently, in addition to Playstation 2, video game buyers also have options of purchasing Nintendo's latest console (Nintendo Gamecube) or Microsoft's X-Box (Microsoft's first endeavor into the console market). With these changes in computing power and graphic quality, the growth of video gaming has been phenomenal in recent years. In 2001, despite an economic recession, the video game industry experienced 43% increase in sales, boosting American sales to $9.4 billion (Markoff, 2002). Of course, video gaming on computers has also evolved into more violent gaming with more realistic graphics.

An emerging current trend is the growth of online gaming. There are numerous games that one can play over local area networks and over the Internet. The most recent advancement is Microsoft's X-Box Online network. X-Box owners can use a broadband connection to access the X-Box network, where they can play a variety of games with or against other online players. Some of these games are simply more complex versions of first person shooters, in which groups of gamers can play with or against other gamers in real time. Perhaps the most interesting trend, though, is the emergence of subscription-based online role-playing games, known as MMORPGs (massively multiplayer online role playing games). To play these games, one must subscribe (currently, about $25-$40 per month) to the company hosting the game. Players create their own character for the game, and can increase the skills and power of that character by playing the game. Characters can kill and can be killed by other players as well as characters built into the game. *Everquest* is currently the largest MMORPG, with around 400,000 players worldwide (Sony Online, 2002). Players can be heavily invested in their online quests, by buying and selling their created characters via online auctions for hundreds of dollars (Ebay Online Auctions, 2003). Indeed, this could be seen as the beginning of a new video gaming era.

The best selling console video games are also usually available on computers. Many games can now be downloaded from the Internet. This includes "demo" versions of extremely violent games that include most or all of the graphic features of the full game. Such demos can be downloaded at no charge by virtually anyone with a computer and a modem. Walsh (2000) found that 32% of all boys surveyed who play video games have downloaded such "demo" games from the Internet.

Video Games, Violent Content, and Preference for Violence

The content of video games has drastically changed from the decade dominated by Atari. Recent content analyses of video games show that as many as 89% of games contain some violent content (Children Now, 2001), and about half of the games include serious violent actions toward other game characters (Children Now, 2001; Dietz, 1998; Dill, Gentile, Richter, & Dill, 2001).

In addition, many children prefer to play violent games. Even older surveys of school children (4th through 8th grade) showed that more than half preferred games dominated with themes of human violence or fantasy violence (Buchman & Funk, 1996; Funk, 1993). In surveys of paired children and parents, about two thirds of children named violent games as their favorites. Most parents, however, are not likely to know what their child is playing. Only one third of parents were able to correctly identify their child's favorite video game. In 70% of the incorrect parental responses, children described their favorite game as violent (Funk et al., 1999).

Not only is violence a dominant theme in current video games, but video game companies are marketing those violent games towards youth. A Federal Trade Commission report (2000) revealed that 70% of the M-rated games (games suitable for people 17 or older according to the Entertainment Software Rating Board) were marketed to children under 17.

Fifty-one percent of the M-rated game titles researched had at least one advertising plan that blatantly included targeting children under seventeen. Additionally, ten of the eleven companies surveyed had documents that included males under seventeen as part of the target audience for their M-rated games.

There is a large discrepancy between what the video game industry considers violent as compared to the public. The video game industry and its ratings board (Entertainment Software Rating Board) claim to see much less violence in their games than do parents (Walsh & Gentile, 2001) and other research groups (Thompson & Haninger, 2001). For example, many games contain cartoon-like violence, (known as mild animated violence) which the industry claims is appropriate for all ages, but parents and children disagree (Funk, Flores, Buchman, & Germann, 1999).

Time Spent Playing Video Games and Parental Control

As the financial aspect of the video game industry has grown, so has time spent playing video games. In the mid 1980s children were spending an average of four hours a week playing video games, both at home and in arcades (Harris & Williams, 1985). By the mid 1990s, video game usage had increased to 4.5 hours per week for 4th grade girls and 7.1 hours per week for 4th grade boys (Buchman & Funk, 1996).

Recent estimates have shown that video game usage has grown for both young and older children alike. Children ages two to seven have been shown to play video games an average of three to five hours a week (Gentile & Walsh, 2002). School-age children (both boys and girls) spend an average of about 7 hours per week playing video games (Gentile & Walsh, 2002). These numbers are even higher for slightly older youth, with 8th and 9th grade students reporting an average of 9 hours (13 hours for boys, 5 hours for girls) a week spent playing video games (Gentile, Lynch, Linder, & Walsh, in press). In 1999, 2.5 percent of entering college men reported playing video games over 20 hours per week (CIRP, 1999).

In addition, parental supervision of children's video game use is almost entirely absent. Walsh (2000) reported that 89% of teens surveyed said their parents never put a limit on the amount of time spent playing video games. Also, 90% of the youth surveyed in grades 8-12 reported that their parents never check the ratings of video games before allowing the youth to purchase them. Only 1% of the youth surveyed reported their parents had ever prevented them from purchasing a video game because of its rating.

Effects of Viewing Media Violence

The vast amount of research conducted on the effects of violent television and movies on aggressive behavior spans several decades. Eighty studies had been published on the effects of media violence on aggressive behavior by 1975. A meta-analysis conducted on these early studies revealed that exposure to media violence (both in the laboratory and in real-life settings) causes increases in aggressive behavior (Bushman & Anderson, 2001). However, although the scientific research clearly demonstrated that exposure to media violence led to increases in aggressive behavior, the news media's coverage of this issue painted quite a different story. Since 1975, research on media violence has yielded even stronger evidence of causal effects on aggression, but the news coverage in following years portrayed the media violence effects as weaker than did earlier news reports (Bushman & Anderson, 2001).

Despite how the news media continues to portray the effects of media violence, the research is clear: youth who view violent television tend to become more aggressive adults (e.g., Anderson & Bushman, 2002b; Bushman & Anderson, 2001; Hearold, 1986; Huesmann, 1994; Huesmann, Moise-Titus, Podolski, & Eron, 2003; Paik, & Comstock, 1994; Wood, Wong, & Chachere, 1991). Viewing violent television causes increases in aggressive cognitions, affect, and behavior. In a recent meta-analysis, Bushman & Anderson (2001) found that the correlation of viewing violent television and aggression is greater than correlations of being exposed to asbestos and contracting laryngeal cancer, consuming calcium and increased bone mass, or wearing a condom and not contracting HIV.

Another media violence effect besides increasing aggressive behavior is desensitization to violence. There is an empirical basis as well as a theoretical basis for the desensitizing effect of violent media. Research has shown that participants exposed violent media (slasher films, police television programs, violent boxing matches) are less physiologically aroused by real world violence than are those exposed to nonviolent media (Cline et al., 1973; Lazarus et al., 1962; Linz et al., 1989; Thomas, 1982; Thomas et al., 1977). Exposure to violent media also changes peoples' perceptions of violence. Research has shown that after viewing several sexually violent movies, participants rated the last movies in the set as less violent (e.g., Cline et al., 1973; Linz et al., 1988) and showed less sympathy and assigned more responsibility to a rape victim compared to those who viewed nonviolent movies (Dexter et al., 1997; Linz et al., 1988). Exposure to media violence has also been shown to cause decreases in helping a violence victim (e.g., Drabman & Thomas, 1974, 1976; Thomas and Drabman, 1975).

Differences Between Television and Video Games

The effects of violent television and movie exposure have received considerably more research attention than the effects of violent video games. The main reason for this is because video games are still a relatively "new" medium of entertainment compared to television and movies, which have received decades of examination. Due to their similarity to television programs and movies, we can hypothesize that violent video game exposure will have similar effects on aggression and aggression related variables. However, besides their obvious similarities, there are also a variety of differences that need to be acknowledged. There are several theoretical reasons why exposure to violent video games may have greater or weaker effects than exposure to violent television on aggressive behavior, cognitions, affect, and desensitization. These differences are addressed below.

Why Violent Television Exposure May Be More Detrimental

The most obvious difference between violent video games and violent television programs is the level of graphical quality. Current and past video game consoles do not have the graphic capability compared to television and movies. This difference, however, could become a moot point in the near future, as the graphical capabilities of video games are increasing a high rate. The original Sony *PlayStation* processed 350,000 polygons per second (pg/s). Sega *Dreamcast* increased the graphical capability by over nine times in 1999, when it processed over three million pg/s. *PlayStation 2* blew *Dreamcast* out of the water when it's [sic] new system processed 66 million pg/s. Microsoft's *Xbox*, released in 2001, increased graphic capability to 125 million pg/s. The goal for *PlayStation* 3 is 1 billion pg/s. The dramatic increase in speed and graphic capability has allowed for more realistic violence than ever before. At this rate, the difference of graphics between video games and television may not be an issue in the very near future.

Why Violent Video Game Exposure May Be More Detrimental

There are several reasons that violent video games could have larger effects than television programs. Some of these differences are that playing violent video games involve almost complete attention and involvement, more identification with violent characters, more reinforcement of violent acts, and higher frequency of violent scenes (Anderson & Dill, 2000; Dill & Dill, 1998; Geen, 2001).

Level of attention. Television or movies do not necessarily require a large amount of attention from viewers. Viewers are not forced to focus their attention to the television. Programs may be running in the background while individuals are completing other tasks (reading newspaper, talking with others, leaving the room, etc. . .). Attention from television or movies can shift without having any effect on the program itself. Video games, however, require a higher level of attention from the player. A player must typically focus his or her attention towards the video game or a failure of goals will occur. This means that the player is constantly watching the screen and is focused on any potential violence that will be shown.

Level of active involvement. Viewing television or movies can be a relatively passive process. Violence will occur during the television program regardless of what the viewer does. In video games, this is not the case. What happens next on the screen depends on how the player controls the characters in the game. Video game players are responsible for the violence they see on the screen. Players are the ones who are pulling the trigger and throwing the punches. Research has shown that learning is enhanced when people are actively rather than passively involved (e.g., Atlas, Cornett, Lane, & Napier, 1997; Berkowitz, 1974; Onion & Bartzokas, 1998). This active component could enhance the negative effects of violent video games, relative to more passive forms of viewed violence.

Identification with violent characters. People who view violence in television programs or movies might identify with violent characters, but not necessarily. Violent video game players are essentially forced to identify with the character they are controlling. Players are required to take on the identity of a video game persona and "become" the violent character. In first person video games, the player sees the virtual world through the eyes of the main character. The perspective on the screen is everything that the main character would see. In some third person games, players are allowed to alter the appearance, gender, and name of the character they are controlling. This can allow the player to create a visual replica of oneself in the video game. In some more sophisticated games, the player can import scanned images of faces directly onto characters in the game (called "skins"). Research on violent television has demonstrated that identifying with a violent character increases the media violence effect (e.g., Leyens & Picus, 1973; Huesmann et al., 2003; Perry & Perry, 1976; Turner & Berkowitz, 1972).

Reinforcement of violent acts. When viewing television or movies, a viewer may only receive indirect rewards for violent actions of the characters (e.g., witnessing when a violent character is rewarded for his or her actions). When individuals play violent video games, there is direct (and typically instant) reinforcement for their choice of action. This reinforcement can come in numerous forms: visual effects, sound effects (e.g., groans of pain from an injured target), verbal praise (e.g., when a target is hit the computer says "well done" or "impressive"), points for various violent actions, and advancing to the next game level after obtaining certain goals. Bandura (1973, 1983) has demonstrated that aggression is likely to increase when it is rewarded.

Frequency of violent scenes. Even in the most violent movies, the violence is not completely constant. There are typically less intense scenes with a romantically or comical theme that enhance the plot of the TV program or movie. This is not necessarily the case for video games. Despite the more recent addition of "cut scenes" (digitized movie clips that enhance the plot of the game), the violence in video games is almost continuous. Player must constantly be ready to shoot the next enemy and witness the bloody repercussions. Players are almost continuously exposed to scenes of gore, blood, and screams of pain. Together these negative sights and sounds are accompanied with positive events (reward of points, new weapons, advancement to higher levels) that activate positive emotions. Because of this factor, desensitization is likely to occur at a higher rate from exposure to violent video games compared to violent television if the graphical nature of both forms of media is fairly equivalent.

Empirical Issues in the Video Game vs. Television Debate

Currently, it is unclear whether exposure to violent video games or exposure to violent television has a larger impact on aggressive behavior. The main reason for this haziness is because it is unclear exactly how to examine this issue in a laboratory setting. One issue is how to equate video games and TV programs on a variety of components (amount of violence, graphical nature of violence, active participation, etc. . .) or whether it is legitimate or possible to equate these factors. At the current time, it seems that each of these differences must be addressed one issue at a time. It still seems unclear how to control certain differences between these two types of media (e.g., if trying to control frequency of violent scenes, how do you account for participants who are better players and view more violence because they accomplish more in the given amount of time?).

Effects of Violent Video Games

Because violent video games are a rather new type of violent media, the literature examining its negative effects on players is rather small, but a rather clear consensus has already been reached. This consensus is virtually identical to the conclusions reached in the violent television literature: playing violent video games increases aggression. Several studies, both correlational and experimental, have demonstrated that playing violent video games can have a wide variety of negative effects on players (Anderson & Bushman, 2001). Recent meta-analyses (Anderson & Bushman, 2001: for updated version, Anderson, in press) have demonstrated that exposure to violent video games increases aggressive behavior, cognition, affect, and physiological arousal, and decreases helping behavior.

Violent Video Games Increase Aggressive Behavior

Correlational studies have revealed a positive relationship between playing violent video games and aggressive behavior. Anderson and Dill (2000) showed a positive relationship between violent video game exposure and self-reported aggression on the National Youth Survey, which includes items assessing assault and robbery. Gentile et al. (in press) found that young adolescents who played more violent video games reported more frequent aggressive behaviors, such as arguing with teachers and getting involved in physical fights.

Experimental studies have revealed the same results: participants exposed to violent video games behave more aggressively than participants not exposed to violent video games (e.g., Anderson & Dill, 2000; Cooper & Mackie, 1986; Irwin & Gross, 1995; Lynch et al., 2001; Schutte, Malouff, Post-Gorden, & Rodasta, 1988; Silvern & Williamson, 1987). The average effect size across studies between violent game play and aggressive behaviors was 0.19 (Anderson & Bushman, 2001). These effects have been found in children and adults, in males and females, and in experimental and non-experimental studies.

Violent Video Games Increase Aggressive Cognition

There is both correlational and experimental evidence that playing violent video games increases aggressive cognitions. In a correlational study, young adolescents who played more violent games also had higher hostile attribution biases (Lynch et al., 2001). People with hostile attribution biases have been shown to act aggressively and are likely to be socially maladjusted (Crick & Dodge, 1994). These same biases have been found in laboratory settings. Bushman and Anderson (2003) and Kirsch (1998) showed that young adults who had just played a violent video game generated more aggressive endings to story stems than those who had played nonviolent video games.

Besides hostile attribution biases, aggressive cognitions can be measured several different ways. For example, Anderson & Dill (2000) showed that playing a violent video game increased the relative speed with which the person could read aggression-related words (aggressive thoughts). In addition, studies measuring cognitive responses to playing violent video games have shown that aggressive thoughts are increased compared to playing nonviolent video games (e.g., Anderson & Dill, 2000; Calvert & Tan, 1994; Graybill, Kirsch, & Esselman, 1985; Kirsh, 1998; Lynch et al., 2001).

Recent meta-analyses have shown the average effect size across studies between violent game play and aggressive cognitions is 0.27 (Anderson & Bushman, 2001). These effects have also been found in children and adults, in males and females, and in experimental and non-experimental studies.

Violent Video Games Increase Aggressive Affect

Empirical studies have also demonstrated that playing violent video games can lead to an increase in aggressive affect. Anderson and Bushman's (2001) meta-analyses found that the effect size of playing violent videogame on aggressive affect is .26. In one study, adults' state hostility and anxiety levels were increased after playing a violent game compared to control conditions (Anderson & Ford, 1986). In a study of 3rd through 5th grade children, playing a violent game increased frustration levels more than playing a non-violent game (Funk et al., 1999). Results involving aggressive affect are less than clear because nonviolent video games can also cause increases in negative affect by being to [sic] difficult and frustrating the player.

Violent Video Games Decreases Prosocial Behavior

Prosocial behavior has been shown to decrease with exposure to violent video games. Studies measuring emotional responses to playing violent video games have shown that prosocial behaviors are decreased compared to playing nonviolent video games (e.g., Ballard & Lineberger, 1999; Chambers & Ascione, 1987; Silvern & Williamson, 1987; Wiegman & Van Schie, 1998). Carnagey, Bushman and Anderson (under review, Study 2) showed that participants who played a violent video game were slower at providing help to a violence victim than participants who played a nonviolent video game. Anderson and Bushman (2001) meta-analyzed eight independent samples and found the average effect of these studies was -.19.

Violent Video Games Increase Physiological Arousal

Studies have found that playing violent video games tends to increase heart rate, systolic and diastolic blood pressure compared to playing nonviolent video games (e.g., Murphy, Alpert, & Walker, 1992). The average effect size across studies between violent game play and physiological arousal was 0.22 (Anderson & Bushman, 2001). For example, Ballard and Wiest (1996) showed that a violent game (*Mortal Kombat* with the blood "turned on") resulted in higher systolic blood pressure responses than either a nonviolent game or a less graphically violent game (*Mortal Kombat* with the blood "turned off").

Other physiological reactions have also been found. Adult males' brains have been shown to release dopamine in response to playing violent video games (Koepp et al., 1998). In addition, Lynch (1994; 1999) has found that the physiological effects of playing violent video games may be even greater for already aggressive children. Children high in trait hostility showed greater increases in heart rate, blood pressure, epinephrine, testosterone, norepinephrine and cortisol in the blood. These findings suggest that video game exposure effects may be greater for children who are already at a high likelihood for aggressive behavior.

Even though violent video game exposure has been shown to increase certain physiological measures, it has also been shown to cause physiological desensitization to real-life violence. Carnagey et al. (under review, Study 1) demonstrated that participants who previously had played a violent video game for 20 minutes had lower heart rates while watching scenes of real-life violence than participants who had played a nonviolent video game. This study is the first to demonstrate that violent video games can have a physiological desensitizing effect to real-world violence.

Criticisms of the Video Game Literature

There are many criticisms of the current violent video game literature. Some of these criticisms are justified, while some of them are completely unjustified.

Justified Criticisms

Small sample sizes. Many current studies contain less than ideal sample sizes. Small samples sizes can cloud a research area, by artificially generating what appear to be inconsistent effects. For example, if the average effect size for violent video game exposure on aggressive behavior is about r = .20 (Anderson & Bushman, 2001), then the number of study participants should be at least 200 for .80 power (likelihood of being able to find a legitimate difference between groups). Studies with smaller samples may yield results that appear inconsistent, with some apparently "'working" and others failing to find a statistically significant effect, or even finding opposite effects. Two ways to overcome this obstacle are to increase sample sizes in future research and use meta-analytic strategies to summarize previous findings rather than using the more traditional narrative review. When this is done, a more consistent effect of video game violence is revealed (Anderson & Bushman, 2001).

No differences in violent content between conditions. Some studies have been criticized for the lack of difference in violent content between violent and nonviolent conditions. Typically, either the violent condition resembles a nonviolent game or the nonviolent game resembles a violent game. When the "violent" and "nonviolent" comparison conditions have only a small difference in violent content, the effect sizes will also be small. When the differences are large, the effects tend to be large (Anderson, 2002). Future studies need to do a better job of assessing the violent content of the video games being compared and ensure there is a significant difference between games.

Additional differences between violent & nonviolent games. Some studies utilized video games that have other differences between them besides violent content. The nonviolent game could be more boring or frustrating than the violent game. These additional differences can yield inaccurate results. The obvious solution for future studies is to do more pilot testing or manipulation checks on such aggression-relevant dimensions.

Lack of results reporting. Some previously published studies have neglected to include all the necessary information needed to include them in meta-analyses. For example, this has occurred in studies in which half of the participants played a video game while the other half merely observed. Reported means were then collapsed across this play vs. observe dimension. Future reports should include the individual means necessary for including in future meta-analyses.

Questionable measures of aggressive behavior. Modern definitions of aggression restrict its application to behaviors that are intended to harm another person (Anderson & Bushman, 2002a; Anderson & Huesmann, in press; Geen, 2001). A surprising number of past studies have used inappropriate dependent measures. For example, self-reports on "Trait Aggression" scales have been used as measures of aggressive behavior in short-term experiments. But there is no way for a short-term manipulation of exposure to violent vs. nonviolent video game (e.g. 20 minutes) to influence one's past frequency of aggression. In this short-term context, such a trait measure might possibly be conceived as a measure of cognitive priming, but it clearly is not a measure of aggressive behavior. Another example is operationalizing aggressive behavior such as hitting an inanimate object. Future studies need to use better measures of aggression.

No longitudinal studies. Currently, there has not been a longitudinal study conducted on the negative effects of violent video games. The main reason for this is because major funding is needed to conduct a large-scale longitudinal study and so far, no such funding has been issued. Until a large-scale study is funded, one must look to the longitudinal studies conducted in the TV/movie violence domain to get a reasonable guess as to the likely long-term effects.

Unjustified Criticisms

Too few studies to warrant any conclusions. If a research area has too few studies, it may be impossible to detect a small effect size. However, this is not the case for the video game literature. As noted earlier, meta-analyses have been conducted and clear findings have already demonstrated that exposure to violent video games cause increases in aggressive behavior, cognitions, affect, and decreases in prosocial behavior (Anderson & Bushman, 2001). If anything, it is remarkable that such reliable effects have emerged from such a relatively small number of studies (compared to TV & movie violence studies) that vary so much in method, sample population, and video game stimuli.

Lack of external validity. An old standby criticism used on a variety of research areas has been that experimental studies lack external validity, due to demand characteristics, participant suspicion, trivial measures, artificial settings, and unrepresentative participants. These arguments have been successfully debunked many times by empirical analyses and have found little cause for concern (Anderson, Lindsay, & Bushman, 1999; Banaji & Crowder, 1989; Kruglanski, 1975; Mook, 1983). In addition, examinations of these issues in the aggression domain have consistently found evidence of high external validity, and have done so in several very different ways (Anderson & Bushman, 1997; Berkowitz & Donnerstein, 1982; Carlson, Marcus-Newhall, & Miller, 1989; Giancola & Chermack, 1998).

Correlation is not causation. Psychology instructors teach this mantra to introductory psychology students, and hope that they will gain a much more sophisticated view of methods and scientific inference by the time they are seniors. Whole fields of science are based on correlational data (e.g., astronomy). Correlational studies are used to test causal theories by providing opportunities for falsification. A well-conducted correlational design, one that attempts to control for likely confounding variables, can provide a large amount of useful information. The main key for a particular research area is that it provides a consistent pattern of results across studies that differ in design, procedure, and measures. The current research on violent video games and aggression related variables does yield consistent results (Anderson & Bushman, 2001).

Arousal accounts for all video game effects. Another unjustified criticism of the video game literature is that the arousal caused in violent video games accounts for the differences in aggressive related variables. This criticism has several flaws. First, arousal dissipates fairly quickly and the criticism cannot apply to studies that measure aggressive behavior more than 30 minutes after game play has occurred. Also, this criticism generally does not apply to correlational studies, but they show a significant link between violent video game exposure and aggression (Anderson & Bushman, 2001). Furthermore, there are some experimental studies in which the violent and nonviolent game conditions were equated on arousal, still revealing significant violent content effects (e.g., Anderson & Dill, 2000, Study 2; Carnagey, Bushman, & Anderson, under review).

No studies linking violent video game play to serious aggression. Another unjustified criticism of the video game literature is that there are no studies that examine the relationship between violent video game exposure to serious aggressive actions. This criticism is simply not true. A number of correlational studies have linked repeated violent video game play to serious aggression. Anderson and Dill (2000, Study 1) showed that college students' reports of violent video game play in prior years were positively related to aggressive actions that would be considered criminal (e.g., assault, robbery) if known to police. Similarly, Gentile et al. (in press) found significant links between violent video game exposure and fighting in school.

Violent media affect only a small portion of the population. There are certain reasons to believe that some sub-populations may be more susceptible than others to the negative effects of violent video game exposure. However, there has been no evidence that particular populations are completely "immune". Even some populations thought to be at low risk have nonetheless yielded significant violent video game exposure effects (e.g., Anderson & Dill, 2000; Gentile et al., in press).

Effects of media violence are trivially small. One of the most well known criticisms is that even though there may be a violent video game exposure effect, the effect is so small that it is trivial. This is simply not true. Violent video game effects have been shown to be larger than the effects of passive tobacco smoke on lung cancer, exposure to lead on I.Q. scores in children, and calcium intake on bone mass (see Anderson & Bushman, 2001; Bushman & Anderson, 2001, for more comparisons).

Critics have used all of the unjustified criticisms discussed above to dismiss and trivialize the current video game literature. By using unjustified criticism "correlation does not equal causation", one can ignore all of the correlational research. In addition, with use of unjustified criticism "lab studies are trivial", all of the experimental studies can be similarly ignored. The only way to satisfy these unjustified criticisms is to conduct a longitudinal field experiment in which young children are assigned to high or no exposure to violent video games over the course of their life while measuring their violent, criminal activities. Obviously, such a study is completely unethical and could never (nor should ever) take place. It is not an accident that all ethically feasible types of studies are dismissed by the industry and its supporters and the only way to prove (in their eyes) the dangers of their products is to conduct a study that would never be allowed.

The General Aggression Model: A Theoretical Explanation

A theory developed in recent years can be used in understanding the media violence research is the general aggression model (GAM; see Anderson & Bushman, 2002a; Anderson & Huesmann, in press). GAM is an integration that combines key ideas from earlier models: social learning theory and related social cognitive theory concepts (e.g., Bandura, 1971, 1973; Bandura, Ross, & Ross, 1961, 1963; Mischel 1973; Mischel & Shoda, 1995), Berkowitz's cognitive neoassociationist model (1984, 1990, 1993), Dodge's social information-processing model (e.g., Crick & Dodge, 1994; Dodge & Crick, 1990), Geen's affective aggression model (1990), Huesmann's script theory (Huesmann, 1986), and Zillmann's excitation transfer model (1983). GAM describes a cyclical pattern of interaction between the person and the environment. Three main points compose the cycle: *input variables* of person and situation, *present internal state* of the individual, and *outcomes* resulting from various appraisal and decision processes.

Input Variables

According to GAM, a person's behavior is based on two main kinds of input variables: the person and the situation (see Figure 1). The person variables are all the factors a person brings into the current situation, including traits, current states, beliefs, attitudes, values, sex, scripts, and aggressive personality.

Situation variables are simply the environmental factors surrounding the individual, including factors in the environment that could affect the person's actions, like aggressive cues, provocation, pain, rewards, and frustration.

Routes

Input variables, sometimes interactively, affect an individual's appraisal of a situation and ultimately affect the behavior performed in response to that appraisal, primarily by influencing the present internal state of the individual. According to GAM, these influences can occur through three main aspects of the present internal state: cognition, affect, and arousal.

Cognition. Input variables can influence internal states by making aggressive constructs more readily accessible in memory. Constructs can be either temporarily or chronically accessible (e.g., Bargh, Lombardi, & Higgins, 1988; Sedikides & Skowronski, 1990). As a construct is repeatedly accessed, its activation threshold decreases. This means that the construct requires less energy necessary for activation, making it chronically accessible. A situational input (e.g., a violent film) results in a temporary lowered threshold of activation, making the construct accessible for a short time. This temporary increase in the accessibility of a construct is often called "associative priming." Situational variables may also activate aggressive scripts (Huesmann, 1986). Aggressive scripts can bias the interpretation of a situation and the possible responses to that situation. Repeated access of aggressive scripts can also make them more readily accessible and more likely to be activated in future situations, guiding future behavior.

Affect. Input variables can also influence the present internal state through affect, which in turn can impact later behavior. For example, pain and uncomfortable temperatures can produce increases in state hostility (anger) and general negative affect (C. Anderson, Anderson, & Deuser, 1996; K. Anderson, Anderson, Dill, & Deuser, 1998). Exposure to violent movies, TV, or video games also increases state hostility (Anderson, 1997; Anderson & Bushman, 2001; Bushman, 1995; Bushman & Geen, 1990; Bushman & Huesmann, 2000; Hansen & Hansen, 1990). Besides situational variables, personality variables are also related to hostility-related affect. Self-reported trait hostility has been shown to be positively related to state hostility (Anderson, 1997; K. Anderson et al., 1998).

Arousal. The final aspect of the present internal state that can be influenced is arousal. This can be accomplished a number of ways. An increase in arousal can strengthen an already present action tendency, which could be an aggressive tendency. For example, if the person has been provoked at the time of increased arousal, aggression is more likely to be an outcome than if the arousal increase didn't occur. Geen and O'Neal (1969) demonstrated this phenomenon by showing that loud noise increased arousal and aggression. A second way in which arousal could increase aggression is commonly associated with excitation transfer theory (Zillman, 1983). Arousal elicited by other sources (e.g., exercise) may be misattributed as anger in situations involving provocation, thus more likely producing anger-motivated aggressive behavior. A third, and untested, way is that unusually high and low levels of arousal may be aversive and may stimulate aggression in a similar manner as other aversive stimuli (Anderson & Huesmann, in press).

Interaction Between Routes. Not only can input variables can influence cognition, affect, and arousal, but these three routes may also influence one another. The idea that cognitions and arousal influence affect dates back all the way to William James (1890) and was first popularized among social psychologists by Schachter & Singer (1962). Affect has also been shown to influence cognition and arousal (Bower, 1981). Research has shown that people often use their affective state to guide inference and judgment processes (Forgas, 1992; Schwarz & Clore, 1996). Thus, hostility-related affect may make hostile cognitions more accessible, and vice versa.

Outcomes

Typically, the individual will appraise the current situation and then select a behavior appropriate for the situation before that behavior is emitted. Depending on the situational variables and resources present, appraisals may be made hastily and automatically, without much (or any) thought or awareness, resulting in an impulsive behavior. However, frequently the individual will have the time and resources to reappraise the situation and perform a more thoughtful action. Of course, both impulsive and thoughtful actions may be aggressive or nonaggressive.

This action will then be followed by a reaction from the environment, which is typically other people's response to the action. This social encounter can alter the input variables, depending on the environmental response. This encounter could then modify situation variables, person variables, or both, resulting in a reinforcement or inhibition of similar behavior in the future (Anderson & Bushman, 2002a).

Applying GAM to Media Violence

GAM can be used to interpret the effects of exposure to violent media. Theoretically, violent media can affect all three components of internal state. As mentioned earlier, the literature on violent video games has shown that playing them can temporarily increase aggressive thoughts, affect, and arousal (Anderson & Bushman, 2001). Also noted earlier, exposure to violent media can reduce arousal to subsequent depictions of violence. Playing a violent video game can also influence the person's internal state through the affective route by increasing feelings of anger, and through the arousal route by increasing heart rate (Anderson & Bushman, 2001).

Despite's the GAM's primary focus on the episode, it is not restricted to short-term effects. The cyclical process of GAM lends itself to addressing long-term effects of exposure to media violence. With repeated exposure to certain stimuli (e.g., media violence), particular knowledge structures (e.g., aggressive scripts) become more readily accessible. Figure 2 displays this process and several common types of long-term changes that may occur. Over time, the individual will employ these knowledge structures and possibly receive environmental reinforcement for their usage. Over time, these knowledge structures become strengthened and more likely to be used in later situations. Research supports this notion by demonstrating that repeatedly exposing children to media violence produces aggressive adults (Huesmann & Miller, 1994). Such long-term effects result from the development, automatization, and reinforcement of aggression-related knowledge structures. In essence, the creation and automatization of these aggression-related knowledge structures and the desensitization effects change the individual's personality. Long-term consumers of violent media, for example, can become more aggressive in outlook, perceptual biases, attitudes, beliefs, and behavior than they were before the repeated exposure, or would have become without such exposure.

Public Policy Implications and Parental Supervision

There are three main factors to consider when discussing the potential implications of research on violent video games. First, one must consider the research that has been conducted on violent video games. Even though this research area is still relatively small compared to research on the effects of violence in TV and movies, there is sufficient evidence to state that playing violent video games can cause significant increases in aggression in the short term, demonstrated both in laboratory-based situations and in real world contexts.

Second, one must consider the sheer size of the research literature on media violence in general. This literature has demonstrated that media violence has significant causal effects on aggression and on interpersonal violence in both the short and long term. The processes underlying the effects of TV and movie violence are very similar to those presumed to underlie the effects of violent video games, making findings from the TV domain very relevant to implications for video game research.

Third, one must consider the various processes underlying human aggression in general. Numerous advances in understanding human aggression have been achieved in recent years; advances that allowed the formulation of the General Aggression Model. As Kurt Lewin (1951) once said, "There is nothing so practical as a good theory." Though no theory is ever complete in all respects, a good one allows accurate predictions about the likely effects of certain actions. Social scientists' understanding of human aggression in general and of media violence effects in particular is now good enough to allow fairly accurate predictions of the likely effects of actions that policy makers and parents might take.

Potential Public Policy Action

Public policy makers can aid parents in their attempts to provide a healthy media diet to their children by giving them back some of the parental control that has been lost to the media industry and their marketing departments. Legislation that restricts access of minors to violent media by requiring parental permission for minor children to buy, rent, or play violent video games in arcades, is likely to be helpful. Creating a single, unified rating system for various types of entertainment media would also help parents regain some control by simplifying the current confusion of systems. The new rating system should be applied by a group that is truly independent of the entertainment media industries. It should also be based on the best available research. We now know from research, for example, that strictly age-based systems encourage children to seek out media that are "too old" for them (Bushman & Stack, 1996). A rating system that more clearly labels the content of the video game might well be more informative to parents and might provide less encouragement to youth to violate age targets.

Research also shows that even "cartoon" violence has a negative impact on children, especially on the youngest ones for whom the cartoon violence is supposedly created. Of course, feasible types of public policies vary widely across countries around the world. In the U.S., for example, the TV and movie industries have been quite successful in their efforts to prevent the creation of a legally binding system of access restrictions for children. The video game industry has been following in their footsteps in this regard. Other countries, however, do have governmental agencies that evaluate a variety of types of entertainment media for the primary purpose of restricting access to inappropriate material by children without parental permission (e.g., Australia's Office of Film and Literature Classification).

Parental Supervision

Based on survey research of parents and children, we know that parental supervision for obtaining and playing violent video games is relatively low (e.g., Walsh, 2000). Parents can correct this in a number of ways. First, parents need to discover what kinds of media, including video games, their children are ingesting, and then take steps to ensure that their media diet is a healthy one. Some parents lament that it is impossible to totally control what their children see and do and therefore throw up their hands in dismay. It is true that they cannot totally control their children's media diets, but this is no reason to give up all attempts at media diet control.

For example, it is difficult to control what games your child plays at a friend's house. However, it is also difficult to control what your child eats when at a friend's house, but the solution is not to abandon your parental responsibility to provide nutritious meals at home. As the General Aggression Model illustrates, the long-term negative effects of exposure to violent video games is related to frequency of exposure. Steps that reduce such exposure in any environment, especially the home, can be beneficial. Such steps might include removing the TV, the video game console, and the computer from the child's room to an area that is more easily monitored by the parent. One can also monitor and control what kinds of computer games are on whatever computers the child uses and can restrict the web sites that the computer can access while in use by the child. Along these same lines, parents should encourage the parents of their children's friends to provide a healthy media diet rather than a violent one. None of these monitoring and control tasks is easy, but a lot can be accomplished by a committed parent.

Second, parents can actively teach their children the reasons behind the restrictions they place on certain types of media, why such media can be bad for them. In a sense, this is teaching them to become more media savvy. Similarly, discussing alternative nonviolent solutions to interpersonal conflicts with one's children can help teach more positive values as well as practical guides to life. This can be done in the context of violent media themselves, as well as in numerous everyday situations as conflicts arise.

Third, reducing the amount of time children spend on electronic media and substituting increased time in social contexts and activities is likely to improve social skills and functioning over time.

In summary, parents need to be on the alert for any video game that encourages or allows the player to harm another creature, human or nonhuman. Such games are very likely teaching the game player subtle but harmful aggression lessons, regardless of how cute the game characters are or how unrealistic the violence appears.

Six Questions Parents Should Ask Themselves Regarding Violent Video Games

When examining video games your child is being (or could potentially be) exposed to, it is best to get a first-hand demonstration of the game and ask yourself six questions. If you, like many parents, are not video game savvy enough to operate the game yourself, have someone else demonstrate it for you. Then ask yourself the following questions:

- Does the game involve some characters trying to harm others?
- Does this happen frequently, more than once or twice in 30 minutes?
- Is the harm rewarded in any way?

- Is the harm portrayed as humorous?
- Are nonviolent solutions absent or less "fun" than the violent ones?
- Are realistic consequences of violence absent from the game?

If two or more answers are "yes," think very carefully about the lessons being taught before allowing your child access to the game.

Future Research

The evidence is now clear that playing violent video games increases aggressive behavior and decreases prosocial behavior in children and in young adults. Despite these conclusions, there are still many unanswered questions and much more work is needed. The following is a list of research needs in this domain.

1. Does explicitly gory violence desensitize video game players more so than less gory violence? If so, does this desensitization increase subsequent aggression? Does it decrease helping behavior?

2. What features increase the game player's identification with an aggressive character in video games? Prior research and theory in the media violence domain suggest that the impact of exposure to violent video games is likely to be greater when the game player closely identifies with an aggressive game character (e.g., Huesmann et al., 2003)

3. What features, if any, could be added to violent video games to decrease the impact on subsequent aggression by the game player? For instance, does the addition of pain responses by the game victims make players less reluctant to reenact the aggression in later real-world situations, or do such pain responses in the game further desensitize the player to others' pain? Can exciting video games be created that teach and reinforce nonviolent solutions to social conflicts?

5. What are the long-term effects of exposure to violent video games?

6. What types of people are most susceptible to violent video game effects, and who is relatively immune?

7. As mentioned earlier, does exposure to violent television or violent video games have larger impacts on aggression related variables and desensitization?

Answers to these questions are vital in understanding the effects of video game violence, but will require considerable effort by the research community and considerable funding by federal and other research agencies and foundations. Violence in contemporary American culture is a major social concern, and media violence plays an important role. To date, researchers in the United State have studied violence and video game questions with virtually no governmental support. As video games continue to evolve in the digital age, becoming ever more realistic and violent, a commitment by federal governments is needed to fund basic research that will more adequately inform policy makers about the role that these games play in the development of childhood aggression. What we have learned so far has taken almost 20 years, in part because of the lack of research funding; let's hope that it will not take another 20 years to complete the next round of studies on this vital topic.

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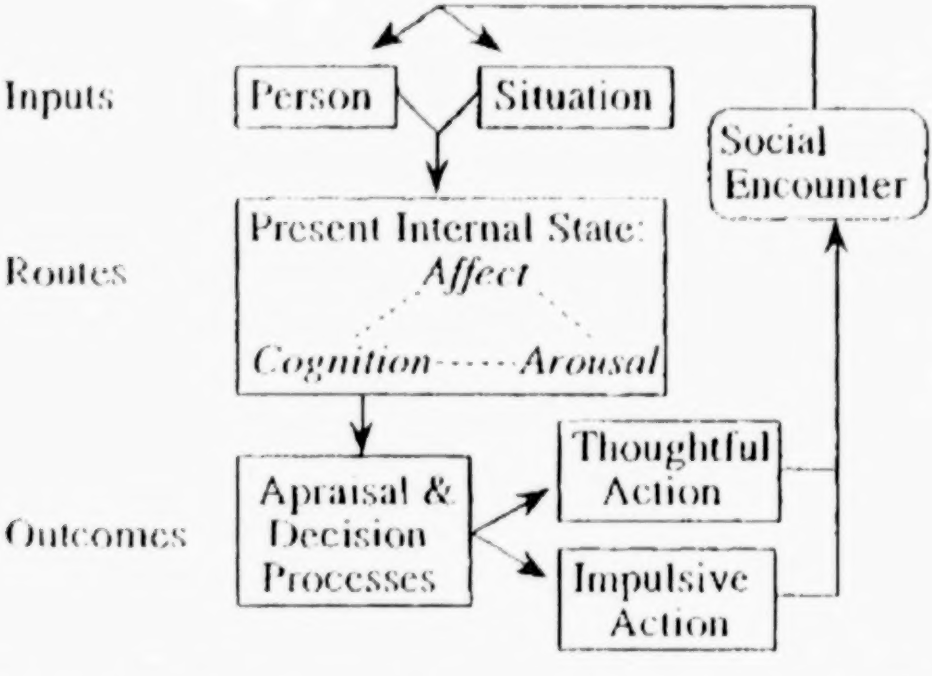
Inputs
Person
Situation
Social Encounter
Routes
Present Internal State:
Affect
Cognition
Arousal
Outcomes
Apraisal & Decision Processes
Thoughtful Action
Impulsive Action

Figure 1. The general aggression model: episodic processes

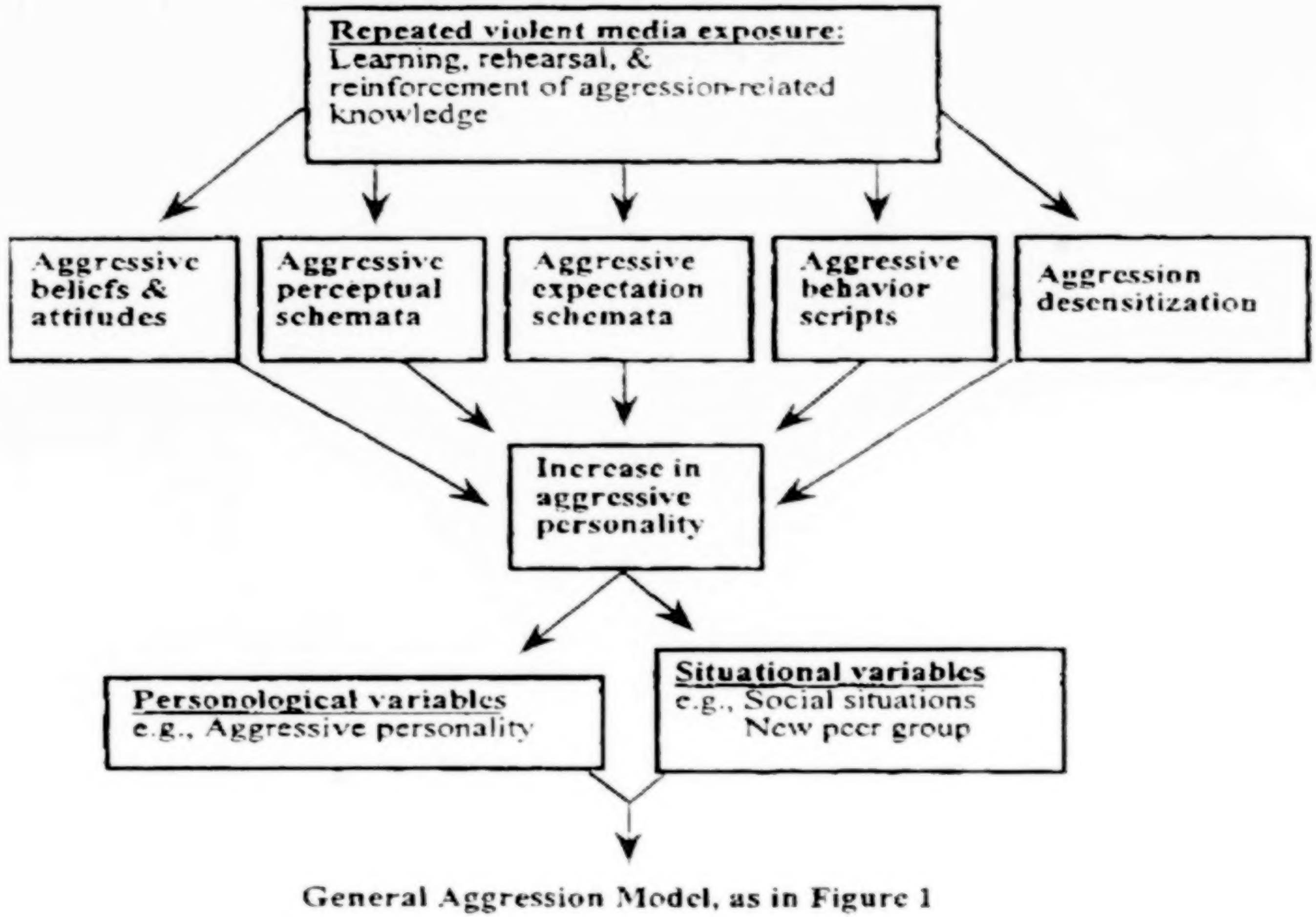
Repeated violent media exposure:
Learning, rehearsal, & reinforcement of aggression-related knowledge
Aggressive beliefs & attitudes
Aggressive perceptual schemata
Aggressive expectation schemata
Aggressive behavior scripts
Aggression desensitization
Increase in aggressive personality
Personological variables
e.g., Aggressive personality
Situational variables
e.g., Social situations
New peer group
General Aggression Model, as in Figure 1

Figure 2. The general aggression model: personality processes

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Violence exposure in real-life, video games, television, movies, and the internet: is there desensitization?

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Abstract

It is believed that repeated exposure to real-life and to entertainment violence may alter cognitive, affective, and behavioral processes, possibly leading to desensitization. The goal of the present study was to determine if there are relationships between

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real-life and media violence exposure and desensitization as reflected in related characteristics. One hundred fifty fourth and fifth graders completed measures of real-life violence exposure, media violence exposure, empathy, and attitudes towards violence. Regression analyses indicated that only exposure to video game violence was associated with (lower) empathy. Both video game and movie violence exposure were associated with stronger proviolence attitudes. The active nature of playing video games, intense engagement, and the tendency to be translated into fantasy play may explain negative impact, though causality was not investigated in the present design. The samples' relatively low exposure to real-life violence may have limited the identification of relationships. Although difficult to quantify, desensitization to violence should be further studied using related characteristics as in the present study. Individual differences and causal relationships should also be examined.

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Introduction

It is encouraging that the rate of crimes of violence in the United States has dropped about 15 percent since 1999 (US Bureau of Justice Statistics, 2001). However, self-reported violent offending by American youth has not declined (US Department of

Health and Human Services, 2001). Exposure to violence has been implicated as one cause of subsequent aggression and violence: It is believed that repeated exposure to real-life and to entertainment violence may alter cognitive, affective, and behavioral processes (Friedlander, 1993; Osofsky, Wewers, Hann, & Fick, 1993; Osofsky, 1995; Farrell & Bruce, 1997; Cooley-Quille, Boyd, Frantz, & Walsh, 2001).

Despite decreasing rates of violent crime, adolescents and adults in the United States still experience over 6 million such crimes annually (US Bureau of Justice Statistics, 2001). Exposure to community violence may cause a variety of emotional reactions including fear, anger, anxiety and depression (Martinez & Richters; 1993; Osofsky et al., 1993; Ceballo, Dahl, Aretakis, & Ramirez, 2001). In children, such exposure may undermine the development of emotion regulation skills. Impaired emotion regulation may lead to desensitization to cues that normally trigger empathic responding, increasing the likelihood of aggressive or violent behavior (Osofsky, 1995; Eisenberg, 2000). Exposure to community violence may also increase the probability of violent behavior through the demonstration and reinforcement of violent attitudes, problem-solving strategies, and behaviors, and through alterations in related cognitive processes (Huesmann & Malamuth, 1986; Osofsky et al., 1993; Guerra, Eron, Huesmann, Tolan, & Van Acker, 1997).

Violence in entertainment media is also considered by many to be a major contributor to aggressive and violent behavior in real life (see, for example, Donnerstein & Smith, 1997; Huesmann, Moise, & Podolski, 1997; Anderson & Bushman, 2002; Sparks & Sparks, 2002). Screen-based media violence (television, movies, the Internet, and video games) is the most prevalent and most thoroughly studied source for children and adolescents. Some of the proposed mechanisms of impact are similar to those believed to be active in exposure to community violence: Demonstration and reinforcement of violent actions, desensitization to the real-life consequences of violence with increased proviolence attitudes, and alterations in cognitive processing (Huesmann & Malamuth, 1986; Rule & Ferguson, 1986; Cantor, 2000; Strasburger & Wilson, 2002; Funk, 2003). The impact of television violence has been especially well-studied (for examples, see Paik & Comstock, 1994; Bushman & Huesmann, 2001; Johnson, Cohen, Smailes, Kasen, & Brook, 2002; Wilson et al., 2002). There has been less focus on movie violence, though many of the mechanisms and conclusions ascribed to television apply (Pennell & Browne, 1999; Browne et al., 2002). Music videos are a related genre, however, one recent content analysis suggests that only 15% of the almost 2000 music videos reviewed contained violence (Smith & Boyson, 2002), and the specific impact of this music-based medium will not be further addressed here. Our understanding of the impact of exposure to violent content on the Internet is essentially uncharted territory (Montgomery, 2000; Tarpley, 2001), and the impact of video game violence is just beginning to be closely examined.

Video game violence

As one of the newest and most prominent sources of screen-based media violence, special attention should be given to considering the possible impact of violent video games. It has been suggested that the active nature of video games makes them unique among the screen-based media (Funk & Buchman, 1996b; Wartella, O'Keefe, & Scantlin, 2000). Video game players actually participate in, and to some extent create the video game actions, rather than simply being a content recipient. In order to succeed at a violent video game, players must identify and then choose violent strategies. Repeated violent choices result in a continuous cycle of reward. Violence is presented as justified, without negative consequences, and fun (Funk, 1995). Some researchers assert that it has been proven that playing violent video games increases negative cognitions, affect, and behaviors (Anderson & Bushman, 2001). However, much more work is needed to identify who is at most risk for negative impact and under what conditions negative outcomes are most likely (Funk, 2002a).

Desensitization and moral evaluation

Desensitization is one of the key mechanisms proposed for the effects of exposure to violence (Ceballo et al., 2001; Strasburger & Wilson, 2002). Desensitization means the attenuation or elimination of cognitive, emotional, and, ultimately, behavioral responses to a stimulus (Rule & Ferguson, 1986). The process of desensitization can be directly and purposefully manipulated. For example, systematic desensitization is a commonly used technique in behavior therapy whose aim is to reduce or eliminate certain emotional responses through graded and supervised exposure to anxiety-inducing stimuli (Wolpe, 1973). Systematic desensitization is a key component of therapeutic interventions for children, with documented effectiveness in changing feelings, emotions, and behaviors (Weersing & Weisz, 2002).

Desensitization to violence is a subtle, almost incidental process which may occur as a result of repeated exposure to real-life violence, as well as from exposure to media violence. Emotional desensitization is evident when there is numbing or blunting of emotional reactions to events which would typically elicit a strong response. Cognitive desensitization is evident when the belief that violence is uncommon and unlikely becomes the belief that violence is mundane and inevitable. Emotional and cognitive desensitization to violence decrease the likelihood that violent behavior will be either censored or censured.

Although often cited as a major outcome of violence exposure, empirical documentation of the phenomenon of desensitization to violence is limited. With respect to real-life violence, Farrell and Bruce (1997) surveyed 473 inner-city middle school students to determine their exposure to community violence and their level of distress and aggression. There were no significant relations between violence exposure and distress, though higher exposure was related to more aggression in girls. Farrrell [sic] and Bruce suggest that children with chronic violence exposure become desensitized to violence, which allows increased aggression.

Desensitization to media violence has been examined in experimental situations, as in the classic work by Drabman and Thomas (1974). In this study, children who viewed an aggressive film later took significantly longer to seek adult assistance to stop what they thought was an altercation between younger children, compared to the children who did not see the film. In a more recent replication using contemporary video materials, Molitor and Hirsch (1994) confirmed the original findings: viewing violence increases tolerance for violent behavior.

Desensitization may also be inferred by examining related processes which are affected by desensitization. For example, when desensitization occurs, the process of moral evaluation is disrupted because the individual does not perceive or respond to the cues that are necessary to initiate evaluative processes. As a result, actions may be taken without consideration of their moral implications. Empathy and attitudes towards violence are important components of the process of moral evaluation which may be affected by exposure to violence in real life or in the media. Blunted empathic responding may reflect primarily emotional desensitization, while cognitive desensitization may be apparent in stronger proviolence attitudes (Eron, 2001).

Empathy and attitudes towards violence

Empathy, the capacity to perceive and to experience the state of another, is critical to the process of moral evaluation (Tangney & Fischer, 1995; Eisenberg, 2000; Hoffman, 2000). Empathy develops in response to positive socialization experiences including the opportunity to view empathic models and to experience feedback about behavioral choices (Feshbach, 1997). A positive relationship between empathy and prosocial behavior is typically identified (Miller & Eisenberg, 1988; Krevans & Gibbs, 1996; Roberts & Strayer, 1996; Hastings, Zahn-Waxler, Robinson, Usher, & Bridges, 2000). Relationships between lower empathy and social maladjustment and aggression in youth have also been found (Boldizar, Perry, & Perry, 1989; Cohen & Strayer, 1996).

Violence in screen-based media may affect empathy by desensitizing viewers to the true consequences of violent actions (Strasburger & Wilson, 2002). Because of its active, creative nature, video game play could be expected to have a particularly strong relationship with empathic responding. Two studies have examined this association. Sakamoto's (1994) survey of 307 fourth, fifth, and sixth graders in Japan identified a negative relationship between simple frequency of video game use and lower empathy. Barnett et al. (1997) investigated game preference, self-esteem, and empathy in a survey of 229 15-19 year olds. Adolescents whose favourite game was violent had lower empathy scores.

Attitudes also contribute to the process of moral evaluation, especially attitudes towards violence. The formation of attitudes towards violence is probably influenced by many factors including the amount of exposure to violence in real-life and the media, and the attitudes of peers and parents (Rule & Ferguson, 1986; Vernberg, Jacobs, & Hershberger, 1999). Attitudes towards violence play an important role in the translation of negative cognitions and affect into behavior (Velicer, Huckel, & Hansen, 1989; Vernberg et al., 1999). In several studies, stronger proviolence attitudes in children and adolescents have been associated with aggressive behavior (Slaby & Guerra, 1988; Guerra & Slaby, 1990; Cotten et al., 1994; Tolan, Guerra, & Kendall, 1995; Huesmann & Guerra, 1997).

For most people, violence is much more prevalent in screen-based media than in real life. If the viewer develops the attitude that violence is normative, they may become desensitized and callous to violence in real life (Bushman & Huesmann, 2001). Media presentations of justified violence may also change the belief that violent behavior is wrong, encouraging the development of proviolence attitudes. As previously noted, violent video games have the added dimension that one creates and participates in violent actions. Such games condone, promote, and justify the use of violence while concealing realistic consequences. Violence is acceptable because it is not real, therefore "victims" do not really suffer. Playing violent video games could contribute to the development of proviolence attitudes because these games normalize violence and desensitize the player to the real-life consequences of violence.

Relationships between a preference for violent video games, attitudes towards violence, and empathy were examined in research with 52 sixth graders (Funk, Buchman, Schimming, & Hagan, 1998). Participants completed Bryant's Index of Empathy for Children and Adolescents (Bryant, 1982) and the Attitudes Towards Violence Scale (Funk, Elliott, Urman, Flores, & Mock, 1999a). They also listed and categorized up to three favourite video games using a system of six content categories previously developed with the help of children and adolescents (Funk & Buchman, 1995). It was anticipated that a stronger preference for violent games would be associated with lower empathy and stronger proviolence attitudes. Results were generally in the expected directions, though only marginally significant relationships with small effect sizes were found. Perhaps most interesting, children with a high preference for violent games and high time commitment to playing demonstrated the lowest empathy. The results of this preliminary study are intriguing, but much more research is needed to confirm possible relationships.

The present study

Today's children and adolescents have many potential sources of violence exposure which may desensitize them to the true consequences of violence, increasing the relative risk of aggression or even violence (Friedlander, 1993; Johnson-Reid, 1998; Singer, Slovak, Frierson, & York, 1998; Groebel, 2001). The goal of the present study was to determine if there are relationships between real-life and media violence exposure and desensitization as reflected in empathy and attitudes towards violence. It was anticipated that higher exposure to violence in real life and in the media would be associated with lower empathy and stronger proviolence attitudes. Because of its active and creative nature, of the sources of media violence, exposure to video game violence was expected to have the strongest relationships.

Method

Participants

A sample of 150 students was recruited from elementary schools and a daycare center located in a mid-sized, Midwestern city. The elementary schools are religiously oriented private schools, primarily Catholic, and the daycare center is affiliated with the public school system. The sample included 82 boys and 68 girls from grades 4 and 5, with an average age of 9.99 (S.D. = 0.74). The racial backgrounds of the sample were primarily European American (58%) and African American (24%), reflecting the makeup of the community. Mothers' educational level is presented in Table 1. The sample is somewhat better educated and likely to be of somewhat higher socioeconomic status than the general population.

Measures

Participants were asked to complete 4 questionnaires (order counterbalanced): a background questionnaire with demographic information and questions about media use and preferences; a survey with questions about real-life violence exposure across different settings; an assessment of children's attitudes towards violence; and a measure of children's empathy.

Background questionnaire

In addition to basic demographic information (gender, age, grade, mother's education), the background questionnaire requested information about average time per week spent playing

Table 1

Distribution of highest grade completed by mother

Category	Frequency	Per cent
8th grade or less	1	0.7
9th to 11th	3	2.0
High school graduate	9	5.9
Some college completed	19	12.5
College graduate	43	28.3

Graduate school (attended or degree)	32	21.3
Don't know	42	27.6
Missing	2	1.3

video games, watching television, watching movies (on videotape or in theatres), and using the Internet. Children chose from six time range categories: no time; 1-2 h; 3-6 h; 7-10 h; 11-14 h; more than 15 h. Children were also asked to categorize the content of up to three favourites in each of the four activities using definitions provided by the experimenter. For their favourite video games children used the Funk and Buchman (1995) categories described earlier. Definitions for the other categories were developed based on these categories and on a review of previous surveys of media use (see, for example, Wright et al., 2001) For favourite television programs children chose from the following categories: figuring out, learning, "educational"; cartoon characters; sports, no contact between players (example: golf); sports with contact between players (example: football); game show; talk show; story about real people with fighting or destruction; story about real people, no fighting or destruction; no favourite television show.

For favourite movies the categories included: figuring out, learning; sports, no contact between players; sports with contact between players; real people, fighting, destruction; real people, no fighting or destruction; cartoon characters; no favourite movie. For favourite Internet activity children selected from the following: chat rooms; instant messaging; play one-person games with violence; play one-person games without violence; play multiplayer games with violence; play multiplayer games without violence; consumer/shopping sites; look for information, educational; no favourite thing to do on the Internet; do not have access to the Internet.

KID-screen for adolescent violence exposure (KID-SAVE; Flowers, Hastings, & Kelley, 2000)

The KID-SAVE is a 34-item questionnaire developed to assess children's real-life violence exposure. It is an adaptation of the Screen for Adolescent Violence Exposure (SAVE; Hastings & Kelley, 1997), which is a self-report scale measuring the frequency of violence exposure in settings relevant to adolescents, such as home, school, and neighborhood. KID-SAVE was developed for use with third to seventh grade children. All items on the scale inquire about actual violent events the child has witnessed, events the child has heard about, or violence the child has experienced directly. Items include such statements as "I have seen someone carry a gun," "I have heard about someone getting killed," and "I have been attacked with a knife." Children are specifically instructed to include only real-life violent events. Each endorsed item is rated for Frequency (0 = Never, 1 = Sometimes, 2 = A lot) and Impact (0 = Not at all upsetting, 1 = Somewhat upsetting, 2 = Very upsetting). A total score is calculated for Frequency of exposure; for the purposes of the present study, the KID-SAVE Impact Total was calculated using means in order to differentiate between children who had not been exposed to violence and therefore could not report any emotional impact and children who had been exposed to violence but did not report any emotional impact. Psychometric properties as reported by Flowers, Hastings, and Kelley and in further study by Flowers, Lanclos, and Kelley (2002) are acceptable. Cronbach's alpha for the Total Frequency Scale was 0.91; for the Total Impact Scale, Cronbach's alpha was 0.89 (Flowers, Hastings, & Kelley). The initial norm group was 90% African American and selected from a "high crime" area to obtain a sufficient range of scores. The mean score for Total Frequency of exposure to violence was 22.2, S.D. 11.3, range 1-59 (Flowers, Hastings, & Kelley).

The attitudes towards violence scale: child version [Funk, Elliott, Bechtoldt, Pasold, and Tsavoussis (2003a)]

The Attitudes Towards Violence Scale: Child Version (ATVC) is a 16-item self-report measure of children's attitudes towards violence that was originally developed to evaluate a specific violence prevention program. Children are instructed to read each statement and endorse one of four possible response choices reflecting their agreement with that statement (1 = No, 2 = Maybe, 3 = Probably, 4 = Yes). Items include statements such as "Parents should tell their kids to fight if they have to," and "People with guns or knives are cool." A total score is calculated across all items with higher scores indicating stronger proviolence attitudes. The ATVC has a meaningful two-factor solution: (a) Reactive Violence – violence used in response to actual or perceived threat and (b) Culture of Violence – a pervasive, ingrained identification with violence as an acceptable and valued activity. The ATVC demonstrates acceptable psychometric properties for the Total scale (Cronbach's alpha = 0.84) as well as for the Reactive Violence (Cronbach's alpha = 0.79) and Culture of Violence (Cronbach's alpha = 0.79) factor scores.

Children's empathy questionnaire [Funk et al. (2003b)]

The Children's Empathy Questionnaire (CEQ) is a 15-item self-report questionnaire which assesses a child's level of empathy. Similar to the ATVC, children are instructed to read each statement and endorse one of four possible response choices reflecting their agreement with that statement (1 = No, 2 = Maybe, 3 = Probably, 4 = Yes). Items include statements such as "When I see a kid who is upset it really bothers me," and "If two kids are fighting, someone should stop it." A total score is calculated across all items, with higher scores indicating more empathy. A strong one-factor solution (Cronbach's alpha = 0.71) was identified. Because this scale is in development, other psychometric data are not yet available.

Procedure

After obtaining informed consent from a parent or guardian and from the child, participants were tested in groups of approximately 10-20 students at their schools during times designated by the school principal or daycare administrator. An investigator was available in the classroom to answer questions. The majority of children were able to complete the measures without difficulty with minimal or no assistance, though some missed the reverse side of two-sided questionnaires. Complete data were available for 130 students.

Results

Preliminary analyses

A Violent Media Preference score was calculated for each of the four activities by computing the frequencies of violence category choices. Time per week spent for each activity was determined using the midpoint of the range endorsed by the child with two exceptions: when no time was endorsed the multiplier was zero and when 15 or more hours was endorsed the multiplier was 15. Means and standard deviations for frequency of violent media favourites and time spent for video games, television, movies, and Internet use are presented in Table 2. A Violent Media Exposure variable was then created for each activity by multiplying the percent of violent choices by the time spent per week for each activity. This procedure is similar, though not identical to, procedures used by other researchers in calculating exposure to media violence (see Anderson and Dill, 2000; Gentile, Lynch, Linder, & Walsh, 2003).

Means and standard deviations were computed by gender for the violent media exposure variables, and for the KID-SAVE, ATVC and CEQ. Results are presented in Table 3. A series of *t*-tests was performed to examine gender differences on the Frequency and Impact Total scales of the KID-SAVE, the ATVC Total, and the CEQ Total. Significant gender differences were noted on the KID-SAVE Frequency Total scale, $t(148) = 2.71, p < 0.01$. Although boys reported higher rates of exposure to violence, no significant gender differences were found on the KID-SAVE Impact Total scale. There was a significant difference between boys and girls on both the ATVC and CEQ Total scales, $t(148) = 2.62, p < 0.05$, and $t(148) = -3.72, p < 0.01$, respectively, with boys reporting stronger proviolence attitudes and girls reporting higher levels of empathy.

Correlations between study variables are presented in Table 4. Indices of multicollinearity were examined and no problems were identified.

Violence exposure, empathy and attitudes towards violence

Regression analyses were performed to examine the relationships between real-life violence exposure as indicated by scores on the Total Frequency and Total Impact scales of the KID-SAVE, exposure to the four measures of media violence (video game, television, movies, and Internet) and the total CEQ score. Gender was entered first in the model, with real-life violence exposure entered in step two and the media variables in step three. Results of the regression are presented in Table 5. Apart from the expected relations with gender, only exposure to video game violence was a significant predictor of empathy scores, with more exposure related to lower empathy. There was a trend for a relationship between exposure to movie violence and empathy.

Regression analyses were performed to examine whether or not the responses of girls and boys to the CEQ were equally affected by their exposure to video game violence. We first constructed an orthogonalized two-way interaction variable using a partial Gram-Schmidt procedure (Burrill, 2003). We then tested a model predicting CEQ scores that included the primary and interaction variables. Gender and exposure to video game violence were entered in Step 1 of a regression analysis; the interaction variable was entered in Step 2. The two primary variables accounted for 12% of the variance in CEQ scores [$F(2, 137) = 10.67$, $p = 0.00$]. The two-way interaction explained an additional 0.2% of the variance in the CEQ score which was not significant [$F(1, 136) = 0.29$, $p > 0.05$].

Table 2

Means and standard deviations for violent favourites and average time per week by activity and by gender

	Boys				Girls			
	Viol. favourites[a]		Time[b]		Viol. favourites		Time	
	M	S.D.	*M*	S.D.	*M*	S.D.	*M*	S.D.
Video Games	1.27	1.05	4.03	3.58	0.51	0.88	2.63	3.01
Television	0.16	0.49	5.64	3.62	0.14	0.46	2.85	3.75
Movies	0.86	0.98	3.14	2.78	0.71	0.82	2.85	3.23
Internet	0.40	0.61	2.81	4.52	0.12	0.41	1.80	3.25

[a] Possible range = 0-3.

[b] Possible range = 0-15h

Table 3

Means and standard deviations for media violence exposure variables KID-SAVE, ATVC, and CEQ

	Total ($N = 150$)		Boys ($n = 82$)		Girls ($n = 68$)	
	M	S.D.	*M*	S.D.	*M*	S.D.
Video games	1.16	2.30	1.79	2.81	0.46	1.22
Television	0.16	0.55	0.23	0.70	0.01	0.28
Movies	0.80	1.41	0.90	1.56	0.68	1.20
Internet	0.27	1.17	0.43	1.48	0.01	0.60
KID-SAVE						
Total frequency	12.40	6.99	13.77	7.29	10.80	5.84
Total impact[a]	1.24	0.45	1.27	0.39	1.19	0.53
ATVC	23.18	5.89	24.30	6.14	21.82	5.30
CEQ	42.14	5.00	45.63	6.75	49.49	5.72

Note: Media violence exposure variables include video games, television, movies and the Internet, calculated by multiplying the per cent of violent choices (possible range = 0-3) by the time spent per week for each activity (possible range = 0-15 h). KID SAVE, KID-Screen for Adolescent Violent Exposure (possible range = 0-68 for Frequency and 0-2 for Impact), ATVC, The Attitudes Towards Violence Scale: Child Version (possible range = 16-64); CEQ, The Children's Empathy Questionnaire (possible range = 15-60). For these three measures, higher scores indicate more of the construct.

[a] Mean score was calculated for this variable instead of means of sum scores.

Regression analyses were performed to examine the relationships between real-life violence exposure as indicated by scores on the Total Frequency and Total Impact scales of the KID-SAVE, exposure to the four measures of media violence (video game, television, movies, and Internet) and children's Attitudes Towards Violence scores. Results of this regression are presented in Table 6. Apart from the expected relationship with gender, only video game violence exposure and movie violence exposure predicted attitudes towards violence score, with more exposure predicting stronger proviolence attitudes.

Table 4
Correlations between gender, mother's education, violence exposure variables, empathy (CEQ), and attitudes toward violence (ATVC)

	Gender[a]	Mother ed.	Tot. freq.	Tot. impact	VG	TV	Movies	Internet	CEQ	ATVC
Gender		0.07	-0.16*	0.01	-0.29***	-0.13	-0.09	-0.15	0.33**	-0.21*
Mother ed.			-0.05	-0.01	0.01	0.14	0.02	-0.07	0.02	-0.09
Tot. freq.				0.22**	0.11	-0.05	0.15	0.20*	-0.10	0.18*
Tot. impact					-0.07	-0.12	-0.07	0.03	0.01	0.01
VG						0.14	0.15	0.22*	-0.24**	0.30**
TV							0.30**	0.20*	-0.04	0.14
Movies								0.31**	-0.18*	0.36**
Internet									-0.17*	0.24**
CEQ										-0.45**
ATVC										

* $p < 0.05$; ** $p < 0.01$.
[a] Geuder dummy coded as follows: boys = 0, girls = 1.

Table 5
Summary of hierarchical regression analysis for variables predicting children's empathy scores

Variable	ΔR^2	B	s.e. B	β
Step 1				
Gender	0.14	3.69	0.82	0.37**
Step 2				
Gender		3.68	0.85	0.37**
Real-life violence exposure				
Total frequency		-0.00	0.06	-0.01
Total impact	0.00	0.47	0.95	0.04
Step 3				
Gender		3.20	0.86	0.32**
Real-life violence exposure				
Total frequency		0.00	0.06	0.05
Total impact		0.18	0.94	0.02
Media violence exposure				
Video games		-0.40	0.18	-0.19*
Television		0.67	0.90	0.06
Movies		-0.57	0.34	-0.15
Internet	0.05	-0.50	0.59	-0.08

* $p < 0.05$, ** $p < 0.000$

Table 6

Summary of hierarchical regression analysis for variables predicting children's attitudes towards violence scores

Variable	ΔR^2	B	s.e. B	β
Step 1				
Gender	0.06	-2.71	0.96	-0.24**
Step 2				
Gender		-2.39	0.98	-0.21*
Real-life violence exposure				
Total frequency		0.10	0.07	0.13
Total impact	0.02	-0.82	1.11	-0.07
Step 3				
Gender		-1.50	0.92	-0.13
Real-life violence exposure				
Total frequency		0.00	0.07	0.06
Total impact		-0.00	1.00	-0.00
Media violence exposure				
Video games		0.54	0.20	0.23**
Television		1.20	0.96	0.10
Movies		1.15	0.36	0.28**
Internet	0.21	0.86	0.63	0.12

* $p < 0.05$; ** $p < 0.01$.

Regression analyses were performed to examine whether or not the responses of girls and boys to the Attitudes Towards Violence Scale (ATVC) were equally affected by their exposure to video game violence. We first constructed an orthogonalized two-way interaction variable using a partial Gram-Schmidt procedure (Burrill, 2003). We then tested a model predicting ATVC scores that included the primary and interaction variables. Gender and exposure to video game violence were entered in Step 1 of a regression analysis; the interaction variable was entered in Step 2. The two primary variables accounted for 10% of the variance in ATVC scores [$F(2, 136) = 7.88$, $p = 0.00$]. The two-way interaction explained an additional 1.3% of the variance in the ATVC scores, which was not significant [$F(1, 135) = 2.05$, $p > 0.05$]. A similar procedure was used to examine whether or not the responses of girls and boys to the Attitudes Towards Violence Scale (ATVC) were equally affected by their exposure to movie violence. The two primary variables accounted for 17% of the variance in ATVC scores [$F(2, 137) = 15.06$, $p = 0.00$]. The two-way interaction explained an additional 1.3% of the variance in the ATVC scores, which was not significant [$F(1, 136) = 2.07$, $p > 0.05$].

Discussion

The purpose of the present study was to examine relationships among violence exposure in the media and in real-life and desensitization as reflected in empathy and attitudes toward violence. As anticipated, exposure to video game violence was associated with lower empathy and stronger proviolence attitudes. This finding provides further support for concern about children's exposure to video game violence, particularly if granted that lower empathy and stronger proviolence attitudes indicate desensitization to violence. In violent video games empathy is not adaptive, moral evaluation is often non-existent, but proviolence attitudes and behaviors are repeatedly rewarded. Even if children with pre-existing lower empathy and stronger proviolence attitudes are simply drawn to violent video games, this exposure is unlikely to improve empathy or decrease proviolence attitudes.

Intense engagement is another potential reason for concern about violence in video games because such engagement may increase the probability that game behaviors will generalize outside the game situation. Qualitative research suggests that children do experience intense engagement. For example, one child in a focus group addressing children's interest in violent video games reported: "And sometimes you get so into it you don't want to stop" (Funk, 2002b). Focus group children also reported later copying characters' actions in fantasy play, for example saying: "They try to act like them, like wrestling." One child qualified his endorsement: "But not killing. Like if the game has you killing something or whatever." Other research suggests that the content of children's fantasy play may be an important marker. For example, in one recent study "difficult" preschoolers were more likely to engage in violent fantasy play than children without behavioral difficulties (Dunn & Hughes, 2001). "Difficult" children also demonstrated lower empathy in a 2-year follow-up. Understanding the importance of relationships between children's fantasy play and later empathy requires much more study, but it seems reasonable to conclude that, at least for some children, playing violent video games contributes to violent fantasy play.

Individual differences may increase a child's vulnerability to negative impact from playing violent video games. For example, there were 17 girls in our sample who reported playing more than the mean for girls each week. In some cases, these were also girls with a strong preference for violent video games. Typically, boys play more and prefer more violent video games than girls (Funk & Buchman, 1996b). It seems possible that girls with more exposure to violent video games may be at higher than average risk to experience negative impact because their behavior violates gender norms (Funk & Buchman, 1996a). Younger age may also be a risk factor for exposure to violent video games. Prior to adolescence, children are still developing their moral scaffolding (Eisenberg and Fabes, 1998). The values operative in violent video games may be more likely to have lasting impact on children who are still developing moral reasoning principles as a guide to prosocial behavior than on individuals with established value systems.

The present research did not identify strong relationships between exposure to real-life violence and study measures of desensitization. Compared to KIDSAVE norms (based on "high crime" areas), children in the present group had modest real-life violence exposure which may have limited the identification of meaningful relationships. There may be a critical threshold for real-life violence exposure which was not reached for the present sample. Alternately, the sample size may have been too small to detect a small effect.

Among the other media variables, a relationship was found only for exposure to movie violence. For each source, the violence exposure variable was composed of both content and time commitment, recognizing the importance of considering both elements of media exposure (Anderson, Huston, Schmitt, Linebarger, & Wright, 2001). Time reported may have influenced the failure to find a relationship between television violence exposure and the study variables. Across all content categories, boys reported an average of 5.6 h of viewing per week, while girls reported only 2.9. This is considerably less than the typical time commitment reported in national surveys (Roberts, Foehr, Rideout, & Brodie, 1999; Wright et al., 2001). The possibility that children have become so densensitized to violence on television that they are unlikely to consider it worth mentioning must also be examined. A review of the list of program names and the children's chosen category challenges this hypothesis. In most cases the children's categorization corresponded with the adult experimenter's perception. For example, one child whose most favourite television program was "Power Ranger" categorized it as a "story about real people with fighting or destruction." "Lizzie McGuire," a frequently cited favourite, was typically categorized as a "story about real people without fighting or destruction." Although children in the present sample probably underestimated their time spent watching television, they seem to have categorized program content in a realistic manner.

It was much more likely for a child to report a preference for violent video games or movies than for violent television or violence on the Internet (see Table 2). Only about 5% of television choices fell within the one category with violence. This may be due in part to the fact that there was not a separate category for cartoons with violence, and cartoons made up about half of children's reported favourites. However, for movies there was also only one violence category, and there relationships were found. It is possible that the nature of the sample contributed to some bias as the participants were drawn primarily from Catholic schools, with higher maternal education than the general population. These parents may be vigilant in monitoring television content. However, this does not appear to be true for violent video games or violent movies, with, respectively, one-third to one-quarter of preferences being violent. Past research indicates that parents often do not know the content of their children's favourite video games

(Funk, Hagan, & Schimming, 1999c). Parents may also be less aware of the movie content children watch, particularly when there is easy access to a range of options through cable or satellite. Therefore, children may have inadvertent and unintended violence exposure via video games and movies. Parental monitoring would be enhanced if the various entertainment industries would agree on one standard ratings system (Funk, Flores, Buchman, & Germann, 1999b; Walsh & Gentile, 2001).

It has long been acknowledged that the media contribute to how individuals construct reality. For many, American reality includes an acceptance of violence coupled with desensitization to its true consequences. Desensitization to violence is a concept which is difficult to statistically capture as the condition itself may limit labeling exposure, either real or media-based, as violent. Because desensitization is difficult to quantify, we chose to measure related characteristics expected to be affected by desensitization. However, the question as to how low empathy or how high proviolence attitudes must be to label an individual "desensitized" was not addressed and remains a study limitation and a question for future research. In addition, relationships identified between sources of violence exposure and indicators of desensitization do not necessarily translate into causality. Future research should examine relationships between several indices of desensitization and all potential sources of violence exposure in real-life and in the media, and should address causality.

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In The
Supreme Court of the United States

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ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN Jr., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

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Marketing Violent Entertainment to Children:

A Fourth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries

A Report to Congress

Federal Trade Commission

July 2004

FEDERAL TRADE COMMISSION

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Executive Summary

In September 2000, the Federal Trade Commission issued a report requested by the President and Congress entitled, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*. That report found that these entertainment industries had engaged in widespread marketing of violent movies, music, and electronic games to children that was inconsistent with the cautionary messages of their own parental advisories and that undermined parents' attempts to make informed decisions about their children's exposure to violent content. In addition, the Commission found that advertisements for such products frequently failed to contain rating information. Finally, the Commission reported on the results of an undercover "mystery" shop by unaccompanied teens, aged 13-16, of retailers and movie theaters. The young shoppers were able to buy M-rated electronic games and parental advisory-labeled music recordings 85% of the time and purchase tickets for an R-rated movie almost half (46%) of the time.

In April and December 2001, and in June 2002, the Commission issued follow-up reports in response to requests from Congressional committees and individual members of Congress. Each report documented progress by the movie and electronic game industries to limit advertising in popular teen media, but noted that the music industry had not changed its ad placement practices. In the music industry's view, advertising targeted to all ages (including children) is consistent with its parental advisory labeling program which, unlike the rating programs for movies and electronic games, does not designate an age for which parental advisory-labeled music may be inappropriate.

In its most recent report, issued in June 2002, the Commission found that the movie and game industries were in substantial compliance with each industry's self-regulatory standards governing ad placements and disclosure of rating information in advertising. At the same time, the Commission found many examples of advertisements by the movie industry and some advertisements by the electronic game industry placed on television programs with large numbers of teen viewers, and continued placement of advertising by the electronic game industry in game enthusiast magazines with large youth readership. The report also found that the music industry showed virtually no change in its placement of parental advisory-labeled music ads since the September 2000 Report. Advertisements continued to be placed on television shows and in print magazines popular with teens. The Commission did find some improvement in the music industry's disclosure of labeling information in its advertising.

This Report documents the current state of marketing in the areas addressed in the Commission's previous reports. As was the case with the Commission's December 2001 Report, this Report includes a review of marketing documents from nine industry members, as well as the results of ongoing Commission monitoring of advertising practices. In addition, it reports on a Commission-sponsored Public Workshop held in October 2003 at which industry and consumer groups discussed the state of self-regulation in each of these industries as well as the results of an undercover "mystery" shopper survey conducted in the summer of 2003, in which young teens attempted to purchase tickets to R-rated movies, or buy parental advisory-labeled recordings, R-rated movie DVDs, and M-rated games.

Movies

The Commission's review of internal marketing documents and ad placements for selected R-rated films showed that studios did not target advertising for those films at children under 17, and, for the most part, did not advertise those films in media with an under-17 audience share over 35%. The studios continue to advertise violent, R-rated films and DVDs on programs with large teen viewership, however. In addition, some studios have conducted promotions for R-rated films in venues likely to attract significant numbers of young teens, an apparent resurgence of a practice that previously had decreased.

With respect to the disclosure of film ratings and rating reasons by the motion picture studios, the Commission finds that current industry practices continue to improve. In television, print, and Internet website advertising, the studios routinely disclose both ratings and rating reasons for R-rated and PG-13-rated films and DVDs. Although there remains room for improvement in the legibility of ratings reasons – particularly in print ads – the studios' practices in this area generally are commendable. Retailer advertisements for DVDs, by contrast, often do not contain ratings or reasons at all.

Finally, the Commission's undercover shopper survey of children's access to tickets for R-rated films indicated significant improvement by movie theaters, as only 36% of the 13-16-year-old shoppers successfully purchased tickets. In contrast, DVD retailers -- included for the first time in this survey – sold R-rated DVDs to 81% of teen shoppers seeking to buy them.

Music

The Commission's review of ad placements for parental advisory-labeled music showed that the music industry has substantially curtailed advertising in print media popular with teens but continues to place ads on television shows with substantial teen audiences, primarily on cable music channels. Although the Commission found improvement in the music industry's disclosure of labeling information in print and television advertising, the industry's compliance with labeling requirements for product packaging has improved only slightly since September 2000.

For the first time, the Commission reviewed commercial online music downloading services and found that all of the services examined provided some sort of advisory about explicit-content music. Nevertheless, only a third of these services offered a parental control mechanism to exclude explicit-content labeled recordings. During the Commission's October 2003 Workshop, the music industry's trade association made a commitment to reinforce the importance of consistent parental advisory descriptors and encourage these online services to implement parental control mechanisms.

The Commission's undercover shopper survey showed that some progress has been made in restricting sales of explicit-content labeled recordings to children, particularly among the youngest shoppers. Nevertheless, 83% of the teenaged shoppers were able to make a purchase.

Games

For the electronic game industry, the Commission's ongoing ad monitoring and its review of company marketing documents found substantial, but not universal, compliance with industry standards limiting ad placements for M-rated games where children under 17 constitute a certain percentage of the audience – 35 percent for television and 45 percent for print. Nonetheless, these standards do not prevent the placement of ads in television programs and in game enthusiast magazines with substantial teen audiences. Advertising for M-rated games continues to appear in such media.

The Commission also found some instances of the marketing of Teen-rated video games in media popular with a pre-teen audience. According to the industry's own description of that rating, such products are suitable for children who are thirteen and older. Yet, with limited exceptions, the self-regulatory system for electronic games does not directly address such marketing.

The game industry continues to provide rating information prominently in advertising and on product packaging. Although some areas still should be improved – *e.g.*, including content descriptors in television advertising and on the front of product packaging – the game industry's rating disclosure requirements go far to ensure that parents have access to rating information when considering product purchases.

Finally, the Commission's mystery shopper survey documented some progress by electronic game retailers in limiting sales to unaccompanied children of M-rated games. Even with that progress, however, 69% of the young teen shoppers were able to buy such games.

Cross-industry Issues

In the case of all three industries, the Commission's Public Workshop noted several examples of the cross-marketing of entertainment media products with different ratings, labels, and intended audiences. The electronic game industry has adopted some provisions to address aspects of this marketing, and individual movie studios have placed some restrictions on the marketing to children of licensed products based on R-rated movies. The question remains unanswered whether some of this cross-marketing attracts younger children and teens to entertainment media intended for an older audience.

As in prior reports, the Commission offers suggestions for improvements by each of the industries. Because of First Amendment and other issues, the Commission continues to support private sector initiatives by industry and individual companies to implement these suggestions.

The Commission will continue to work with industry and parent groups and support efforts to improve self-regulation and increase education of parents.

Further, as directed by Congress, the Commission will work with video game publishers and retailers toward ensuring that games rated T and M are marketed or sold to children in a manner consistent with the rating's age guideline. The Commission also will undertake efforts to educate parents about the content included in T and M games. Finally, the Commission has made its toll-free consumer complaint line and its website complaint form available for consumer complaints regarding media violence, and is publicizing to consumers the availability of these complaint mechanisms. Following implementation of these steps, and a one-year period of monitoring industry practices and consumer concerns, the Commission believes that a follow-up report would be appropriate.

I. Introduction

A. Commission Reports on Marketing Violent Entertainment to Children

This is the fifth Commission Report on the marketing to children of violent entertainment products by the motion picture, music recording, and electronic game industries. The Commission's prior reports – the initial report released in September 2000 ("September 2000 Report"), and three smaller follow-up reviews in April 2001 ("April 2001 Report"), December 2001 ("December 2001 Report"), and June 2002 ("June 2002 Report") – were in response to requests from the President and Congress.[1] The reports examine whether these three industries promote products that they themselves acknowledge warrant parental caution in venues where children make up a substantial percentage of the audience.

The September 2000 Report found that industry members routinely targeted children in their advertising and marketing of violent entertainment products, despite self-regulatory ratings or labels indicating the products might not be appropriate for children.[2] The Commission concluded that such advertising and marketing efforts undermined each industry's parental advisories and frustrated parents' attempts to protect their children from possibly inappropriate material. It called upon the industries to strengthen their self-regulatory programs by: (1) prohibiting target marketing to children and imposing sanctions for violations; (2) improving self-regulatory programs at the retail level; and (3) increasing parental awareness of the ratings and labels. Because of First Amendment issues, the Commission concluded that vigilant self-regulation offers the best approach to helping parents choose what is appropriate for their children.

The Commission's three follow-up reviews described the adoption and implementation of new self-regulatory initiatives by the four industry trade associations — the Motion Picture Association of America ("MPAA"), the National Association of Theatre Owners ("NATO"), the Recording Industry Association of America ("RIAA"), and the Interactive Digital Software Association ("IDSA") (now the Entertainment Software Association ("ESA")).[3] The Commission also reported its findings that although the movie and electronic game industries had made progress in limiting marketing of R- and M-rated products to children, the music recording industry had not significantly changed its marketing practices since the September 2000 Report. The Commission continued to urge the industries to strengthen their self-regulatory programs.

In releasing the June 2002 Report, the Commission indicated that it would review industry practices for a year, and then prepare and release an additional report.

B. Sources of Information for this Report

To prepare this Report, the Commission collected information from several sources. As it had done for each follow-up report, the Commission tracked advertising placements in media popular with youth, and reviewed advertisements in major media – print and television – to determine whether they included clear and prominent rating and labeling information. The Commission also reviewed retail packaging for music products to assess the extent to which the size and placement of the parental advisory label complied with industry guidelines.

In addition, the Commission reviewed internal company documents provided by nine individual industry members, including marketing plans for certain R- and PG-13-rated movies, explicit-content labeled music, and M- and T-rated games released since the Commission's June 2002 Report. The company documents describe, among other things, where advertisements were placed and the target audiences they were intended to reach, the nature and extent of promotional activities used to generate consumer awareness and interest in the products, and company research.

More specifically, with respect to the motion picture industry, the Commission reviewed marketing plans for nine R-rated films and three PG-13-rated films released by three major studios between June 2002 and July 2003.[4] In selecting these films, the Commission chose R- and PG-13-rated movies whose ratings were based, at least in part, on violent content.[5] For the music recording industry, the Commission studied the marketing of 14 explicit-content labeled recordings[6] released by three major recording companies over the past year.[7] For the electronic game industry, the Commission reviewed the marketing of 18 violent M-rated games and six T-rated games by three of the major companies in the marketplace.[8] The Commission selected M-rated games issued in the last year.[9]

In addition, in the summer of 2003, the Commission undertook an undercover shopper survey – as it had done for its September 2000 and December 2001 Reports – to determine whether progress has been made in limiting the sale to children of products rated or labeled as potentially inappropriate for them without their parents' consent. Finally, on October 29, 2003, the Commission held a one-day public workshop, at which representatives from consumer and parents' groups as well as each of the industries' major trade and retailer associations – the MPAA, the RIAA, the ESA, the NATO, the Entertainment Software Rating Board ("ESRB"), the National Association of Recording Merchandisers ("NARM"), the Interactive Entertainment Merchants Association ("IEMA"), and the Video Software Dealers Association ("VSDA") – discussed and debated the success of self-regulation in each of these industries.

II. Motion Pictures

A. Marketing to Children: Advertising Placement

1. Self-regulatory programs restricting placement of advertising in media popular with children

In its September 2000 Report, the Commission found that the motion picture industry had engaged in extensive marketing of violent R-rated movies to children under 17.[10] In response to the report and the Commission's recommendations, the MPAA implemented 12 initiatives.[11] Among the Initiatives was a promise that each member studio would "review its marketing and advertising practices in order to further the goal of not inappropriately specifically targeting children in its advertising of films rated R for violence."[12] In addition, the studios pledged to "request theater owners not to show trailers advertising films rated R for violence in connection with the exhibition of its G-rated films."[13]

Several individual motion picture studios undertook additional steps to respond to the Commission's report. For example, three studios announced that they would not advertise R-rated movies in media with an under-17 audience of more than 35%,[14] and many pledged not to attach trailers for violent R-rated movies to PG-rated movies. Members of the NATO similarly pledged not to show trailers advertising R-rated films in connection with any G- or PG-rated feature film.[15]

2. Advertising placements: current practices

a. Television advertising

The Commission has previously noted that most moviegoers, and teens in particular, become aware of movies through television ads.[16] Accordingly, the Commission has recommended that the film industry prohibit advertising of R-rated films in media with a substantial under-17 audience. In response, several studios committed to avoid advertising in media with an under-17 audience of more than 35%,[17] and other studios instituted alternative policies intended to curb the advertising of R-rated films to children.[18]

In its June 2002 Report, the Commission reported that studios had largely complied with their pledges not to advertise films rated R for violence on television programs with an under-17 audience of 35% or more.[19]

For this Report, the Commission reviewed motion picture advertising during an eight-week period and found that the studios continue to advertise violent, R-rated films on television programs popular among teens.[20] For example, Warner Bros.' *The Matrix Reloaded* was advertised on *WWE Smackdown*[21] and BET's *Rap City*, Fox's *Wrong Turn* was advertised on BET's *106th & Park*, and Columbia's *Identity* was advertised on MTV's *Direct Effect*. In all, the Commission found 59 ads for seven films rated R for violence on programs popular with teens during the monitored time period.[22] The Commission also monitored the advertising of home video and DVD releases on the same programs, but did not find any television ads for violent, R-rated videos.[23]

The Commission's review of first-airing data for the time period June 2002 through early September 2003 revealed 19 instances in which a studio first aired an advertisement for a violent R-rated film or DVD/home video release on a program popular with teens.[24] Examples include ads for Universal's *8 Mile* on *The Bernie Mac Show*, Miramax's *Confessions of a Dangerous Mind* on *The Simpsons*, Paramount's *The Hunted* on *WWE Smackdown*, and MGM's *Jeepers Creepers 2* on *The Simpsons*.

Similarly, data received from the Parents Television Council further confirmed the Commission's finding that studios continue to advertise films rated

R for violence on some of the programs most popular with youth audiences.[25] Among the films and DVD releases advertised on these programs were Fox's *Wrong Turn*, New Line Cinema's *Final Destination 2*, Sony Picture's *Bad Boys 2*, and Warner Bros.' *Cradle 2 the Grave*.[26]

Finally, the Commission's review of documents from three motion picture studios yielded similar findings.[27] Consistent with policies implemented by the studios following the Commission's September 2000 Report,[28] media plans submitted for this Report indicated that the studios did not specifically target advertising for R-rated films at children under 17. In fact, documents relating to the studied R-rated films uniformly identified the films' target audiences as comprising persons aged 18 years and older. Nonetheless, the Commission found that one studio advertised two of its R-rated violent films on BET's *Rap City* and *106th & Park* – programs that were disqualified under the studio's own policy of not advertising on programs with an under-17 audience of more than 35%.[29] Moreover, the documents indicate that the studios have continued to place advertisements for violent R-rated movies on other programs with substantial youth audiences, including *Cedric the Entertainer, Smallville*, *The Bernie Mac Show*, and *WWE Smackdown*. Notably, another studio advertised two of its R-rated films on a few television shows it had specifically targeted for "teen burst" and "families" advertising for a PG-13-rated film.[30]

b. Print and radio advertising

The Commission's review of print and radio advertising showed that the studios continue to limit ad placement for violent R-rated films. In its September 2000 Report, the Commission found that studios advertised their R-rated films in youth-oriented publications,[31] and, in subsequent reports, the Commission has noted significant improvement in this area.[32] For this Report, the Commission monitored advertisements in the June 2002 through October 2003 issues of 13 magazines with substantial or majority youth audiences,[33] and, as in the June 2002 Report, found no studio advertisements for R-rated movies currently running in theaters. The monitoring did reveal, however, that DVDs for Lions Gate's *House of 1000 Corpses* and New Line's *A Man Apart*, two films rated R for violence, were advertised in *World Wrestling Entertainment Magazine*, a magazine with a substantial youth audience.[34]

The Commission's review of the three studios' media plans did not reveal any plans to advertise R-rated films in youth-oriented publications. Two of the three studios have compiled lists of youth-oriented magazines that the studios deemed inappropriate for ads for R-rated films, and the third studio has a policy not to advertise or market R-rated films in any publication with an under-17 audience of 35% or higher.[35]

Similarly, with respect to radio advertising, the three studios' media plans did not indicate that they specifically targeted under-17 audiences for advertising R-rated films. One of the studios collected audience demographic data for radio programming and sought to avoid advertising its R-rated films during time periods on certain stations when the audience share of children under 17 likely exceeded 35%. This studio also sent letters to radio stations requesting that promotional ads for one of its R-rated films not air during programs with a 35% or higher under-17 audience.

c. Trailers

In its September 2000 Report, the Commission found that trailers for R-rated films were shown to audiences containing substantial numbers of youngsters attending PG-13 films – including PG-13 films marketed to children aged 11 years and younger – and that trailers for R-rated films were shown before features rated PG.[36] At the time, the major theater chains had a policy limiting trailer placement to within one rating of the feature presentation.[37] The Commission recommended that the industry prohibit placing advertisements for R-rated films in venues with a substantial under-17 audience.[38]

In response, MPAA member studios pledged to ask theater owners not to show trailers advertising films rated R for violence in connection with a G-rated feature film.[39] Several studios extended this commitment to apply to PG-rated films as well.[40] NATO member theaters went further. They pledged not to show trailers for R-rated films before G- or PG-rated films, and, before showing such trailers in connection with PG-13-rated films, promised to ensure that the trailers are consistent in tone and content with the feature film.[41]

The Commission's review of studio documents indicated that the studios largely are complying with their commitments. With respect to the films studied, marketing and other documents show that the studios attached or requested that trailers for those films be shown only before features rated R or PG-13,[42] with one exception.[43] With respect to DVD and home video releases, documents indicated that the three studios attached trailers for R-rated films only to features rated R or PG-13, again with one exception.[44]

d. Promotions

In its September 2000 Report, the Commission found that promotions for R-rated films, including the distribution of free passes to movie screenings or film-related merchandise, were sometimes conducted at places where teens congregate.[45] The December 2001 Report noted significant improvement in this area.[46]

The marketing plans reviewed for this Report indicate that the studios' promotional activities for the R-rated films studied generally have not been expressly targeted to under-17 audiences. The marketing documents reveal, however, that two studios conducted some promotions and other advertising at locations or events that likely attracted substantial numbers of teens, including: music and gaming stores, an amusement park, comic book stores, arcades, skateboard stores and skate parks, and recreation centers. One of the studios also arranged to have posters and doorknob hangars for one of its R-rated films distributed at high schools, as well as at a July 4th event described as being "for families."

e. Internet advertising

Internet advertising by studios on third-party websites remained a relatively small, but growing, component of the advertising campaigns for the films reviewed for this Report. All three of the studios advertised online for the R-rated films studied,[47] and for the most part this advertising did not specifically target youth audiences.[48] Nonetheless, all three studios did advertise on websites with youth audiences of at least 35%, and in one case a majority, including: gamespy.com (36%), IGN.com (40%), MTV.com (38%), teenpeople.com (53%), and ugo.com (44%).[49]

f. Other steps

The studios submitted documents describing additional steps taken in response to the Commission's recommendation that they avoid targeting their marketing of violent R-rated films to children under 17. Most of these steps have been noted in previous Commission reports.[50] For example, one studio's policy prohibits the licensing of certain products based on films rated R for violence if the products are "specifically targeted for sale to children under the age of 17" and prohibits the distribution of such products through any outlet that "specifically targets children under 17 as their primary demographic." Another studio appears to require that licensed products based on R-rated films contain a clear indication on their packaging that they are "not for children under the age of 17," and further that such products be sold "only through segregated adult collector areas" in retail outlets.

The studio documents generally confirm continued compliance with these policies. For the most part, studios did not appear to cross-promote their R-rated films with companies selling products intended for a younger age group. The one exception was an R-rated film promoted in conjunction with other media products carrying a lower appropriate age, including a video game rated T (for Teen).[51]

B. Ratings and Reasons for Ratings in Advertising

1. Self-regulatory programs governing disclosure of ratings and reasons

In its September 2000 Report, the Commission found that motion picture advertisements generally provided the films' rating but did not provide the reasons for the rating.[52] The Commission recommended that the studios clearly and conspicuously disclose both the rating and the reasons in all advertising.[53]

In response, MPAA member studios pledged to "seek ways to include" ratings reasons in print advertising and official movie websites.[54] Among the specific requirements implemented by the MPAA in this regard is the inclusion of rating reasons for all films (other than those rated G) in newspaper ads above a certain size, websites, posters, and billboards.[55] Member studios also vowed to encourage newspapers and theaters to provide or include rating reasons,[56] and NATO members pledged to seek ways to disseminate rating reasons.[57]

Since then, the Commission has noted progress by the studios in disclosing ratings and rating reasons clearly and prominently.[58] For this Report, the Commission reviewed studio documents and conducted its own monitoring of studio and retailer advertisements in various media.

2. Advertising of rating information: current practices

a. Television advertising

Although the MPAA Advertising Handbook only requires member studios to disclose a film's rating and its definition, legibly, in television advertisements,[59] the Commission's review of television advertisements provided by the three studios studied suggests that the studios nearly always included both the letter rating (with its definition) and the reasons for the rating in their commercials for the R-rated films studied. With the exception of ads for films not yet rated, the television ads presented the film's rating both visually and audibly, and also provided the rating reasons, usually visually.[60] The ratings themselves were typically readable but the reasons were less so.

b. Print and radio advertising

Among the commitments the MPAA member studios made in response to the Commission's September 2000 Report was to seek ways to include a film's rating reasons in print advertising.[61] For this Report, the Commission reviewed more than 1,700 newspaper and magazine advertisements for films rated PG-13 or R[62] to determine the extent to which the rating and rating reasons were disclosed and legible.[63]

Consistent with the Commission's most recent findings,[64] nearly all of these ads contained both the rating and reasons,[65] and, in most of those cases, the rating and reasons were clearly displayed.[66] The reasons in some ads were notably prominent, such as those for MGM's *Die Another Day* and Columbia's *Tears of the Sun*. In other ads, however, the reasons were much smaller or less conspicuous, often due to placement over the ad's graphics or to the use of colored or gray print rather than black on white. Some of the ads had rating reasons that were so small or obscured that they were very difficult to decipher, and in others the reasons were so tiny or blurred that they were literally unreadable, including some ads from Fox Searchlight, Sony Pictures Classics, Focus

Features, and Lions Gate Films.[67] Finally, consistent with past reviews,[68] some studios provide legible rating reasons in ads less than five inches in height, although the MPAA Guidelines do not require them.

The Commission also reviewed magazine print ads for DVD and home video releases, and found that the majority of these ads contained both the film's rating and its rating reasons.[69] Of the 55 advertisements for movies rated PG-13 or R at least in part for violence, about half displayed the ratings and rating reasons clearly, while another ten displayed clear ratings but the rating reasons were either difficult to read or obscured by their placement. Eleven ads contained ratings but no reasons, and six contained neither ratings nor rating reasons.

The Commission's review of retailer DVD ads yielded more mixed results.[70] Consistent with previous Commission findings,[71] Target and Best Buy continued to display prominently the R rating for movies featured in their inserts and to include the words "Restricted Rating" next to or near R-rated DVD clip art. Toys "R" Us prominently displayed movie ratings for all the DVDs it advertised.[72] Half the retailers, however – Amazon, Circuit City, Kmart, and Tower – did not disclose ratings for any of the R-rated DVDs they advertised. CompUSA only sometimes disclosed R ratings; in one instance, an ad featuring two R-rated DVDs side by side disclosed the rating for only one of them.

Finally, the Commission also reviewed the studios' disclosure practices with respect to radio advertising. The studio documents indicated that ads for the R-rated films studied did provide the film's rating in audio. Ads for two of the films also provided the rating reasons.[73]

c. Internet advertising

(1) Motion picture websites

For its June 2002 Report, the Commission's review of 20 official movie websites showed that nearly all displayed the film's rating symbol and rating reasons, and linked to at least one of three rating information sites.[74] For this Report, the Commission again reviewed the rating information practices of 20 official movie websites.[75]

The Commission's review indicated that the studios are substantially complying with the Commission's recommendations in this area.[76] All of the sites displayed the R rating symbol and rating reasons somewhere on the site, and nearly all (18 of 20) displayed the rating and reasons on either the teaser page or home page.[77] In a notable improvement, more than half the sites displayed the rating symbol and rating reasons on every page or nearly every page -- often in a frame that remained constant on part of the screen as the visitor navigated through the site. Virtually all of the sites linked to at least two of three rating information sites, and all but four sites linked to all three.[78] Four sites offered the opportunity to purchase movie tickets through a third-party site, and displayed the R rating in close proximity to the link to the third-party site; two sites also displayed the rating reasons close to the link.[79] All of the sites had a trailer of the film available for viewing and/or downloading.[80]

(2) Theater and movie ticket websites

The Commission also reviewed the rating information practices of websites for 15 major movie theater circuits and three online movie ticket sellers and found mostly positive results.[81] All of the theater sites displayed the movies' ratings and the rating reasons.[82] Particularly with respect to rating reasons, this finding marks a significant improvement over previous reports. Six sites (40%) provided information about the MPAA rating system, and five of those sites (33% of total sites) also linked to rating information sites – comparatively lower percentages than previous reports found.[83] One of the theater sites offered movie tickets for sale directly, and nine others offered visitors the opportunity to purchase tickets through a third-party site.[84]

The Commission's review of three movie ticket sites yielded comparable results. All three websites displayed the films' official ratings, and Movietickets.com and Fandango.com also displayed the rating reasons. All three provided information about the

MPAA rating system, although none linked to any of the rating information sites.

(3) Home video/DVD retailer and rental websites

The Commission surveyed five online movie retailers' sites to determine their rating information practices with respect to five movies rated R for violence, and found that these retailers' practices have improved relative to previous Commission findings.[85] All five websites provided each movie's correct MPAA rating, and four of the sites provided the official rating reasons for each of the five films examined. Amazon.com did not provide rating reasons but specified that R-rated movies are "Not for sale to persons under age 18."[86] None of the sites linked to film rating information sites, although BestBuy.com and TowerRecords.com provided information on their sites about the movie rating system.

For the first time, the Commission reviewed the practices of three websites that allow consumers to rent movies via the Internet.[87] Two of the sites allow users to rent films online that are then mailed to their homes,[88] while the third site allows users to download movies for viewing on the computer.[89] All three of these sites displayed the movies' official ratings, and two of the three also displayed the films' rating reasons. None of the sites linked to any of the rating information sites, although one site did provide information about the MPAA rating system on its own website. That same site also required users to check a box to indicate that they are at least 17 years of age.

C. Efforts to Enforce Rating System in Movie Theaters and at Stores

In connection with two previous reports, the Commission conducted nationwide undercover studies to determine the extent to which unaccompanied children under 17 were able to purchase tickets to R-rated films. In its September 2000 Report, the Commission reported that almost half of the theaters studied sold tickets to the "mystery shoppers," and the Commission found a similar result in its December 2001 Report.[90] In response to these reports, the MPAA, the NATO, the VSDA, and individual motion picture studios have continued to urge theater owners and video retailers to improve their enforcement of the rating system.[91]

The Commission conducted its third undercover survey in July and August 2003.[92] The results indicate an improvement in theaters' performance in restricting children's access to R-rated motion pictures: only 36% of the "mystery shoppers" were able to buy tickets to R-rated films, as compared to 48% in the 2001 survey.[93] In addition, more theaters checked the ages of the teen shoppers, increasing from 39% in the 2001 survey to 48%.[94] For the first time in this survey, the Commission also surveyed practices at stores selling R-rated movies on DVD: 81% of the teen shoppers were able to purchase the product, and in only 19% of cases did the cashier or clerk ask the shopper's age.

FTC Mystery Shop Results – Movies
Q. Was the shopper able to make the purchase?

Movie Theaters

	13 years old	14 years old	15 years old	16 years old	Total
No	49 75%	34 71%	42 65%	18 38%	143 64%
Yes	16 25%	14 29%	23 35%	29 62%	82 36%
# of Shoppers	65	48	65	47	225

DVD Movie Stores

	13 years old	14 years old	15 years old	16 years old	Total
No	18 27%	9 18%	13 21%	4 8%	44 19%
Yes	49 73%	40 82%	49 79%	44 92%	182 81%
# of Shoppers	67	49	62	48	226

To help evaluate current industry practices, the Commission also obtained information from a number of DVD/home video retailers regarding the retailers' policies, if any, governing the sale of R-rated movies to children under 17.[95] Several major retailers indicated that they do have such policies. Some of these policies require clerks or cashiers to check the identification of anyone seeking to purchase an R-rated movie who is suspected of being under 17, and at least one retailer stated that it uses a cash register prompt that reminds the clerk, when a restricted product is scanned for purchase, to perform the ID check. Another policy restricts the sale of R-rated movies to children under 17 unless a parent previously has provided consent. One retailer does not require ID checks at all, and another leaves the decision up to individual stores. Some of the companies also indicated that they display in-store signage explaining the MPAA rating system or the store's restrictions on sales to children under 17. Notwithstanding the existence of such policies, mystery shop data obtained by the Commission indicates, as discussed above, that four out of five children under 17 are able to purchase R-rated DVDs from retailers.

D. Analysis of Current Industry Practices

On the whole, the motion picture industry has continued to comply with its pledge not to specifically target children under 17 when advertising films rated R for violence. In addition, the studios generally are providing clear and conspicuous ratings and rating information in advertisements for their R- and PG-13-rated films. However, the studios continue to advertise and promote R-rated films in some media and venues popular with youth. In addition, retailers commonly are not providing ratings and rating reasons in advertisements for DVDs, and do not appear to be effectively restricting youth from purchasing R-rated DVDs, despite the existence of policies adopted by some retailers. Movie theaters have shown improvement in barring unaccompanied children under 17 from purchasing tickets to R-rated films.

III. Music Recordings

A. Marketing to Children: Advertising Placement

1. Self-regulatory programs restricting placement of advertising in media popular with children

The Recording Industry Association of America's ("RIAA") Parental Advisory Program Guidelines do not indicate that a sound recording is either appropriate or inappropriate for any particular age group. Instead, according to the RIAA, the parental advisory label is a clear "heads-up" to all consumers that a sound recording contains explicit content, and a method to empower parents to make their own determinations about what content is appropriate for their particular child.[96] Accordingly, the RIAA's guidelines do not prohibit companies from placing, or even recommend that they refrain from placing, advertising for explicit-content labeled recordings in media popular with children.

Not surprisingly, therefore, in previous reports the Commission consistently has found that the music industry advertises on television shows and in print magazines popular with teens. Even though the parental advisory system does not purport to be an age-based system, such marketing appears inconsistent with a label that advises parents that some material may not be appropriate for children.[97] For this Report, the Commission requested that three music recording companies provide information, including marketing plans, about 14 explicit-content labeled recordings.[98]

2. Advertising placements: current practices

a. Television advertising – cable music channels

Television cable channels that show music videos and other music-related programming continue to figure prominently in the marketing of explicit-content labeled recordings to children under 17. Marketing documents the Commission examined for each of the 14 explicit-content labeled recordings discussed placing advertisements on some or all of the following music cable channels that have substantial youth audiences in many day-parts: MTV; MTV2; BET; and Much Music USA.[99] Nine of the 14 marketing plans examined specifically discussed placing this advertising on popular after-school and early-prime-time shows such as MTV's *Total Request Live* (*"TRL"*) and *Direct Effect* and BET's *Rap City* and *106th & Park*.[100]

In addition, marketing documents for 10 of the 14 recordings discussed promoting the recording on these cable music channels in other ways, either through rotation of videos associated with the recording, contests, or artist appearances on programming such as *TRL*, *Direct Effect* and *106th & Park*.[101]

To supplement information from the marketing plans, the Commission obtained additional information on advertising for explicit-content labeled recordings aired during popular teen programs on cable television during the months of May and June 2003.[102] Four of the five major recording companies[103] as well as three independent record labels placed advertising for 13 different explicit-content labeled recordings on cable music programming popular with teens.[104] First airing data for June 2002 through September 2003[105] reviewed by the Commission showed that the five major recording companies advertised 35 different explicit-content labeled recordings on programs with a substantial youth audience such as *106th & Park*,[106] *Direct Effect*,[107] and MTV's *WWE Heat*.[108]

b. Other television advertising

As indicated in earlier Commission reports, marketing plans for explicit-content labeled recordings place much less emphasis on network and non-music cable channel advertising and promotions. This continues to be the case. Five of the 14 marketing plans indicated plans to advertise explicit-content labeled recordings on wrestling programs. A sixth marketing plan indicated that it would advertise an explicit-content labeled recording on *Yugioh*, a children's cartoon program that airs on the WB channel daily at 4:30 p.m.[109] None of the other marketing plans examined discussed placing advertising on network television.

Additional advertising information the Commission obtained for popular television programs aired on network and non-music cable programming revealed that two recording companies ran advertising for two different explicit-content labeled recordings during *WWF Smackdown* and syndicated airings of *The Simpsons*.[110] First airing data obtained by the Commission also showed that a third recording company advertised an explicit-content labeled recording on the WB's *The Gilmore Girls*.[111]

c. Print advertising

Since the Commission's initial report in September 2000, the recording industry has shown steady improvement in the area of ad placement in print media with substantial teen audiences. The Commission's most recent review shows that only 21% (three of 14) of the marketing plans examined discussed placing advertising in magazines with a majority or substantial teen audience, compared to 70% of the marketing plans reviewed for September 2000 Report.[112]

The Commission's monitoring of print advertising confirms the trend toward fewer advertising placements in popular teen magazines. Over a four-month period, the Commission reviewed advertisements in seven magazines with a majority or substantial readership under 18,[113] and found that two of the five recording companies – EMI and UMG – each ran one advertisement for an explicit-content labeled recording.[114] Over the same time period, independent record companies ran four ads for explicit-content labeled recordings in *Thrasher* and one in *Right On!* These results show marked improvement from the results reported in April 2001 where 77 ads were placed in four magazines, and June 2002, where 14 ads were placed in three magazines.[115]

d. Internet marketing

As noted in previous reports, Internet advertising and promotion is an integral part of the marketing of explicit-content labeled recordings.[116] Twelve of the 14 marketing plans reviewed for this Report discussed efforts to promote explicit recordings on websites with significant teen audiences, including Alloy.com, MTV.com, BET.com, Teenpeople.com, Katrillion.com, and AOL Teens Music.[117] These promotional efforts included artist interviews and online chats, "first listens" and premieres of music videos and singles, contests, music downloads, streaming concerts, and listening parties.

B. Advisory Labels and Reasons for Labels in Advertising

1. Self-regulatory programs governing disclosure of parental advisory label and reasons

The RIAA's revised guidelines, effective April 1, 2002, enhanced the disclosure of the explicit-content designation in consumer advertising by requiring that, in addition to print advertising, radio and television advertising for explicit-content recordings also must "communicate the presence of explicit content."[118] The guidelines note that this may be achieved by the use of an actual depiction of the parental advisory label ("PAL") in the ad, or by prominently displaying the exact wording of the PAL – "Explicit Content – Parental Advisory" – in the consumer advertisement. In addition, if the advertisement contains a miniature depiction of the album cover, the guidelines suggest that, at a minimum, the words "Explicit Content – Parental Advisory" be placed nearby.[119] In these instances, the guidelines require that the use of the PAL logo or the wording "Explicit Content – Parental Advisory" be legible.[120]

As noted in previous reports, unlike the motion picture and electronic game industries rating systems, the PAL does not provide the reasons for the advisory. One of the major recording companies, BMG, began placing "enhanced" advisory labels on its explicit-content labeled recordings as of August 2002. The parental advisory label that BMG uses indicates, when applicable, whether the recording has been stickered because of "Strong Language," "Sexual Content," "Violent Content," or "Sexual + Violent Content."[121] The Commission is not aware that other recording companies have followed BMG's lead and adopted an expanded label that includes the particular reasons why the recording has an advisory.

2. Advertising of advisory label: current practices

a. Television and radio advertising

As noted above, the RIAA's policy to require advisories in television and radio advertisements became effective on April 1, 2002, and it appears advisory language is frequently included in television advertising. The Commission obtained additional information about advertisements for explicit-content labeled recordings that aired during popular teen programs on cable, network, and syndicated television during May and June 2003.[122] This data shows improvement in usage of the PAL logo: all but one of the 25 ads contained the PAL logo,[123] a substantial improvement from the June 2002 Report, which showed that only about half of the 49 television ads for explicit-labeled recordings contained the PAL logo.[124]

A review of the sample television ads received by the Commission for this Report indicated that six of nine contained a legible PAL logo at the end of the advertisement.[125] The PAL logos for the six ads were prominent and legible, some extremely so. In addition, advertising for two different recordings by one recording company also indicated that an edited version was available. By contrast, sample advertising submitted by recording companies for the Commission's December 2001 Report did not include any advisory information.[126] Neither of the two sample radio advertisements for explicit-content recordings submitted by one recording company to the Commission for this Report, however, communicated parental advisory information.

b. Print advertising

The recording industry also continues to show improvement in placing PAL logos in print advertising for explicit-content recordings. For this Report, the Commission reviewed ten magazines covering a 15-month period.[127] The review showed that 60% (58 of 96) of the ads placed by the recording industry contained a PAL logo. Only 74% of those advisories (43 of 58), however, were clear and conspicuous.[128] An analysis of the most recent four months of monitoring period shows better results: 69% (9 of 13) of the ads placed by the recording industry for explicit-content recordings contained a PAL logo and all of the ads that contained the PAL logo used it in a clear and conspicuous fashion.[129] These results show continued improvement since the Commission began monitoring print advertising in conjunction with the September 2000 Report. At that time, the Commission's review of print advertising showed that only 8% (18 of 234) of ads in magazines popular with teens displayed the parental advisory.[130] By the time of the June 2002

Report, 48% (12 of 25) of the ads placed by major recording companies for explicit-content recordings contained a PAL logo, all of which were clear and conspicuous.[131]

This recent review of magazines also showed fairly consistent usage of the PAL logo by retailers when placing ads for explicit-content labeled recordings. Over the most recent four-month review period, two retailers placed six ads for explicit-content recordings; all of the ads contained the PAL logo. In four instances the PAL logo was clear and conspicuous, while in the other two instances, it was small, but readable.[132]

A review of free-standing inserts in Sunday newspapers showed that most ads included a PAL logo on the clip art for the music promoted. As pointed out in the June 2002 Report, however, these labels are frequently too small, blurry, or inconspicuously placed to be easily noticed or read.[133] Progress in this area was lacking despite RIAA's specific acknowledgment of this potential problem and its suggestion that the wording "Explicit Content – Parental Advisory" be placed near the miniature depiction of the album in advertising.[134] Two exceptions were ads for Target and Best Buy, which had larger, conspicuous labels and the addition of the words "Parental Advisory" next to the clip art for explicit titles.

c. Internet promotions and sales

The current labeling program, updated in April 2002, provides guidelines for online sales of physical recordings and digital downloads. The RIAA recommends that all online retail sites prominently display the PAL logo when a shopper is searching for or reviewing recordings that are explicit-content labeled and suggests that an indication that a recording contains explicit content "appear in **all** stages of the purchases process – from search results to the shopping cart."[135] The guidelines offer three ways to accomplish this: using the PAL logo in a sufficiently legible size; prominently displaying the words "Explicit Content – Parental Advisory" in the product description; or including the same wording near the miniature depiction of the album. The guidelines specifically recommend that companies avoid using inconsistent or unclear descriptions such as "E" (for explicit) or "PA" (for parental advisory).[136] Finally, the RIAA recommends that individual sites, whether those of record companies or members of the online retail community, link to or otherwise incorporate information from the entertainment industry's informational website, www.parentalguide.org.

During the Commission's Workshop held in October 2003, the RIAA recognized the growing importance of the online distribution model for music, and identified the Internet as one of the methods that children are increasingly using to obtain music.[137] In light of this development, the RIAA committed to revise its parental advisory guidelines to encourage online music downloading sites to provide effective parental control mechanisms and to reinforce the importance of using consistent parental advisory descriptors on these sites.[138]

For this Report, as it has done for the last three previous reports, the Commission surveyed websites to determine whether industry members are providing online disclosures about explicit content. It surveyed 20 artist and recording company sites and five major online retailer sites. For the first time, the Commission also surveyed six popular online music downloading services as well as four peer-to-peer file-sharing services.

(1) Artist or recording company websites

Despite the extension of the RIAA guidelines to include the online distribution and promotion of explicit-content labeled recordings on the Internet, the recording industry's performance in this area showed little, if any, improvement. For this Report, the Commission examined 20 official artist and recording company websites.[139] Sixty percent (12 of 20) of the sites displayed the PAL logo,[140] compared to 50% (10 of 20) in the June 2002 Report.[141] Eight of those 12 sites (about 67%) displayed the PAL logo on the home page and/or teaser page,[142] compared to 80% (8 of 10) in the June 2002.[143] In addition, the percentage of sites that provided a legible PAL logo shrank from 90% (9 of 10) in June 2002 to 67% (8 of 12) in this review.

Fewer websites provided lyrics for the explicit-content labeled recordings, although the number of sites that allowed the visitor to listen to audio samples and play downloadable video clips stayed about the same.[144] Furthermore, while 25% of the sites in June 2002 provided a link to riaa.org or parental guide.org, only 15% percent of the sites surveyed for this Report did.

Seventy-five percent (15 of 20) of the music company and artist websites examined offered the opportunity to purchase the explicit-content labeled recording, either from an official recording company website or through a link to a third-party online retailer.[145] The PAL logo or other advisory language about the explicit content of the recording was visible some time during the search or purchase process for about 67% (10 of 15) of the sites.[146] In six out of ten of those cases, however, the website merely showed a PAL logo on the cover art and once the recording was placed in the shopping cart, there was no indication of explicit content.[147] In comparison, the websites for Sony and Atlantic Records were particularly effective in providing the PAL logo as well as other advisory language about the content of the recording through most, if not all, of the entire purchase process as recommended by the RIAA's guidelines.

(2) Retailer websites

The review of the five major online retailers' websites showed results somewhat similar to those found in past surveys.[148] In nearly all cases (22 out of 24 recordings), the websites either displayed the PAL logo on the album art, or used other language indicating explicit content.[149] Both Circuit City and Sam Goody relied solely on the PAL logo on the album cover art to relay information about the explicit-content status of the recording. In many of these cases, the PAL logo was difficult to read, although Sam Goody indicated that the recordings contained "Explicit Lyrics" during the checkout process. Nearly two-thirds of the time (in 15 of 24 instances), the visitor, regardless of age, could play either part or the full version of songs from the album. This was similar to the findings made in the June 2002 Report.[150]

None of the websites linked to the entertainment industry's informational site, parentalguide.org, although Bestbuy.com did provide detailed information about the parental advisory label system when the visitor clicked on the words "Parental Advisory." Towerrecords.com was the only website reviewed that consistently provided advisory language throughout the purchasing process, for all albums surveyed.

Although not examined as part of the music retailer survey, the Commission also reviewed the online shopping portions of MTV.com and VH1.com for each of the same five explicit-content labeled recordings. In all instances, both MTV.com and VH1.

com indicated that the recording had a parental advisory. VH1.com used the PAL logo on the album cover art,[161] while MTV.com used large lettering indicating "Explicit Version." Both sites also indicated explicit content during the search function – VH1.com used "PA" while MTV.com noted that the recording was the "Explicit Version." In addition, MTV.com provided advisory language for all five albums during the checkout process, as recommended by the RIAA's guidelines. Neither site linked to parentalguide.org or otherwise provided information about the industry's parental advisory labeling program.

(3) Music downloading websites

For the first time, the Commission examined the online disclosure practices of several online digital music providers.[162] For this Report, the Commission examined six popular online music downloading sites to determine whether these services followed the RIAA's guidelines regarding the notice of the parental advisory for Internet-based sales and promotions.[163]

Although all six of the online music downloading services labeled explicit-content music with a parental advisory, the method for doing so varied from one service to another. Three services used the terminology "Explicit" when a track or album had received an explicit-content designation,[164] while the other three services merely used the initials "PA."[165] These designations were displayed either next to the track title or next to the album title. All of the services also offered edited versions of explicit-content labeled recordings and provided this information through the use of the words "Edited" or "Clean." In addition, five of the six services also used album cover art displaying the PAL logo on their websites.[156] The logo was often barely legible, however, and in some cases it was completely illegible.

Four of the six services provided information about the explicit content of a song while it was being played.[157] In particular, Napster depicted a very noticeable PAL logo on the toolbar during song playback. Three of the six services indicated that a track contained explicit content during download to a user's hard drive.[158]

Half of the services provided information about the Parental Advisory system by linking to parental guide.org as recommended by the RIAA's guidelines.[159] On the iTunes service, clicking on the "Explicit" or "Clean Lyrics" icon located next to the album cover art brought the user to a pop-up screen that displayed a detailed description of the Parental Advisory system and linked to the RIAA's website, riaa.org. Although not required by the RIAA's guidelines, only Napster and MusicNet provided any sort of parental control mechanism to allow the parent to prevent a child's access to explicit-content labeled music.[160]

(4) Peer-to-peer file-sharing services

The Commission examined the software and websites of four popular peer-to-peer file-sharing services for this Report, to assess what on-line disclosures, if any, are made regarding the content of individual files shared by users of these services.[161] All four services offer consumers the ability to download free software that enables them to share files, including music downloads, with other users.[162] The files do not reside in a central location, but rather are stored on the hard drives of the users of the software. None of the peer-to-peer file-sharing services themselves label or otherwise provide notice of explicit content for music recordings that had been designated with a parental advisory by a recording company. Instead, each user of a particular peer-to-peer file-sharing program uploads files to a shared folder on his or her own hard drive and thus can label or designate the file in any manner he or she chooses. Accordingly, each file, if labeled or otherwise described as having explicit content, would have been labeled by the individual user. Thus, as industry correctly notes, this means of distribution effectively circumvents the parent advisory labeling system.[163]

Each of the peer-to-peer file-sharing programs offered some type of filter to exclude unwanted content. Kazaa and LimeWire provided filters that blocked access to materials that contained offensive or otherwise adult words in the description of the file.[164] In addition, all four services gave users the ability to create their own filters by manually entering all the words that they wanted blocked from search results. All of these filters, however, operate by filtering language found in the title or descriptor of the file, rather than the content of the file. For example, music recordings that have been designated with a parental advisory by a recording company would only be blocked by the filter if a word in the title or descriptor of the file happened to be offensive. A recording company may have decided to apply the Parental Advisory Label to a particular recording for any number of reasons other than the presence of offensive words in the title. Substituting the use of a filter in place of the Parental Advisory Label undermines the recording company's own determination of whether to label a particular recording.

The limitation of this type of filter is also an issue when files have been mislabeled. As reported frequently in the press and in government reports, many files are labeled inaccurately, sometimes intentionally, and even though the descriptor may be innocuous, the file may be explicit or pornographic in nature and may contain viruses and spyware.[165] To caution computer users about the potential privacy and security risks associated with peer-to-peer file-sharing, the Commission issued a consumer alert in July 2003.[166]

C. Efforts to Enforce the Labeling System at Point-of-Sale

In its December 2001 Report, the Commission reported that its nationwide undercover study had found that 90% of unaccompanied children ages 13-16 were able to buy explicit-content labeled recordings at retail stores.[167] A similar survey conducted for this Report shows a slight decrease in the percentage of sales: 83% of unaccompanied teens, ages 13-16, were able to buy an explicit recording.[168] Furthermore, there appears to be some improvement in preventing the sale of explicit-content labeled recordings to the youngest shoppers: 69% of 13-year-olds were able to buy explicit-content labeled recordings, as compared to 87% of 13-year-olds as reported in the December 2001 Report. A breakout by age of the mystery shop results follows:

FTC Mystery Shop Results by Age – Music

Q. Was the shopper able to make the purchase?

	13 years old	**14 years old**	**15 years old**	**16 years old**	**Total**
No	31%	15%	14%	4%	17%
Yes	69%	85%	86%	96%	83%
# of Shoppers	65	48	63	47	223

D. Product Packaging

Once a recording company or an artist determines that a sound recording warrants a Parental Advisory Label, the RIAA guidelines require that the label "be plainly displayed in nonremovable form on the album cover" and be placed beneath the cellophane shrink wrap.[169] The RIAA also requires that the label measure 1" x 5/8."[170]

A review of the packaging of the 14 CDs produced to the Commission by three recording companies for this Report reveals a lack of compliance with the RIAA's labeling guidelines, primarily with the RIAA's size requirement for the Parental Advisory Label. Only 29% (4 of 14) of the CDs were in full compliance with requirements that the PAL logo be permanently affixed to the cover art of the album and that the logo measure 1" x 5/8."[171] For nine of the 10 non-compliant CDs, the Parental Advisory Label logo was too small; for the remaining CD, the sticker was not permanently affixed. In comparison, the September 2000 review of the packaging of CDs produced to the Commission showed that 50% (27 of 55) met the RIAA recommendations for size, placement, and format.[172]

The Commission's separate examination of the packaging of 25 top-selling CDs[173] that bore the Parental Advisory Label, however, suggested better compliance with the RIAA's guidelines: 48% (12 of 25) of the CDs examined fully complied with the requirements for size and placement of the Parental Advisory Label. This is an improvement from September 2000, when only 36% (nine of 25) top-selling explicit recordings fully complied with the RIAA guidelines.[174]

Product Packaging Review Results

Report	Origin of CDs	Size	Affixation
Sept. 2000	55 produced by companies	61% met size requirement (33/55) 39% too small (22/55)	75% were part of cover art (41/55) 25% were stickers (14/55)
Sept. 2000	25 purchased	48% met size requirement (12/25) 52% were too small (13/25)	84% were part of cover art (21/25) 16% were stickers (4/25)
June 2002	12 purchased	83% met size requirement (10/12) 17% were too small (2/12)	92% were part of cover art (11/12) 8% were stickers (1/12)
Dec. 2003	14 produced by companies	36% met size requirement (5/14) 64% too small (9/14)	93% were part of cover art (13/14) 7% were stickers (1/14)
Dec. 2003	25 purchased	60% met size requirement (15/25) 40% too small (10/25)	80% were part of cover art (20/25) 20% were stickers (5/25)

E. Analysis of Current Industry Practices

Overall, the practices of the music industry show some improvement. In particular, the industry has made progress in decreasing the amount of advertising placed in magazines popular with teens. Although industry members continue to advertise explicit-content labeled recordings on cable music channels and wrestling programs popular with teens, advertising on other television shows is virtually nonexistent. In addition, the industry continues to improve the frequency with which print and television ads for explicit-content labeled recordings contain the Parental Advisory Label.

The industry needs to ensure that the application of the Parental Advisory Label continues to improve in every venue: compliance with RIAA guidelines for placement of the Parental Advisory Label on the packaging of top-selling recordings has increased only slightly, and little, if any, improvement has been shown in placing the Parental Advisory Label on websites. Providing notice of the parental advisory is an important component of the RIAA's system, and the Commission encourages the recording industry to improve its performance in complying with this requirement. Finally, retailers need to take additional steps to limit the sale of music with a parental advisory to children.

IV. Electronic Games

A. Marketing to Children: Advertising Placement

1. Self-regulatory programs restricting placement of advertising in media popular with children

In its September 2000 Report, the Commission found widespread marketing of Mature ("M")-rated electronic games to children under 17[175] – a practice that violated the anti-targeting provision of the game industry's self-regulatory advertising and marketing code ("AdCode"). Following issuance of that report, the electronic game industry amended its anti-targeting provision to add specific standards defining targeting. Under those provisions, ads for M-rated games cannot appear on TV and radio programs with a 35% or more under-17 audience, or in print media or on Internet sites with a 45% or more under-17 audience.[176] In addition, on October 31, 2001, the ESRB implemented an expanded enforcement system premised on the severity of a particular violation and the number of points accrued by a publisher for past and current violations of the industry code. Sanctions range from requiring corrective action to monetary fines for inappropriate target marketing. In the first nine months of 2003, thirty-two companies were found to have violated the ESRB's requirements and were assessed points and, in four instances, fines.[177]

As a complement to restricting the marketing of M-rated electronic games to children under 17, the

Commission's prior reports have noted programs developed by the VSDA and the ESRB for retailers that wish to restrict sale or rental of products. Those programs continue.[178] In addition, the IEMA has just announced a new initiative by its member retailers to restrict sales by the end of 2004.[179]

2. Advertising placements: current practices

For this Report, the Commission monitored industry advertising placements on television and in print media. In addition, the Commission reviewed marketing plans from three companies that had released and promoted several M-rated games in the last year, including information on where ads for those products were placed in major media, including television, print, and online.[180]

a. Television advertising

None of the plans submitted to the Commission for the M-rated games expressly targeted an under-17 audience, although all that specified a target audience included youth as young as 17 or 18.[181] In seeking to reach that 17- and 18-year-old audience, several of the marketing plans included at least some planned ad placements for M-rated games on television shows popular with teens, including *Jackass*, *Total Request Live*, *WWE Smackdown*, *Smallville*, and *King of the Hill*.[182] Placements on MTV's *Total Request Live* would appear to run afoul of the industry's advertising code's prohibition against placing ads for M-rated games on shows with a 35% or greater under-17 audience, but the other shows are permitted under the code.[183]

To supplement information from the marketing plans, the Commission monitored advertising on network, cable, and syndicated programs popular with teens for an eight-week period commencing in May 2003.[184] That monitoring found that ads were placed for two M-rated games (Midway's *Mortal Kombat*, and Microsoft's *Brute Force*) on *WWE Smackdown*. In addition, ad monitoring data provided by The Parents Television Council for the period January to August 2003 showed several more ad placements for M-rated games on programs popular with teens, including MTV's *Making the Band 2* and *Sorority Life 2*; Fox's *Cedric the Entertainer*; UPN's *Girlfriends*; and WB's *Smallville*.[185] The five M-rated games promoted on one or more of those programs were: Activision's *Tenchu: Wrath of Heaven*; Capcom's *Devil May Cry 2*; Microsoft's *Brute Force*; and SCEA's *Primal* and *The Getaway*. Although these ad placements would appear to comply with the AdCode's 35% requirement, all are on shows with large teen audiences.

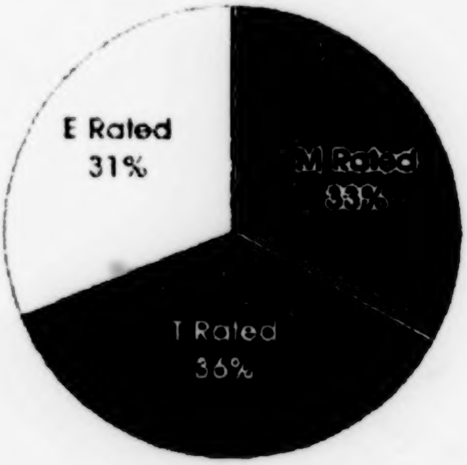
b. Print advertising

In the September 2000 Report, the Commission found that game companies' marketing documents revealed plans to advertise M-rated games repeatedly in magazines with a substantial readership under 17.

The media plans submitted for this Report continue to show advertising in print media popular with teens, although virtually none of the print ad placements would violate the AdCode's standard that ads for M-rated games not be placed in print media with a 45% or greater under-17 audience. Ads were often placed in print media that came very close to the 45% limit. In only one instance did the media plans show that a company placed ads in a magazine with a majority under-17 readership. The ESRB challenged that placement, but the company appealed ESRB's challenge on the basis that its media buyer had placed the ads in error.

To monitor industry-wide ad placements, the Commission reviewed *Electronic Gaming Monthly* and *Playstation 2 Magazine* over a four month period (June-September 2003). Although neither of these magazines have a readership that is 45% or more under 17, each has a sizeable readership among teens and older children.[186] The Commission's review found that ads for M-rated games made up 33% of the game ads placed in those magazines, even though M-rated games account for less than 10% of the game titles published in the last year. A breakout of the magazine ads by rating is presented here.

Playstation 2 Magazine and Electronic Gaming Monthly Advertising Composition by Rating
June – September 2003



"Rating Pending" ads are grouped by the rating they later received.

In addition to the large percentage of M-rated game ads found in *Electronic Gaming Monthly* and *Playstation 2 Magazine*, the Commission reviewed *Tips & Tricks*, which has a 43% readership under 17. In the *Tips & Tricks* issues from June to September 2003, 13% of the ads were for M-rated games.[187]

As noted in the Commission's June 2002 Report, the publisher of *GamePro* instituted a change to its M-rated game ad placement policy: ads for M-rated games are not allowed in its subscription edition because of its large under-17 readership (59%). Nonetheless, the Commission's review of the subscription edition of *GamePro* found ads by five different game publishers for six games that ultimately were rated M. These eight ads all carried a Rating Pending icon; each placement would, nonetheless, violate the AdCode if the game maker were aware at the time of placement that the game would likely be rated M.[188] Ads appeared in *GamePro* for: UbiSoft's *XIII*; Rockstar's *Grand Theft Auto Vice City*; THQ's *Pride Fighting Championships*; Gotham Games' *The Great Escape* and *Celebrity Deathmatch*; and Eidos's *Backyard Wrestling*. This finding is in contrast to the finding in the Commission's June 2002 Report, where a review of the *GamePro* subscription issues did not find any ads for M-rated games.[189]

One additional concern relates to the placement of ads for T-rated games in publications with a large pre-teen readership, such as *Nintendo Power*. The AdCode requires that "Companies . . . not specifically target advertising for entertainment software products rated "Teen," "Mature," or "Adults Only" to consumers for whom the product is not rated as appropriate." The Commission's review of *Nintendo Power* found many ads for T-rated games (suitable for those 13 and over) with violent content descriptors, even though 43% of its readership is 12 and under and the median age of its readers is 13. Although the AdCode does not define what percentage of magazine readership might put a publication off limits for ads for T-rated games, the ESRB indicates that ads for T-rated games should not appear in publications that are targeted to children under 13.

This would appear to cover magazines like *Boys Life* (Cub Scout Edition), *Nickelodeon Magazine*, *Disney Adventures*, and *Sports Illustrated for Kids*. None of those magazines were reviewed for this Report, except for the December 2003 issue of *Sports Illustrated for Kids*. Sixty-six percent of *Sports Illustrated for Kids'* readership is under 13. Contrary to the ESRB policy, there were four T-rated game ads – TDK Interactive's *The Haunted Mansion*, Namco's *I-Ninja*, Sony Computer Entertainment's *JAK II*, and Crystal Dynamics' *Whiplash*. In 2002, the Children's Advertising Review Unit ("CARU") of the Council of Better Business Bureaus challenged ad placements in *Sports Illustrated for Kids* for a T-rated game, *Tom and Jerry in War of the Whiskers*. The advertiser, NewKidCo., agreed not to make similar ad placements in the future.[190]

c. Internet advertising

In the September 2000 Report, the Commission found that nearly all of the game publishers studied had placed ads for M-rated games on websites popular with teens.[191] Marketing documents reviewed for this Report show that these practices continue. Nonetheless, none of these ads placements would violate the AdCode's requirement that ads for M-rated games not appear on websites with a 45% or greater under-17 audience.[192] The marketing plans do, however, show ad placements on websites where youth visitors constitute one third or more of the audience. These sites include gamespot.com (33%), gamespy.com (36%), and IGN.com (40%).[193]

d. Cross-promotions

The AdCode addresses cross-promotions and cross-sells. Cross-promotions are defined as "promotions that feature entertainment software products in conjunction with another company's brand, products or event." The AdCode prohibits such promotions for M-rated games with another company's event if it is reasonable to assume that the event will reach a "substantial audience of persons under 17 years old."[194] Cross-sells are defined as "ancillary or separate entertainment software products that are being sold or promoted in conjunction with a core entertainment software or hardware product."[195] Under its cross-sell requirements, the AdCode prohibits the use of a T-rated product to market a game that is M-rated.[196]

Two promotions involving video games occurred in 2003 that concern cross-promotions and cross-sells. The first, the Lollapalooza music festival, involved a cross-promotion with video games. Part of the festival's appeal was GameRiot, essentially a tent in the middle of the concert area that allowed festival attendees to play various video games and compete in game contests. The games available for play at GameRiot were of various ratings, and included several popular and violent M-rated games.[197] Although the festival was billed as targeting 14-34 year-olds, festival promoters made efforts to ensure that tournament players of the M-rated games were at least 17.

A second promotion involved a cross-sell where a video game was used to promote a movie. According to various reports, the T-rated *Enter the Matrix* video game contains a trailer for the R-rated movie, *Matrix Revolutions*.[198] The cross-sell prohibitions of the AdCode prohibit an industry member from using a T-rated game to promote an M-rated (17+) game. Here the promotion was for an R-rated (17+) movie. With the increasing cross-promotions across entertainment media, questions can be raised about whether members in one industry could use promotions of another industry's products to market to an audience that it could not directly reach in its own promotions.[199]

B. Ratings and Reasons for Ratings in Advertising

1. Self-regulatory programs governing disclosure of ratings and reasons

In the September 2000 Report, the Commission recommended that all advertising contain both the rating and the reasons for that rating, also known as content descriptors. The ESA and the ESRB require that such information be included in print advertisements, and that the rating (but not the content descriptors) be included in television and radio advertising. In addition, some game publishers have gone beyond the ESRB requirements to include content descriptors in television ads.[200] The ESRB also continues substantial efforts to educate parents about the rating system.

The ESRB has made several revisions to its Adcode since the Commission's June 2002 Report, including increasing the size of the rating icon in print ads, changing the size and design of the requirements for descriptors on the back of packaging, and requiring age identifiers on the Mature and Adults Only icons (Mature icon now says "MATURE 17+").[201]

2. Advertising of rating information: current practices

a. Television advertising

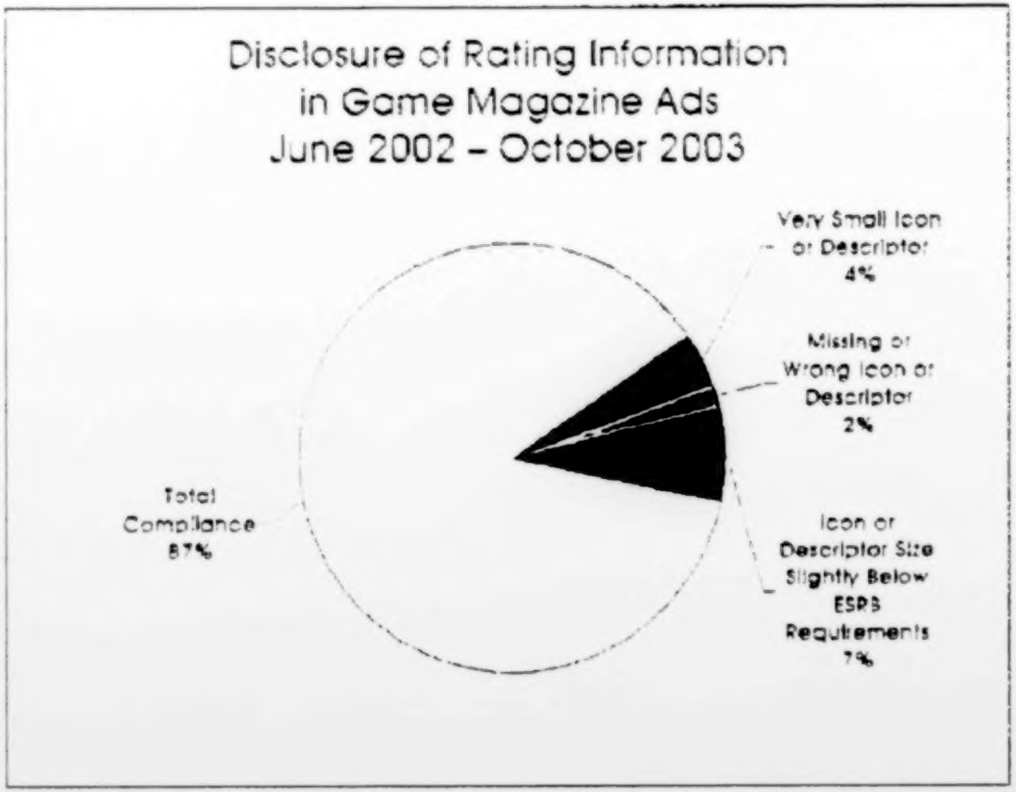
For this Report, the Commission reviewed a selection of ads for M-rated games that aired in 2003. This review found that all but one of the 10 game ads included the AdCode's required voice-overs and rating icons. One 30-second ad incorrectly used the abbreviated voice-over intended for shorter, 15-second ads.[202] These results suggest game industry advertisers are generally complying with industry requirements for disclosing rating information in television advertising.

b. Print advertising

In its review of print ads in the June 2002 Report, the Commission found nearly all game advertisers either fully or substantially complied with industry requirements for rating disclosure, with 2% of ads containing a very small icon or descriptor and 1% missing or containing an incorrect icon or descriptor.[203]

For this Report, the Commission conducted a review of print ads running between June 2002 and October 2003[204] in the following six popular game enthusiast magazines: *100% Independent PlayStation 2 Magazine, GamePro, Computer Gaming World, Electronic Gaming Monthly, Tips & Tricks,* and *Nintendo Power*. Overall, 4% of the ads reviewed contained an icon that was sized substantially below the ESRB requirements and another 2% of the ads contained a missing or incorrect icon or descriptor.[205]

Disclosure of Rating Information in Game Magazine Ads
June 2002–October 2003



A large majority of the major advertisers were in compliance with industry standards. Of the 52 companies that placed four or more ads during the eighteen-month review period, 39 adhered to the industry standards. The companies that did not comply placed at least some ads that had icons and descriptors that were incorrect or missing altogether.[206]

The Commission also reviewed retailer ads in these same publications from Best Buy, Electronics Boutique, Wal-Mart, Ebay, Amazon.com, CompUSA, Virgin Megastore, Kmart, and Pricegrabber.com. Each of the retailers displayed the rating icon on the cover art of the product packaging shown in the ad. Two retailers, Wal-Mart and Best Buy, also included an ESRB icon in their ads showing the range of ratings displayed in the ad like "RP-T." None of the retailer ads displayed the games' content descriptors.

A review of free-standing Sunday newspaper inserts showed that most of the retailer ads included the game's rating on the clip art, although the rating was often hard to find and read. Target and Best Buy were the most consistent in displaying conspicuous or enlarged M ratings on M-rated games. In addition, Best Buy included the words "Mature Rating," and Target added "Rated M for Mature" next to the clip art for M-rated games. Toys "R" Us prominently displayed an explanation of each of the ratings on the page where the game ads appeared. Best Buy, Circuit City, and Toys "R" Us disclosed the ESRB toll-free phone number near advertisements for games, and Circuit City and Toys "R" Us included the address for the ESRB website. None of the retailer ads displayed the games' content descriptors.

c. Internet advertising

(1) Game publisher websites

The Adcode requires a number of specific disclosures for game publishers' websites. If the publisher's advertisement is one-fourth of a screen page or larger, the rating icon and content descriptors must be visibly and prominently displayed directly on the advertisement.[207] If the publisher is selling the game online, both the rating icon and content descriptors must appear on any page where a game can be purchased.[208] For game "demos," the rating icon and content descriptors or text of rating information (*e.g.*, "ESRB Rating: EVERYONE with COMIC MISCHIEF") must be displayed adjacent to the name of the title on the page where the demo is accessed or on the page prior to download.[209]

Twenty game websites were surfed to determine their compliance with the ESRB's requirements.[210] Seventy-five percent of the websites displayed the ESRB rating and icon somewhere on the site, and 14 out of 15 displayed the rating on either the home page or teaser page. Two of the sites, *Hunter the Reckoning - Wayward* and *Silent Scope Complete*, still displayed an "RP" rating instead of the correct "M" rating. Nine of the 15 required the visitor to scroll down the screen to view the rating.

Nine of the game websites displayed content descriptors and two-thirds of those sites required the visitor to hold the cursor over the rating icon to view the content descriptors. Fourteen of the sites had a demo available either to view or to play. However, only three of the demos displayed the rating and content descriptors. The sites that did display the rating and descriptor were *Return to Castle Wolfenstein*, *SWAT: Global Strike Team* and *True Crime: Streets of LA*. The site for *Postal 2* contained a facetious "warning" statement about the content of the site.[211]

Twelve of the sites allowed the visitor to purchase the game, either at the site or through a third-party site. Eleven of the games that could be purchased displayed a rating on a page that the visitor had to view at some point during the purchase process of the game, but only three displayed content descriptors on a page that the visitor had to view during the purchase process. Forty percent of the game sites provided a link to the ESRB website.

The site for *X Files* was the only site that provided specific information about the ESRB ratings. None of the sites linked to parentalguide.org. The homepage for *Outlaw Volleyball* linked to a section of the site containing sexually explicit imagery, although there was a disclosure stating that this section may not be suitable for children under 18.

(2) Retailer websites

For this Report, the Commission reviewed five retailer sites – Amazon.com, BestBuy.com, CircuitCity.com, EBGames.com, and GameStop.com – to see if they included rating information for five M-rated games.[212] Parents looking on major retailers' sites for a game's rating can usually find it easily. The rating was usually prominently placed near the box art. The retailers linked from the web page with information on the game to helpful information on the ESRB rating system – Circuit City also linked to the ESRB's website, www.esrb.org. Some of the sites also provide additional information, such as reviews or descriptions of the game, that may give more details about game play and content.

Aside from EBGames, however, only one site provided the ESRB content descriptors in addition to the rating – and then only for one of the five games checked. Also, while the rating itself was usually provided, the ratings given were not always accurate. One site erroneously categorized a game as not having been rated, when it was actually rated "Mature"; another site indicated that a Mature-rated game was rated "Teen." Two sites provided a rating in writing that was inconsistent with a rating icon visible on the game's box art. In one case the site indicated that the game had been rated "Mature," when the icon on the game's box art indicated "RP" (rating pending); in the other, the reverse situation occurred, as the site indicated the game had not yet been rated, when the icon on the box indicated that the game was rated "M."

Similarly, the content descriptors that were provided were often different, though usually subtly, from the official content descriptors assigned by the ESRB. One game that the ESRB assigned an "intense violence" descriptor was instead described as containing "violence."

The EBGames site was exemplary in providing information about the rating system and the ratings process and in providing the content descriptors, both in text and in several instances in a screen shot of the back of the box art.

C. Efforts to Enforce the Rating System at Point-of-Sale

The Commission's prior nationwide undercover surveys in 2000 and 2001 found that unaccompanied children ages 13-16 were able to buy M-rated games 85% (2000) and 78% (2001) of the time. The survey conducted for this Report shows continued, modest improvement. Sixty-nine percent of the children were able to purchase M-rated games, and more than half (56%) of the youngest shoppers – 13-year-olds – were able to buy an M-rated game. A breakout by age of the mystery shop results follows:

FTC Mystery Shop Results by Age – Electronic Games

Q. Was the shopper able to make the purchase?

	13 years old	14 years old	15 years old	16 years old	Total
No	44%	23%	34%	15%	31%
Yes	56%	77%	66%	85%	69%
# of Shoppers	68	47	62	48	225

Even among those retailers with programs in place to restrict sales,[213] 55% of the unaccompanied children were able to buy violent M-rated games. Although the results reflect improvement from the Commission's last survey two years ago and indicate that some retailers are enforcing policies to restrict sales, the numbers still fall short of what might be expected given the multi-year effort by the ESRB to encourage retailers to adopt restrictive sales policies. The trade group representing game retailers, the IEMA, indicated at the Workshop that the industry was considering additional steps and would have some announcement in the near future.[214] On December 8, 2003, the IEMA announced that all merchants belonging to the association will have in place by the "Holiday Season of 2004" a national carding program and an identification check process for all M-rated games.[215]

Such steps are important because M-rated games continue to be very popular with young teens, especially boys. A recent Gallup poll reported that 75% of boys 17 and under indicated that they had played at least one of the games in the *Grand Theft Auto* series.[216] Additional data from Gallup suggests as well that the younger respondents (those age 13 to 15) were more likely to say they had played a game in the series than the older respondents (age 16 or 17).[217] The latest *Video Game Report Card* issued by the National Institute on Media and the Family notes that its own survey, conducted in the summer of 2003, showed that 87% of tween and teen boys (and 46% of girls) say they have played M-rated games, and that most indicate that M-rated games are among their favorites.[218] According to industry data, nearly 40% of M-rated games purchased in 2002 were for children under 17.[219]

D. Product Packaging

To obtain a rating from the ESRB, companies must agree to place the assigned ESRB rating icon on the lower portion of the front of the package, and any content descriptors on the lower portion of the back of the package.[220] The size of the rating icon varies with the size of the box.[221] The rating icon also must be displayed legibly and prominently on game cartridges, compact discs, and smart cards, and on or in the game's manual or an accompanying insert.[222] In June 2003, the ESRB improved these requirements (enforcement of these new provisions began on September 30, 2003). The ESRB now requires that a game's content descriptors be placed in a rectangular box attached to the rating icon on the lower portion of the back of the product package.[223] This change enhances the readability and prominence of the descriptors. Still, the Commission is aware of research that suggests that most parents would prefer to have a game's content descriptors on the front of the package.

E. Analysis of Current Industry Practices

As the Commission has recognized in its prior reports, the electronic game industry has adopted numerous standards that limit children's exposure to ads for Mature rated products and require the disclosure of rating information in most forms of advertising. The industry is actively enforcing those standards and penalizing those companies found to be in noncompliance. Yet those standards permit, and, in fact, industry members continue to place, advertisements in television and print media with substantial youth audiences.

The industry, with the exception of some retailers, continues in nearly all instances to include in its advertising rating information that would be helpful for parents. Retailers, while doing a better job in restricting sales to children of Mature-rated products, still routinely make such sales to most buyers. These sales should diminish substantially, however, if promised industry improvements in adopting and enforcing restrictive sales policies are put into place by the end of this year.

V. Conclusion

The Commission's review of marketing practices by the motion picture, music recording, and electronic game industries reveals that the movie and game industries continue to comply, for the most part, with their self-regulatory limits on ad placement, and that the music industry has made some progress in this area as well. In addition, the industries are disclosing rating information in most forms of advertising, and generally are doing so in a clear and conspicuous manner; this practice is not widespread among retailers, however.

Nonetheless, the Commission finds that all three industries continue to advertise violent R-rated movies, explicit-content labeled recordings, and M-rated games in media with large teen audiences. The Commission has noted this practice in earlier reports.[224] In addition, despite the existence of restrictive policies among some retailers, the Commission continues to find that teens can purchase rated or labeled entertainment products at a significant number of stores and theaters. The movie theater industry has made real progress in this area, and to a lesser extent so have game retailers, compared to the Commission's prior "mystery shops," but there remains room for improvement across the board.

The Commission recommends that all three industries continue to improve compliance with existing ad placement guidelines and rating information practices, with particular attention to avoiding advertising in venues popular with under-17 audiences, regardless of whether those audiences reach or exceed 35%.[225] All three industries should also consider developing "best practices" to avoid advertising in venues popular with teen audiences, such as recommending that promotions for R-rated films not take place in venues likely to attract significant numbers of young teens or that advertisements not be placed on websites that have a substantial teen audience.

The Commission also recommends that the industries continue to improve their rating information disclosure practices. Although there has been notable progress in both the frequency and legibility of rating information disclosures, there remains room for improvement in both areas. With respect to retailers, both in-store and online, the Commission encourages better disclosure of ratings and reasons in advertising, and more widespread implementation and enforcement of sales policies restricting children's access to restricted or labeled entertainment media, and, in particular, to R-rated DVDs and home videos, music with a parental advisory, and M-rated games.[226] It is particularly noteworthy that although movie theaters are doing much to restrict children's access to R-rated motion pictures, DVD retailers of the same movies appear to be doing little to prevent such sales.

Currently, the movie industry typically places the movie's rating and ratings reasons on the back of each video and DVD. In addition, although the electronic game industry does place the game's rating on the front of product packaging, it still puts the game's content descriptors on the back. Having both industries consider placing all of the rating information prominently on the front of product packaging would not only make that information more visible for parents and children, it would also assist retail store clerks who might be enforcing a policy not to sell R-rated videos or DVDs and M-rated video games to children. Moreover, the Commission repeats the recommendation it has made in prior reports that the music industry consider providing more information on product packaging and in advertising as to why a particular recording has been labeled with a parental advisory.[227] BMG's use of an enhanced label that includes such information provides a good model for others to follow.

Further, as directed by Congress, the Commission will work with video game publishers and retailers toward ensuring that games rated T and M are not marketed or sold to children in a manner inconsistent with the rating's age guideline. The Commission also will undertake efforts to educate parents about the content included in T and M games. Finally, the Commission has made its toll-free consumer complaint line and its website complaint form available for consumer complaints regarding media violence, and is publicizing to consumers the availability of these complaint mechanisms. Following implementation of these steps and a one-year period of monitoring industry practices and consumer concerns, the Commission believes that a follow-up report would be appropriate.

Because of First Amendment issues, the Commission supports private sector initiatives by industry and individual companies to implement these suggestions. All three industries have taken positive steps in response to many of the Commission's past recommendations. Nonetheless, more progress is needed in several important areas, and the Commission will work with industry and parent groups to encourage such change.

Endnotes

[1] See June 2002 Report at 1, nn. 1-2.

[2] The MPAA's system designates movies with one of the following ratings: **G** (General Audiences. All ages admitted); **PG** (Parental Guidance Suggested. Some material may not be suitable for children); **PG-13** (Parents Strongly Cautioned. Some material may be inappropriate for children under 13); **R** (Restricted. Under 17 requires accompanying parent or adult guardian); and **NC-17** (No one 17 and under admitted). Each film assigned a rating other than G also receives a brief explanation for the film's rating, *e.g.*, "Rated R for terror, violence and language," or "Rated PG-13 for intense sci-fi violence, some sexuality and brief nudity."

The ESRB's system designates electronic games with one of the following ratings: **EC** (Early Childhood. Suitable for ages 3 and older. Contains no material that parents would find inappropriate); **E** (Everyone. Suitable for persons ages 6 and older.

Titles in this category may contain minimal violence, some comic mischief and/or mild language); **T** (Teen. Suitable for persons ages 13 and older. May contain violent content, mild or strong language, and/or suggestive themes); **M** (Mature. Suitable for persons ages 17 and older. Titles in this category may contain mature sexual themes, more intense violence and/or strong language); **AO** (Adults Only. Suitable only for adults. Titles in this category may include graphic depictions of sex and/or violence. Adults Only products are not intended for persons under the age of 18.); and **RP** (Rating Pending). As in the motion picture rating system, a descriptive phrase may be assigned to the letter rating to indicate content that might be of concern to parents, such as language, sexual themes, or violence. Current descriptors reflecting violent content include "Animated Blood," "Blood," "Blood and Gore," "Cartoon Violence," "Comic Mischief," "Fantasy Violence," "Intense Violence," "Mild Violence," "Sexual Violence," and "Violence."

The RIAA encourages its members to use a parental advisory label, a black and white label that says "Parental Advisory, Explicit Content."

RIAA's labeling program does not provide reasons for the advisory label or "content descriptors" indicating the nature or the amount of the explicit content (*e.g.*, strong language or graphic references to violence, sex, or substance abuse). Instead, one advisory covers a broad spectrum of content, including violence and/or sex. Also, it is not an age-based system, and the label does not specify the age groups for which an explicit-content labeled recording may be inappropriate.

[5] The Commission's prior follow-up reports described the following industry-wide initiatives:

- The MPAA's 12-point initiative promised: to avoid running trailers for violent R-rated films before G-rated feature films; to review policies regarding marketing violent R-rated movies to children; to avoid using children in research for R-rated films; to install compliance officers to review their marketing practices; to encourage movie theaters to enforce the R rating restriction; and to take steps to include the reasons for ratings in print advertisements, on websites, and in home videos. The MPAA member studios – the Walt Disney Company, Metro-Goldwyn-Mayer, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox Film Corp., Universal City Studios, and Warner Bros. – plus Dreamworks SKG, which is not an MPAA member, signed on to the initiative. *See* Motion Picture Association of America, *A Response to the FTC Report* (Sept. 26, 2000).

- NATO's 12-point initiative: reaffirmed its ID-check policy for R and NC-17 films; promised not to show trailers advertising R films before any G or PG film, and only before PG-13 films if consistent in tone and content with the feature film; and committed to appoint an executive compliance officer and seek additional ways to disseminate rating information. *See* National Association of Theatre Owners, *Response of the National Association of Theatre Owners to the Report and Recommendations of the Federal Trade Commission* (Nov. 2, 2000) (on file with the Commission).
- The RIAA's revised Parental Advisory Labeling system recommended the use of: broad standards for making the explicit-content labeling decisions and guidelines for placing the advisory in print advertising and on retail websites. In July 2001, the RIAA announced that its members supported placing the advisory label in *all* advertising for explicit content recordings, as well as increasing efforts to provide parents with information about the labeling system. *See* Testimony of Hilary B. Rosen, President and CEO, Recording Industry Association of America, House Subcommittee on Telecommunications and the Internet (July 20, 2001).
- The IDSA's revised Advertising Code of Conduct ("AdCode") limited ad placements in magazines, television shows, and Internet sites popular with teens. The Entertainment Software Rating Board ("ESRB")

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stepped up its enforcement of the AdCode and began to develop additional sanctions for repeat violators of its provisions. *See* Testimony of Douglas Lowenstein, President, Interactive Digital Software Association, House Subcommittee on Telecommunications and the Internet (July 20, 2001).

[4] The Commission sent requests to Warner Bros., Twentieth Century Fox, and Sony Pictures Entertainment. These studios were selected because, during the period of review, they were among those that released the most films rated R based, at least in part, on violent content. Each studio cooperated in supplying its marketing materials.

[5] These films were selected after taking into account factors such as the extent of the marketing of the film during the review period, the amount the film grossed, and whether the film had been released on DVD/home video.

[6] Because the recording companies do not keep track of which recordings received the parental advisory label due to violent content, as opposed to some other explicit content, the Commission requested materials for recordings labeled for any reason due to their "explicit" content (which could include strong language and/or depictions of sex, violence, or substance use). The Commission did not attempt to evaluate which recordings contained violent lyrics. Recordings were selected based on their appearance as a top-selling album on "The Billboard 200" chart for the week of May 3, 2003.

[7] The Commission sent requests to Sony Music Entertainment, Inc., Universal Music Group, and Warner Music Group. The companies were selected on the basis of industry data showing that they were the largest distributors of explicit-content labeled music during the review period. Each company cooperated in supplying materials.

[8] The Commission sent requests to Activision, Inc., Capcom Entertainment, Inc., and Take-Two Interactive, Inc. The companies were selected on the basis of their size and the extent of marketing of M-rated games during the review period. Each company cooperated in supplying its marketing materials.

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[9] The Commission selected all the games rated M for violence that were marketed in the review period and not previously reviewed by the Commission.

[10] September 2000 Report at 13-14.

[11] *See* Motion Picture Association of America, *A Response to the FTC Report*, Sept. 26, 2000. Not every movie studio is an MPAA member. Studios who subscribed to the MPAA's 12-Point Initiatives are: Walt Disney Company, Dreamworks SKG, Metro-Goldwyn-Mayer, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox Film Corporation, Universal Studios, and Warner Bros.

[12] *Id.*

[13] *Id.* The studios further committed not to attach trailers for films rated R for violence to G-rated movies released on videocassette or on DVD. *Id.*

[14] *Marketing Violence to Children II: Hearing Before the Senate Comm. on Commerce, Science and Transp.*, 106th Cong. (Sept. 27, 2000), Fed. New Serv., LEXIS, Legis Library, Hearng [sic] File.

[15] National Association of Theatre Owners, *Response of the National Association of Theatre Owners (NATO) to the Report and Recommendations of the Federal Trade Commission* (Nov. 2, 2000) (on file with the Commission). In addition, with respect to trailers for R-rated films shown in connection with PG-13-rated features, NATO members also pledged to "examine the trailers to ensure that their tone and content are consistent with the feature film." *Id.*

[16] September 2000 Report at 14. Studio documents reviewed for this Report, including film audience "exit" surveys, confirmed that television commercials remain one of the most cited sources of awareness of a film. MPAA member studios spent just over 40% of their total advertising costs for theatrical releases on network and spot television alone in 2002. *See* Motion Picture Association Worldwide Market Research, *U.S. Entertainment Industry: 2002 MPA Market Statistics* at 21 (citing MPAA).

[17] *Marketing Violence to Children II: Hearing Before the Senate Comm. on Commerce, Science and Transp.*, 106th Cong.

(Sept. 27, 2000), Fed. New Serv., LEXIS, Legis Library, Hearng [sic] File.

[18] One studio, for example, pledged to adhere to network standards and practices, and also not to advertise films rated R for violence on certain programs, channels, and/or time periods, including Saturday morning children's cartoons, MTV before 7:00 p.m., Nickelodeon, and the Cartoon Network.

Many television networks have their own advertising standards or guidelines, which may affect studios' marketing plans for R-rated films. For example, according to documents produced by the studios, some networks allow advertising for R-rated films only during certain specified times of the day (*e.g.*, weekday "daytime" or after 9:00 p.m.) or during certain types of programming (*e.g.*, sports). Other networks prohibit ads for R-rated films during any "family programming," "children's programs," or any program with an anticipated under-17 audience of 35% or more.

[19] The Commission found, nevertheless, that studios continued to place some ads for those films on some of the programs most watched by teens. June 2002 Report at 3.

[20] The Commission purchased data from Video Monitoring Service ("VMS"), which monitored certain shows for an eight-week period between May and July 2003. These shows included programs with a significant under-17 audience share, and, in some cases, with an under-17 audience share over 35%. *See* Appendix C for demographic information pertaining to these shows.

The network programs monitored were: *7th Heaven*, *The Bernie Mac Show*, *Cedric the Entertainer*, *Gilmore Girls*, *King of the Hill*, *Malcolm in the Middle*, *Oliver Beene*, *The Simpsons*, *Smallville*, and *WWE Smackdown*. The cable shows monitored were: on BET, *Rap City* and *106th & Park*, and on MTV, *Direct Effect* and *Total Request Live*. For syndicated shows, the Commission monitored the following programs during the 5:00 p.m. to 7:30 p.m. time slots on Mondays in Los Angeles and New York: *Drew Carey*, *The Fresh Prince of Bel Air*, *The Hughleys*, *The Jamie Foxx Show*, *King of the Hill*, *Sabrina the Teenage Witch*, *The Simpsons*, and *The Steve Harvey Show*. The Commission

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ultimately did not count ad placements occurring on *Drew Carey*, *The Fresh Prince of Bel Air*, and *The Jamie Foxx Show* because the first two had less than 23% under-17 audiences, and demographic data was not obtained for *Jamie Foxx*.

[21] For purposes of this Report, *WWE Smackdown* and *WWF Smackdown* refer to the same television program; the name was changed.

[22] Ads for Warner Bros.' *The Matrix Reloaded* and *Terminator 3: Rise of the Machines* aired on the monitored programs a total of 21 times; Twentieth Century Fox's *Wrong Turn* was advertised 19 times and its subsidiary Fox Searchlight's *28 Days Later* 10 times; and Columbia (a subsidiary of Sony Pictures Entertainment) advertised *Bad Boys 2*, *Identity*, and *Gigli* a total of 9 times.

[23] Advertising for home video and DVD release is substantial. Recent press reports have cited figures ranging from $641 million to $800 million in 2002, an increase of 63-72% over 2001. *See* "See Spots Run: Ads for DVD Proliferate," VB in DEPTH (June 13, 2003), *available at* www.videobusiness.com/article.asp?articleID=5637&query=see+spots+run&catType=NEWS. One studio executive recently stated that 50% of a movie's revenues derive from DVD and home video release, and DVD sales reportedly have exceeded box office revenues for the first half of 2003 – $4.8 billion to $4.4 billion. "Pirates of the Internet," CBSNEWS.com (Nov. 2, 2003), www.cbsnews.com/stories/2003/10/31/60minutes/main581153.shtml; Hugh Hart, "It's 'Pie' Taken to the Nth Degree," *Los Angeles Times* (Jul. 29, 2003).

[24] The Commission obtained information as to the date, time, station, and program on which advertisements for violent R-rated films or DVD/home videos first aired during the time period June 2002 through early September 2003. *See* Appendix C for a full description of the first airing monitoring.

[25] The Parents Television Council is a non-profit research and education organization concerned with the content of entertainment programming. The Council conducts its own ongoing monitoring program and tracks, among other things, advertisements for R-rated films that air on various networks and cable

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channels during prime time. As a courtesy, the Council made its information available to the Commission. The Commission examined the Council's data on advertisements for R-rated films that aired between January and August 2003.

[26] Commercials for violent R-rated films airing on programs with substantial youth audiences included, for example: Fox's *28 Days Later* on *Smallville*; Fox's *Wrong Turn* on *Smallville* and *Cedric the Entertainer*; Sony Picture's *Basic* on *Smallville*, *The Bernie Mac Show*, and *Cedric the Entertainer*; Warner Bros.' *Cradle 2 the Grave* on *Cedric the Entertainer*, *Smallville*, and *The Bernie Mac Show*; Sony Picture's *Bad Boys II* on *Smallville*; New Line Cinema's *Final Destination 2* on *Smallville*; Columbia Pictures' *Gigli* on *Smallville*; and Universal's *The Life of David Gale* on *Smallville* and *The Bernie Mac Show*.

Commercials promoting the DVD/home video release of R-rated films that aired on programs with substantial youth audiences included Universal's *8 Mile* on *The Bernie Mac Show* and *Smallville*, and Warner Bros.' *Cradle 2 the Grave* on *Smallville*.

[27] As noted previously, the Commission requested documents relating to three R-rated and one PG-13-rated film released by each studio, as well as documents relating generally to the studios' marketing practices.

[28] All three studios signed on to the MPAA's 12-point Initiatives. In addition, one studio committed to avoid advertising its R-rated films during any time period or program which has an audience share of children under 17 exceeding 35%. Another studio implemented a policy not to advertise on any broadcast network programs with a 35% or higher anticipated under-17 audience size. Both of these studios state that they conduct ongoing reviews of audience demographics for relevant programming to ensure compliance. The third studio adheres to network standards and has further pledged not to advertise during specified times on certain channels, and excludes some channels altogether.

[29] Documents produced by the studio indicated that advertising on BET was "unacceptable" during the time periods those programs aired. In addition, Nielsen data indicates that both of these programs garner under 17 audiences well above 35%. *See*

Appendix C. The studio also appears to have advertised these films on MTV during times that attract significant under-17 audiences.

[30] The television shows included *Smallville*, *Buffy the Vampire Slayer*, *Dawson's Creek*, and *Malcolm in the Middle*.

Studio documents and first airing data also revealed that a few ads for violent, PG-13-rated films were placed on television programming directed at or appealing to youth audiences under 13. For example, one studio advertised a PG-13-rated film on cable channels such as the Cartoon Network, ABC Family, and Nickelodeon, which are popular with very young audiences. In addition, ads for PG-13-rated films first aired on programs such as *Scooby Doo*, *Pokemon*, and *The Grim Adventures of Billy and Mandy* – shows with substantial or majority 2-11 audiences. Although the motion picture industry's self-regulatory code does not directly address the marketing of PG-13-rated films to children under 13 – nor does it restrict children under 13 from attending such films at theaters – the industry's PG-13 rating signifies "Parents Strongly Cautioned – Some material may be inappropriate for children under 13."

[31] September 2000 Report at 17-18.

[32] *E.g.*, December 2001 Report at 5-6 (no ads for R-rated films in magazines surveyed); June 2002 Report at 4 (same).

[33] The Commission monitored: *100% Independent Playstation 2 Magazine*, *CosmoGirl!*, *Electronic Gaming Monthly*, *GamePro*, *Metal Edge*, *Nintendo Power*, *Right On!*, *Seventeen*, *Teen People*, *Thrasher*, *Tips & Tricks*, *World Wrestling Entertainment Magazine* and *YM*. *See* Appendix C for demographic data pertaining to these magazines.

[34] Data in industry documents indicates that the under-17 audience share may currently be between 30% and 40%. *See* Appendix C at C-4.

[35] However, in listing the "highlights" of its national publicity campaigns, one of the studios cited feature stories, previews, and other mentions of two of its R-rated films in some youth-oriented magazines that it had listed as not appropriate for advertising such films. It is not clear from the documents whether

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such stories and other mentions resulted from the studio's publicity campaigns or from the magazines' own editorial decisions.

[36] September 2000 Report at 16-17.

[37] *Id.* Under this policy, a trailer for an R-rated film could be shown before a feature rated R or PG-13, and a trailer for a PG-13-rated film could be shown before a feature rated R, PG-13, or PG.

[38] September 2000 Report at 54.

[39] Studios further committed not to attach trailers for films rated R for violence to G-rated movies released on videocassettes or to DVDs containing G-rated movies. Motion Picture Association of America, *A Response to the FTC Report*, Sept. 26, 2000.

[40] Some studios took additional steps, such as sending letters to theater owners urging them to improve enforcement of the rating system. One of those studios also implemented a program whereby each trailer shipped to an exhibitor bears a sticker indicating the film's rating and, for films rated R, requesting that the theater not show the trailer in connection with feature films rated G or PG.

[41] National Association of Theatre Owners, *Response of the National Association of Theatre Owners to the Report and Recommendations of the Federal Trade Commission* (Nov. 2, 2000) (on file with the Commission).

[42] Motion picture exhibitors ultimately determine which trailers run before feature films, but studios can influence those determinations. For example, a studio can physically "attach" a trailer to a specific film, or the studio can send a trailer to a theater with a request that the theater show the trailer before a particular feature. Two of the studios provided extensive lists of all feature films to which trailers for the studied R-rated films were attached or requested to be shown. The third studio did not provide such detailed information, but the documents produced did not indicate that trailers for the R-rated films, once the films were rated, were shown before features rated PG or G.

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[43] Documents indicated that a trailer for one film, not yet rated but ultimately rated R, was shown before the PG-rated film *Star Wars Episode II: Attack of the Clones*. It is not clear whether the studio requested that the trailer be shown or the theater decided to show it.

[44] A trailer for one R-rated film was attached to the home video for the PG-rated film *Chasing Papi*.

[45] September 2000 Report at 17.

[46] December 2001 Report at 6-7. The Commission's April 2001 and June 2002 Reports did not review promotional activities.

[47] All three studios also advertised online for the PG-13 rated films studied.

[48] One of the studios has a policy prohibiting advertising for films rated R for violence on any online sites "specifically targeted for children or teens."

[49] The Commission reviewed Nielsen//NetRatings demographic data on these and several other websites on which the studios, electronic game publishers, and music recording companies advertised products rated or labeled as potentially inappropriate for children. A number of these sites had youth audiences over 35%, and others had between 25% and 35%. See Appendix C for a list of these sites and demographic information pertaining to each. In this regard, the Commission notes that documents the studios produced indicate that some Internet portals – including ones on which the studios also advertised – have implemented advertising guidelines that apply to motion pictures advertisements, which may affect advertising in this medium.

[50] For example, the studios sent letters to theater owners, newspapers, media agencies, and others encouraging those third parties to increase compliance with the MPAA rating system and applicable advertising guidelines. One studio adopted a policy prohibiting actor appearances and interviews on certain youth-oriented television programming, and prohibiting the provision of publicity material to certain youth-oriented publications. In addition, for R-rated films, the studios stopped testing

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television ads and trailers, and stopped conducting focus groups, on children under 17 who are not accompanied by a parent or adult guardian. Prior to the September 2000 Report, studios had conducted research for R-rated films, such as focus groups and trailer tests, on children under 17. *See* September 2000 Report at 14.

Documents reviewed for this Report revealed that one studio tested a television ad for an unrated film, which was ultimately rated PG-13, on children 8-11 years old; according to the documents, the film – a sequel to a PG-13 film – was expected to be rated either PG or PG-13.

[51] Both the film and video game were released on the same day, and the game was marketed as one component of "the most integrated entertainment experience to date." Other components of the "multi-media experience" included a soundtrack, a website, and a PG-13-rated DVD of animated "shorts" inspired by the R-rated film.

The studio also granted licenses for figurines and posters for sale in toy stores, including KB Toys and Toys "R" Us, among other distribution channels. The figurines were intended to be sold at toy stores. The studio documents suggest that steps were taken to ensure that the movie-related products be sold only through segregated adult sections of the stores, not co-mingled with children's toys, and that the products be labeled as not for children under 17.

[52] *See* September 2000 Report at 10.

[53] *Id.* at 55.

[54] Motion Picture Association of America, *A Response to the FTC Report*, Sept. 26, 2000.

[55] 2002 MPAA Advertising Handbook at 5, 23. Some studios further committed to include rating reasons in magazine advertisements of a certain size. Films rated G are not assigned rating reasons. *Id.* at 5.

[56] Motion Picture Association of America, *A Response to the FTC Report*, Sept. 26, 2000.

[57] National Association of Theatre Owners, *Response of the National Association of Theatre Owners to the Report and*

Recommendations of the Federal Trade Commission (Nov. 2, 2000) (on file with the Commission).

[58] *See, e.g.*, June 2002 Report at 4-6, 9-10; December 2001 Report at 9-12.

[59] 2002 MPAA Advertising Handbook at 21.

[60] Television ads for all three PG-13 movies studied also presented the rating both visually and in audio. Ads for two of the three films also displayed the rating reasons visually, but for the third film only two of approximately 25 ads displayed the rating reasons.

[61] Motion Picture Association of America, *A Response to the FTC Report*, Sept. 26, 2000.

[62] These ads included films that had violence as a rating reason, as well as films that did not.

[63] The Commission reviewed ads placed in the magazines discussed in the Advertising Placement section, *see* note 33 *supra*, as well as *Computer Gaming World*, *Rolling Stone*, *Spin*, *Vibe*, and *Wizard*. The Commission also examined ads in the following six general circulation newspapers: *Chicago Sun-Times*, *Chicago Tribune*, *Los Angeles Times*, *New York Daily News*, *New York Post*, and *New York Times*. *See* Appendix C. The advertisements reviewed were at least five inches (excluding space for theater listings), which triggers the MPAA's requirement to disclose rating information. *See* 2002 MPAA Advertising Handbook at 5.

[64] *See* June 2002 Report at 9-10.

[65] Less than ten percent of the ads (111) were found without a rating or rating reasons, or had a rating but not the reasons for the rating. A number of these ads were for movies distributed by MPAA member studios or their subsidiaries, including Fox Searchlight's *Bend It Like Beckham*.

[66] Of the 1,700 newspaper ads reviewed, 1,597 contained both a rating and rating reasons, and 1,380 displayed that information clearly.

[67] There were 227 ads that fell into these two categories.

[68] *See* June 2002 Report at 10.

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[69] *See* Appendix C for a complete list of, and demographic information for, the magazines reviewed.

[70] The Commission reviewed free-standing inserts from eight retailers – Amazon, Best Buy, Circuit City, CompUSA, Kmart, Target, Tower, and Toys "R" Us - placed in the Sunday edition of two major newspapers – the *Los Angeles Times* and *The Washington Post* – over the 18-month period between June 2002 and September 2003.

[71] *See, e.g.*, June 2002 Report at 10.

[72] Toys "R" Us did not advertise any R-rated DVDs.

[73] Radio ads for the two of the PG-13 movies studied also conveyed the film's rating but not the reasons. No radio ads were provided for the third PG-13-rated film.

[74] June 2002 Report at 5-6.

[75] The Commission examined the following 20 motion picture websites in August 2003: *28 Days Later, Bad Boys II, Better Luck Tomorrow, Buffalo Soldiers, City of Ghosts, The Dancer Upstairs, Freddy vs. Jason, Gigli, The Hard Word, House of 1000 Corpses, Identity, Jeepers Creepers 2, The Magdalene Sisters, A Man Apart, The Matrix Reloaded, Open Range, Phone Booth, Swimming Pool, Terminator 3: Rise of the Machines*, and *Wrong Turn*. The movies were selected based on the following criteria: they had a release date between April 1, 2003 and August 31, 2003, received an R-rating, and had a rating reason that involved violence. The studios that released these films included MPAA members as well as non-MPAA members.

[76] *See* Appendix D for more detailed results of the survey.

[77] The site for Fox's *Wrong Turn* had a prominent rating reasons display. Before a visitor could enter the website, a popup screen with a large warning appeared, reading: "Warning! Strong violence and gore. Some language and drug use. Under 17 requires an accompanying parent or guardian." *Wrong Turn*, at www.wrongturnmovie.com (visited Aug. 7, 2003). The R rating was not displayed, however. The *Wrong Turn* website allowed visitors to view a red-banded trailer (*i.e.*, approved for adult audiences only) for the film; it was the only website examined that contained such a trailer. Before a visitor could view

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the trailer, a box appeared asking if the viewer is over 17. If the viewer checked the box, a pop-up appeared stating again that the viewer must be 17 to view the trailer.

[78] The official website for Focus Feature's *Swimming Pool* did not link to any of the three rating information sites. The sites for three other films – Buena Vista's *Open Range* and New Line Cinema's *A Man Apart* and *Freddy v. Jason* – linked to filmratings.com and parentalguide.org, but not to MPAA.org.

[79] The rating information practices of three movie ticket websites are reviewed in Section II.B.2.c(2), below.

[80] Nineteen of the sites offered trailers that were approved for all audiences. The site for Fox's *Wrong Turn* offered a red-banded trailer, which is approved only for audiences 17 and older. *See* note 77, *supra*.

[81] The Commission examined websites for the following motion picture theater chains: AMC, Carmike, Century Theatres, Cinemark, Clearview Cinemas, GKC Theaters, Goodrich Quality Theaters, Kerasotes Theatres, Landmark Theatres, Loews Cineplex, Marcus Theatres, National Amusement, Regal Cinemas, United Artists, and Wallace Theater Corp. With the exception of AMC, these theater chains are members of the NATO. The online movie ticket sites examined were movietickets.com, fandango.com, and moviefone.com. The Commission conducted its review of the theater and ticket sites in September and October 2003. *See* Appendix D for more detailed results of the survey.

[82] Some of the sites provided rating reason information through a third-party site, to which a visitor was linked after clicking on a movie name.

[83] The December 2001 and June 2002 Reports found that 67% and 69% of sites provided detailed information about the rating system, respectively, and 56% and 44% linked to at least one rating website. December 2001 Report at 12; June 2002 Report at 6-7.

[84] Cinemark's website offered tickets for sale directly through the site. The other nine theater sites linked to one or more of the following third-party ticket vendor sites: movietickets.com, fandango.com, and moviefone.com.

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[85] The Commission examined the following retailer websites in September and October 2003: Amazon.com, BestBuy.com, CircuitCity.com, SamGoody.com, and TowerRecords.com. The Commission surveyed these same sites in connection with the June 2002 Report. *See* June 2002 Report at 7-8. In this instance, the Commission reviewed the sites' rating information practices pertaining to the following movies rated R at least in part for violence: *Blood Work*, *Gangs of New York*, *Identity*, *Red Dragon*, and *Road to Perdition*. The Commission notes that, since the surf [sic] was conducted, information about DVDs available from Sam Goody and Circuit City sites is now provided in a common format by a third-party site. *See* Appendix D for more detailed results of the survey.

[86] All five of the sites required a form of payment, such as a credit card, to which many children may not have access.

[87] The rental sites were Netflix.com, Filmcaddy.com, and Movielink.com. The Commission reviewed practices pertaining to the same five movies reviewed for DVD retailer sites – *Blood Work*, *Gangs of New York*, *Identity*, *Red Dragon*, and *Road to Perdition* – in September and October 2003. *See* Appendix D for more detailed results of the survey.

[88] These sites are Netflix.com and Filmcaddy.com. Upon signing up for these services and paying a monthly membership fee, consumers can rent a number of DVDs at one time. These services are beginning to grow: Netflix, for example, recently reported that it has over 1 million subscribers. *See* "Netflix Subscribers Rise 74 Percent," Reuters (Oct. 1, 2003), www.reuters.com/newsArticle.jhtml?type=internetNews&storyID=3543321.

[89] This site is Movielink.com, a joint venture by major motion picture studios Metro-Goldwyn-Mayer Studios, Paramount Pictures, Sony Pictures Entertainment, Universal Studios, and Warner Bros. Studios. Once a film is downloaded from Movielink, a user has 24 hours to view it.

[90] September 2000 Report at 20; December 2001 Report at 13.

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[91] Specifically, the MPAA member studios pledged to "strongly encourage theater owners and video retailers to improve compliance with the rating system." Motion Picture Association of America, *A Response to the FTC Report*, Sept. 26, 2000. Members of the NATO promised to take steps to reaffirm NATO's existing ID-check policy for R-rated films, which was announced in 1999. *See* National Association of Theatre Owners, *Response of the National Association of Theatre Owners to the Report and Recommendations of the Federal Trade Commission* (Nov. 2, 2000) (on file with the Commission); comments of John Fithian, President, National Association of Theatre Owners, at Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation (Oct. 29, 2003), transcript at 176-77 (*available at* www.ftc.gov/bcp/workshops/violence/index.html).

The VSDA had an existing "Pledge to Parents" program, through which participating retailers committed, among other things, not to rent or sell R-rated movies to children under 17 without parental consent. *See* Statement of the Video Software Dealers Association, Senate Comm. on Commerce, Science and Transp. (Mar. 21, 2000) (on file with the Commission). Finally, some studios sent letters to individual theater owners and video retailers urging them to improve compliance with the rating system by not selling tickets or granting admission to R-rated movies, or selling or renting R-rated videos or DVDs, to any persons under 17 not accompanied by a parent or adult guardian.

[92] *See* Appendix B for a discussion of the survey methodology and results.

[93] *Compare* December 2001 Report at 13.

[94] *Id.*

[95] In all, the Commission sought information from nine retailers: Best Buy Co., Inc., Target Corporation, Wal-Mart Stores, Inc., Blockbuster, Inc., Circuit City Stores, Inc., GameStop Corp., Musicland Group, Inc., Trans World Entertainment Corp., and Wherehouse Entertainment, Inc. (Wherehouse Entertainment subsequently was acquired by Trans World Entertainment.) These companies were selected based on the following criteria: each retailer sells at least one type of restricted product R-rated movies, Parental Advisory-labeled recordings, or M-rated

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video games) and each has a large number of retail outlets. The Commission requested information about the companies' policies affecting the sale or rental of restricted products, and about efforts to inform and educate parents regarding the rating and labeling systems for movies, music, and electronic games.

[96] *See* RIAA Parental Advisory Program Guidelines, effective April 1, 2002, at 2.

[97] In response to the Commission's "continued criticism of the recording industry for advertising to teens," the RIAA has noted that most recordings are available in an "edited version" and that recording companies advertise these edited versions "as well as and along with" the versions carrying the parental advisory label. Letter from Hilary Rosen, President and CEO, Recording Industry Association of America, to the Honorable Timothy J. Muris, Chairman, Federal Trade Commission (Apr. 26, 2002) (on file with the Commission). During testimony, Ms. Rosen explained, "[s]ince much of the reason that music marketing is different from other media is the existence of edited versions of the same product which is sold with explicit versions, we have significantly increased awareness of edited versions of these recordings." Statement of Hilary B. Rosen, Chairman and CEO, Recording Industry Association of America, House Committee on Telecommunications and the Internet, "Recording Industry Marketing Practices: A Check-Up," (Oct. 9, 2002) at 18.

The RIAA guidelines note that "[i]f an edited version is also available for sale, consumer advertising may also contain language indicating such a version of the recording is available." *See* RIAA Parental Advisory Program Guidelines at 5.

[98] *See* note 7, *supra*.

[99] For all the recordings reviewed, marketing plans or other documents indicated that the music companies would place paid advertising on one or all of these cable channels.

[100] *See* Appendix C for demographic information for these programs.

[101] Although cable music channels may air edited versions of some of these music videos, the marketing materials for explicit-labeled recordings frequently stress the importance of placing

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music videos on these channels. As noted in past Commission reports, these videos, even if edited to remove some explicit content, continue to play a key role in promoting the sale of explicit recordings to an under-17 audience. *See* December 2001 Report at 15 n.84.

[102] The Commission purchased this data from VMS. *See* Appendix C for a list of cable shows monitored by VMS.

[103] The five major recording companies are: Universal Music Group ("UMG"), Warner Music Group ("WMG"), Sony Music Entertainment ("SME"), EMI Recorded Music ("EMI"), and BMG Entertainment ("BMG").

[104] Five of these recordings were associated with independent labels while the remaining eight were associated with UMG, WMG, SME or BMG. UMG ran ads for: *Mississippi: The Album* on *106th & Park* and *Rap City*; *Joe Budden* on *106th & Park, Rap City, Total Request Live* and *Direct Effect*; and *2 Fast 2 Furious Soundtrack* on *Rap City* and *Direct Effect*. WMG ran ads for *14 Shades of Grey* on *Total Request Live* and *Direct Effect*. SME ran ads for *Da Unbreakables* on Rap City and for *Streetsweeper* on *106th & Park* and *Rap City*. BMG ran an ad for *Best of UGK* on *Rap City* and one ad for *Bittersweet* on *106th & Park*. EMI ran no ads for explicit-content recordings during the monitoring time period.

Independent record companies (Koch, FUBU, Ready! Set! Go!, and Landspeed) ran ads for *All or Nothing, Murda Mix Tape, Firestarr, Movement* and *Headphone Masterpiece* on *106th & Park, Rap City*, and *Total Request Live*.

[105] These data provide information about the first time a television ad is aired and was obtained from VMS.

[106] UMG ran ads on *106th & Park* for *From Me to You, A Gangster and a Gentleman, Aziatic, Better Dayz, Diplomatic Immunity, Electric Circus, From Tha Roota to Tha Toota, Legend of the Liquid Sword, Get Rich or Die Tryin', Ghetto Heisman, Girl Interrupted, God's Favorite, Mississippi: The Album, Nellyville, Philadelphia Freeway, Power in Numbers, The Blueprint 2: The Gift & The Curse, The Fix, The Last Temptation, Truthfully Speaking*, and *Snoop Dogg Presents: Doggy Style*

All-Stars – Welcome to Tha House Vol. 1. SME ran ads on *106th & Park* for *10 Years and Gunnin* and *God's Son*. BMG ran three ads on *106th & Park* for *Lord Willin Loud Records: The Early Daze*, and *Breaking News*. WMG ran ads on *106th & Park* for *Animal House*, *Redemption*, *Street Dreams*, and *Under Construction*. EMI ran one ad on *106th & Park* for *The Ownerz*.

[107] UMG ran an ad for *Get Rich or Die Tryin'* on *Direct Effect*.

[108] BMG ran ads for *Insomniacs Dream* and *It Ain't Safe No More*, SME ran an ad for *Steal This Album!*, and EMI ran an ad for *Tropical Storm* on *WWE Heat*.

[109] Demographic information about *Yugioh*, which indicated an audience of over 70% under the age of 17, was included in the marketing documents produced by the recording company.

[110] UMG ran an ad on UPN's *WWF Smackdown* for *Year of the Spider*. WMG ran ads for *14 Shades of Grey* on *WWF Smackdown* and syndicated airings of *The Simpsons*.

[111] EMI ran an ad on *Gilmore Girls* for *Escapology*.

[112] *See* September 2000 Report at 31. The Commission found in its review for this Report that recording companies still closely track the placement in these publications of feature stories about their artists who had released explicit-content labeled recordings, although this tracking is not a prominent aspect of the companies' marketing plans. Seven of the 14 marketing plans for explicit-content labeled recordings that the Commission reviewed indicated that features such as interviews or CD reviews were scheduled to run in publications with a majority or substantial teen audience, such as: *J-14*, *Metal Edge*, *Teen People*, *Right On!*, *YM*, *Alloy Girl*, *Seventeen*, and *Strength*.

[113] *Metal Edge*, *Right On!*, *CosmoGirl!*, *Thrasher*, *Teen People*, *YM*, and *Seventeen* were reviewed from July 2003 through October 2003.

[114] EMI ran one ad in *Right On!* and UMG ran one ad in *Thrasher*.

In its review of these same seven magazines over a 15-month period (June 2002 through December 2002 and March 2003 through October 2003), the Commission found that recording

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companies ran a total of 50 ads for explicit-content recordings in issues of *Metal Edge*, *Right On!*, and *Thrasher*. Specifically, BMG ran two ads in *Metal Edge*, one ad in *Right On!* and one ad in *Thrasher*. EMI ran one ad in *Right On!*, two ads in *Thrasher* and two ads in *Metal Edge*. SME ran two ads in *Right On!* and one ad in *Metal Edge*. UMG ran fourteen ads in *Metal Edge*, two in *Right On!* and three ads in *Thrasher*. Independent recording companies ran twelve ads in *Metal Edge*, two in *Right On!* and five in *Thrasher*. No ads for explicit content recordings were found in *Teen People*, *CosmoGirl!*, *Seventeen*, or *YM*.

[115] *See* April 2001 Report at 14 n.81; June 2002 Report at 39 n.55.

[116] *See* September 2000 Report at 33; December 2001 Report at 16.

[117] See Appendix C for website demographic information from Nielsen//NetRatings. Although demographic information was not obtained for Katrillion.com and AOL Teens Music, both of these sites are directed to teen audiences.

[118] RIAA Parental Advisory Program Guidelines at 5.

[119] The guidelines acknowledge that "[o]therwise, the small size of the album 'mini' may result in the Label appearing as an illegible black dot, or in confusion regarding the album designation." RIAA Parental Advisory Program Guidelines at 5.

[120] In addition, the revised guidelines now suggest that consumer print advertising contain language alerting consumers that an "edited" version of the recording is also available for sale, when that is the case. The RIAA recommends that this be accomplished by placing the wording "Edited Version Also Available" near the specific album or recording that has been designated with the explicit-content label. Finally, the revised guidelines added recommendations with respect to labeling the edited versions of explicit-content recordings and now suggest that an edited version of an album include an "Edited Version" label plainly displayed on either the front of the album (either on the cellophane or on the album cover) or on the top spine of the CD. *Id*.

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[121] A spot-check of explicit-content labeled recordings showed that the enhanced label is being placed on certain BMG recordings. In addition, the Commission found that the additional descriptive information for certain recordings was also displayed by some online retailers as part of the cover art. A review of product packaging, however, which included two BMG recordings, showed that, although the enhanced label was being used, neither label was part of the permanent cover art (they were removable stickers), nor did they meet the RIAA's size specifications. *See* Section III.D, *infra*.

[122] The Commission purchased this data from VMS. *See* Appendix C for a list of shows monitored by VMS.

[123] SME ran an ad for *Da Unbreakables* containing no Parental Advisory Label. Five out of eight ads for explicit content recordings placed by independent companies contained a Parental Advisory Label.

[124] *See* June 2002 Report at 13. A spot-check done for the Commission's December 2001 Report showed that 19 of the 48 television ads reviewed contained the PAL logo. *See* December 2001 Report at 18.

[125] Three of the four ads submitted by one recording company contained a legible PAL logo at the end of the ad while three of the five ads submitted by the other recording company displayed the PAL logo.

[126] *See* December 2001 Report at 18.

[127] The Commission reviewed *CosmoGirl!*, *Metal Edge*, *Right On!*, *Rolling Stone*, *Spin*, *Seventeen*, *Teen People*, *Thrasher*, *Vibe*, and *YM* from June 2002 through December 2002 and from March 2003 through October 2003.

[128] Specifically, BMG ran seven ads, three without Parental Advisory Labels. Of the four ads displaying Parental Advisory Labels, two were clear and conspicuous and two were blurry. EMI ran 14 ads, three without Parental Advisory Labels, 11 with Parental Advisory Labels. Of those 11, eight were clear and conspicuous and three were readable but small. SME ran five ads, all of which contained Parental Advisory Labels, three of which were clear and conspicuous and two of which were blurry.

UMG ran 40 ads, eight without Parental Advisory Labels, 32 with Parental Advisory Labels, 27 of which were clear and conspicuous and five of which were blurry. WMG ran six ads, one with a clear and conspicuous Parental Advisory Label, and five without Parental Advisory Labels. Independent labels ran 24 ads, 19 without Parental Advisory Labels, five with the label. Of those five, two were clear and conspicuous and three were readable but small.

[129] The most recent four-month period was from July 2003 through October 2003. UMG placed four ads, all with clear and conspicuous PAL logos. BMG and WMG placed one ad each with a clear and conspicuous PAL. EMI placed three ads, two with clear and conspicuous PAL logos and one with no PAL logo. Independent labels placed four ads – three with no PAL logo (Beer City) and one with a clear and conspicuous PAL logo (Big Cat).

[130] *See* September 2000 Report at 29.

[131] *See* June 2002 Report at 13-14.

[132] Virgin Megastore placed two ads in *Vibe* and used a clear and conspicuous PAL logo in both. Coalition Music Stores placed four ads in *Thrasher* – two with clear and conspicuous PALs and two with small, but readable, PALs.

A review of the same ten magazines over the 15-month period shows better results: 42 ads were placed by five different retailers, and in 79% (33 of 42) of the cases, the ad contained a clear and conspicuous PAL. Best Buy placed two ads in *Rolling Stone* with clear and conspicuous PALs, and 11 ads in *Spin* with clear and conspicuous PALs. Coalition Music Stores placed two ads in *Thrasher*, Target placed 15 ads in *Spin*, and Virgin Megastore placed three ads in *Vibe* – all with a clear and conspicuous PAL. In four cases, the ad contained a small but readable PAL, while five ads contained no PAL. Virgin Megastore placed one ad in *Spin* with a PAL that was small but readable. Coalition Music placed two ads in *Thrasher* that carried small but readable PALs. Best Buy placed one ad in *Spin* with a small but readable PAL. Ballbuster Hard Music placed two ads in *Metal Edge* without PALs and Virgin Megastore placed three ads in *Vibe* without PALs.

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[133] *See* June 2002 Report at 14.

[134] RIAA Parental Advisory Program Guidelines at 5.

[135] *Id.* at 7 (emphasis in original).

[136] *Id.* at 6-7.

[137] FTC's Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation (Oct. 29, 2003), transcript at 29 and 33 (*available at* www.ftc.gov/bcp/workshops/violence/index.html).

[138] *Id.* at 33.

[139] The websites reviewed were: www.daunbreakables.com, www.metallica.com, www.lizphair.com, www.staind.com, www.joebudden.com, www.50cent.com, www.blucantrell.com, www.crookedlettaz.com, www.coldonline.com, www.intothematrixmusic.com, www.madonna.com, www.typeonegative.net, www.3eb.com, www.mesterapp.com, www.djkayslay.com, www.smileemptysoul.com, www.gangstarronline.com, www.godsmack.com, www.marilynmanson.com, and www.lilkim.com.

See Appendix D for more detailed results of the survey.

[140] Only one of the sites used descriptive advisory language, *i.e.*, "Explicit," in addition to displaying the PAL logo to indicate that the site was promoting an explicit-content labeled recording.

[141] *See* June 2002 Report at 15.

[142] Some websites displayed the PAL logo on every page of the website, although it was not always legible. For example, the Godsmack and Joe Budden websites both displayed the PAL logo on every page, although the logo on the Joe Budden site was unreadable. The Marilyn Manson and 50 Cent websites also displayed the logo on nearly every page, although the label was quite small on some pages.

[143] *Id.*

[144] Ninety-five percent of the sites allowed the visitor to play all or part of the album at the site, while 90% allowed visitors to download music video clips. In June 2002, all the sites surveyed allowed visitors to listen to music, and 95% provided downloadable video clips. *See* June 2002 Report at 14-15.

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[145] The websites included: sonymusicstore.com, atlantic-records.com/store, artistdirect.com, circuitcity.com, amazon.com, awarestore.com, musictoday.com, and interpunk.com.

[146] The sites that gave some indication of explicit content during the purchase process were: sonymusicstore.com (linked from djkayslay.com, daunbreakables.com); atlantic-records.com/store (linked from lilkim.com); artistdirect.com (linked from coldonline.com and staind.com), circuitcity.com (linked from joebudden.com); musictoday.com (linked from metallica.com and 50cent.com); and interpunk.com (linked from mestcrapp.com). Several online retailers were linked from intothematrixmusic.com.

Sites that did not indicate explicit content for the recording included: amazon.com (linked from smileemptysoul.com, and typeonegative.net); awarestore.com (linked from lizphair.com); and musictoday.com (linked from madonna.com).

[147] These sites were: artistdirect.com (linked from coldonline.com and staind.com); circuitcity.com (linked from joebudden.com); musictoday.com (linked from metallica.com and 50cent.com); and interpunk.com (linked from mestcrapp.com).

[148] The sites reviewed were: Amazon.com, Bestbuy.com, Circuitcity.com, Samgoody.com, and TowerRecords.com. Cdnow.com, which had been reviewed in the past, is now teamed with Amazon.com and for this review was replaced with Circuitcity.com. The recordings examined at these retailers' websites were *Get Rich or Die Tryin'* by 50 Cent; *Liz Phair* by Liz Phair; *The Street Sweeper Vol. 1* by DJ Kayslay; *Smile Empty Soul* by Smile Empty Soul; and *Life is Killing Me* by Type O Negative.

See Appendix D for more detailed results of the survey.

[149] Language used by the websites included: "Explicit Lyrics," "Parental Advisory," and "Explicit Content."

[150] The June 2002 review found that visitors, regardless of age, could play either part or the full-version of songs from the explicit-content labeled recording in 16 out of 25 instances. June 2002 Report at 16.

[151] The PAL logo was legible in all but one instance.

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[152] These online services distribute music via the Internet in a legal, industry-approved manner.

[153] The following online services were reviewed: Apple's iTunes, MusicMatch, AOL's MusicNet, Full Audio's MusicNow, Napster (formerly operating as PressPlay), and RealNetworks' RealOne Rhapsody. MusicNet, MusicNow, Napster, and Rhapsody are subscription-based services that cost approximately $10 a month. These services allow users to purchase and download music (*i.e.*, to a listening device such as an MP3 player) for an additional charge per song. iTunes and MusicMatch allow users to purchase music on a song-by-song basis. All six services require the use of a credit card.

[154] iTunes, MusicMatch and MusicNet.

[155] Napster, Rhapsody and MusicNow.

[156] MusicMatch displayed a picture of the recording artist instead of the album cover art, and did not use the PAL logo.

[157] MusicNet, MusicNow, iTunes and Napster.

[158] MusicNet, iTunes and Napster.

[159] Napster, Rhapsody and MusicMatch.

[160] Napster gave the user the option of installing a parental password, which then allowed the user to "exclude" explicit-content labeled recordings from search results and prevent access. MusicNet excluded explicit content when the parental controls were set using the AOL software. Any setting other than "General 18+" excluded explicit-content labeled recordings.

[161] These services are Kazaa, Morpheus, LimeWire, and Overnet.

[162] Peer-to-peer file-sharing is a "type of transient Internet network that allows a group of computer users with the same networking program to connect with each other and directly access files from one another's hard drives." *See* SearchSecurity.com website at searchsecurity.techtarget.com/gDefinition/0,294236,sid14_gci212769,00.html (visited Dec. 10, 2003).

[163] The RIAA has called attention to the fact that peer-to-peer file-sharing services do not utilize the parental advisory labeling system. *See, e.g.*, Testimony of Hilary B. Rosen, Chairman

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and CEO, Recording Industry Association of America, House Subcommittee on Telecommunications and the Internet, "Recording Industry Marketing Practices: A Check-Up" (October 9, 2002), at 18-19.

Mitch Bainwol, current Chairman and CEO of the RIAA, recently commented during the Commission's Workshop that, in light of the popularity of file-sharing services with children for swapping music files, the lack of labeling on these services "blows a gaping hole through the labeling regime." FTC's Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation (Oct. 29, 2003), transcript at 30 (*available at* www.ftc.gov/bcp/workshops/violence/index.html).

[164] The Kazaa service provided password protection on its filter to prevent the setting from being altered by another user.

[165] *See, e.g.*, "File-Sharing Programs: Peer-to-Peer Networks Provide Ready Access to Child Pornography," General Accounting Office Report to the Chairman and Ranking Minority Member, Committee on Government Reform, U.S. House of Representatives (Feb. 2003); and "Children's Access to Pornography Through Internet File-Sharing Programs," Prepared for Rep. Henry A. Waxman and Rep. Steve Largent by Minority Staff, Special Investigations Division, Committee on Government Reform, U.S. House of Representatives (July 27, 2001).

[166] *See* "File-Sharing: A Fair Share? Maybe Not," at www.ftc.gov/bcp/conline/pubs/alerts/sharealrt.htm. In addition, in April 2004, the Commission held a public workshop on spyware, at which the relationship between peer-to-peer file-sharing software and spyware was discussed. Later this year, the Commission will issue a comprehensive report on the workshop, including the peer-to-peer software and spyware relationship.

[167] *See* December 2001 Report at 22. In its September 2000 Report, the Commission reported that 85% of unaccompanied children ages 13-16 were able to buy explicit-content labeled recordings at retail stores. September 2000 Report at 36.

[168] *See* Appendix B.

[169] *See* RIAA Parental Advisory Program Guidelines at 2.

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[170] *See* RIAA Parental Advisory Program, *Usage Guidelines for Audio and Music Video Product, available at* www.riaa.com/issues/parents/advisory2.asp (visited December 18, 2003).

[171] Although all of the PAL logos on the CDs used the standardized language recommended by the RIAA – "Parental Advisory – Explicit Content," nine of the14 labels failed to satisfy the recommended size requirement. All but one of the labels was a permanent part of the album cover art and not a removable sticker. One CD used a removable sticker under the cellophane shrink wrap; in this case, the use of a sticker was probably due to the absence of album cover art, and the CD was packaged and sold in a clear jewel case.

[172] *See* September 2000 Report at 24 & n.135.

[173] As determined by *Billboard* magazine, for the week of November 15, 2003.

[174] *See* September 2000 Report at n.136. However, a review of a smaller sample of recordings in June 2002 showed that 83% (10 of 12) of the CDs examined complied with RIAA guidelines regarding size and permanent affixation. *See* June 2002 Report at 17.

[175] September 2000 Report at 45.

[176] The Advertising Code of Conduct ("Adcode") at 23, 29 & 31 (2003).

[177] Letter from Patricia Vance, President, ESRB, to Richard F. Kelly, Staff Attorney, Federal Trade Commission (Oct. 27, 2003) at 6 (on file with the Commission).

[178] As noted in the Commission's June 2002 Report, the VSDA had expanded its Pledge to Parents program to include a certification program – Parents in Control. Participating retailers attest that they will allow parents to restrict the ability of their children to rent video games that the parents determine are inappropriate for them. As part of VSDA's Parents in Control Certification program, retailers also commit not to rent or sell to children any video games that are rated "Adults Only" or are "harmful to minors." VSDA's Pledge to Parents program goes further and asks retailers not to rent or sell M-rated video games to persons under age 17 without parental consent. That

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pledge, however, is not part of VSDA's Parents in Control program. *See* June 2002 Report at 19.

[179] *See* "Major Retailers Announce New Campaign to Enforce Video Game Rating System," at releases.usnewswire.com/GetRelease.asp?id=121-12082003 (visited Feb. 17, 2004).

[180] The marketing plans for several games indicated that radio promotions had been planned. The Commission was not provided with sufficient information to determine whether these promotions were targeted to a substantial under-17 audience.

[181] Many plans targeted either males 17-24 or males 18-24. Several included males 25-34 as a "secondary target audience." Others targeted 18-35 year old males.

[182] *See* Appendix C for demographic data on most of these programs. *Jackass* has a 30% under-17 audience share, according to Nielsen data.

[183] AdCode at 29.

[184] The Commission purchased this data from VMS. *See* Appendix C for a list of shows monitored by VMS.

[185] *See* Appendix C for demographic data on some of these programs. According to Nielsen data, the other programs have the following under-17 audience share: *Making the Band 2* (36%), *Sorority Life* (29%), and *Girlfriends* (30%).

[186] Information available in early 2003 indicated that approximately 41% of *Electronic Gaming Monthly's* readership was under 17 and 39% of *Playstation 2 Magazine's* readership was under 17. *Electronic Gaming Monthly's* latest readership survey released late this summer indicates that EGM's under-17 audience has dropped to 30%. *See* Appendix C.

[187] Three of the 24 video game ads were for M-rated games.

[188] The AdCode states: "If a title has a Rating Pending status, a company must use its best efforts to place ads for that title only in publications or outlets with an audience that is appropriate for the content within the title. Such efforts should be based on the company's good faith expectations and reasonable discretion regarding the anticipated rating." AdCode at 26.

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[189] June 2002 Report at 21. Moreover, publications that have majority under-17 audiences, like *GamePro* (subscription edition) and, to a lesser extent, *Nintendo Power*, continue to feature stories, covers, and other news regarding the development and release of M-rated games, despite their stated policies not to accept ads for such products. The Commission's review of marketing plans indicates that game makers often solicit and encourage such stories and product placements. Often such solicitations are highlighted as part of the marketing strategy for the game.

[190] NAD/CARU Case Reports (November 2002), at 522-23. CARU had also questioned as inappropriate a claim in the ad that the game is the "First All-Ages Brawler for the PlayStation2," noting that the game was "clearly not for all ages according to the ESRB rating system." The advertiser agreed to no longer use that claim. *Id.*

[191] Ten of 11 game publishers had placed ads on popular teen websites. *See* September 2000 Report at 49.

[192] AdCode at 31.

[193] *See* Appendix C at C-7.

[194] The AdCode expressly prohibits companies from promoting Mature-rated products at concerts or events where a "substantial portion" of the audience is likely to be under 17 years old. AdCode at 35.

[195] *Id.* at 36.

[196] *Id.*

[197] As one story noted, "Microsoft X-box sponsored this summer's Lollapalooza tour and set up 'GameRiot' tents to let ticket holders play against each other in games such as '*Tony Hawk's Underground,*' '*Midtown Madness 3*' and '*Return to Castle Wolfenstein.*'" *Return to Castle Wolfenstein* is rated M. *See* apps.lollapalooza.com/a_gameriot_comp.jsp (visited Nov. 11, 2003). This page contains an on-line registration form for game competitions. Under "Rules," it states that "Brute Force and Castle Wolfenstein competitions require a valid ID and will be restricted to 17 or older." Both games are rated M. The other games listed for the competition are rated T.

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[198] *See* "Infogrames announces Enter the Matrix," at www.gamershell.com/news_InfogramesannouncesbEntc.shtml (visited on Feb. 19, 2004): "There has been extensive creative crossover that has taken place in the development of the film and the game. Warner Bros., Joel Silver, the film's producer, and Larry and Andy Wachowski, the film's writers, creators, and directors, have clearly shown their appreciation for the connection between the interactive world and THE MATRIX audiences. We are thrilled to unite the two with the screening in our E3 booth of the first official trailer for THE MATRIX RELOADED and THE MATRIX REVOLUTIONS."

See also, "Enter The Matrix Review for Xbox," at www.gamer-talk.net/review33.html (visited Feb. 19, 2004): "At the end of the game there is a new movie trailer for the last and final Matrix movie, 'Matrix Revolutions' (due out in Nov 2003)."

[199] At the Commission Workshop, Dr. David Walsh of the National Institute on Media and the Family noted that: "Because of the power of marketing and because of the power of advertising, products that are cross-marketed . . . in very different ways are, I think, inevitably going to create an interest among kids for products that may not be appropriate for them." FTC's Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation (Oct. 29, 2003), transcript at 133-34 (*available at* www.ftc.gov/bcp/workshops/violence/index.html).

In its September 2000 Report, the Commission recommended that the movie and video game industries "(p)rohibit licensees from marketing action figures, toys, and other products associated with R movies and M games to under-age audiences and require a disclosure that the product is based on an entertainment product rated R or M." September 2000 Report at 54. The ESRB has not prohibited such marketing, although its AdCode does require licensors to ensure that licensees disclose on the product that "This [*state item*] is based on a Mature rated product." AdCode at 22.

[200] In the June 2002 Report, the Commission noted that the IDSA (now the ESA) had avoided imposing such a requirement for television because the descriptors can be difficult to read on a

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television screen and because it does not believe that descriptors can be displayed in a 30-second ad in a way that permits viewers to absorb the information. The IDSA had stated, however, that it would continue to consider this issue. *See* June 2002 Report at 22 n.95.

[201] Vance Letter, *supra* note 177 at Attachment D.

[202] The ad was for Capcom's *Devil May Cry*. The required voice-over, "Rated M for Mature," applies to television ads longer than 15 seconds. For ads 15 seconds or less, the required voice-over is shortened to "Rated Mature." ESRB requires the rating icon to be 22 scan lines in size. *See* December 2001 Report at 3 n.138.

[203] *See* June 2002 Report at 24.

[204] *See* Appendix A.

[205] These ads either: (a) omitted a descriptor assigned to the game; (b) changed the wording of the descriptor in a way that understated the level of violence, sex or strong language in the game; (c) for Rating Pending ads, left off the ESRB-required box containing the phone number and website address for the ESRB that could be called or visited to check if the game had subsequently received a rating; or (d) used rating icons substantially smaller than the size required by ESRB.

[206] Three companies placed poster inserts into the gaming magazines, one of which did not include an icon or descriptor. A poster in *Nintendo Power* for Universal Interactive's *The Scorpion King: Rise of the Akkadian* did not include an icon or a descriptor. Universal Interactive's inserts for *Lord of the Rings: The Fellowship of the Ring* and *Bruce Lee: Quest of the Dragon* both had icons. A poster for Atari's *Godzilla: Destroy All Monsters* had an icon on both sides of the poster. The poster insert for Crave Entertainment's *The Lost* contained an icon. Another poster insert by Crave for *UFC Throwdown* displayed a large and prominent icon.

[207] AdCode at 32. If the publisher's advertisement is smaller than one-fourth of a screen page (such as standard banner advertisement), the rating icon and content descriptors must be visibly and prominently displayed either directly on the

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advertisement and/or on a web page or product specific page that links directly from the advertisement. *Id.*

[208] *Id.* Because a game often can be purchased from several different pages, the AdCode would appear to require disclosures on multiple pages. For purposes of this review, however, the Commission deemed a site compliant with the AdCode so long as the appropriate rating information was displayed on a page that a visitor must click through to make a purchase.

[209] *Id.* at 33. The Commission's review showed that a visitor might navigate through several pages after requesting a download. Accordingly, as was done in its prior reports, the Commission deemed a site compliant with the AdCode's demo disclosure requirement, so long as the appropriate rating information was disclosed adjacent to the title of the game and either (a) in close proximity to the link that initiated the download, or (b) on any subsequent page through which a visitor must navigate during the download process.

[210] The Commission examined the following 20 electronic game websites: *Aquanox 2: Revelation*, *Casino, Inc.*, *Chrome*, *Codename Nina*, *Counter-Strike: Condition Zero*, *Crimsonland*, *Devastation*, *Die Hard Vendetta*, *Dino Crisis 3*, *Hunter the Reckoning – Wayward*, *Outlaw Volleyball*, *Postal 2*, *Purge*, *Return to Castle Wolfenstein*, *Silent Scope Complete*, *Soldier of Fortune 2: Double Helix*, *SWAT: Global Strike Team*, *The X-Files: Resist or Serve*, *Tom Clancy's Rainbow Six 3*, and *True Crime: Streets of L.A.*

See Appendix D for more detailed results of the survey.

[211] The notice reads in part: "DANGER. This site contains content not approved for consumption by children, senators, religious leaders and/or other easily damaged psyches, those seeking to enhance or establish political careers and/or possessed of delusions of grandeur." For the entire disclaimer, see www.gopostal.com/home.

The site for *Postal 2* had the "M" rating displayed at the time of the surf [sic]; two weeks later the rating had been removed from all sections of the site. The rating was subsequently restored.

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[212] CircuitCity.com was substituted for ToysRUs.com in this Report because Amazon.com and ToysRUs.com use the same Amazon.com site.

See Appendix D for more detailed results of the survey.

[213] Toys "R" Us, Kmart, Wal-Mart, Target, Circuit City, Staples, and CompUSA.

[214] *See* Statement of Hal Halpin, President of the IEMA, Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation (Oct. 29, 2003), transcript at 183 (*available at* www.ftc.gov/bcp/workshops/violence/index.html).

[215] *See* "Major Retailers Announce New Campaign to Enforce Video Game Rating System," at releases.usnewswire.com/GetRelease.asp?id=121-12082003 (visited Feb. 17, 2004).

IEMA members are: Best Buy, Blockbuster Entertainment, Circuit City, CompUSA, Gamesource, Electronics Boutique, Hastings Entertainment, Hollywood Video, KB Toys, Kmart, Meijer, Movie Gallery, Musicland, Shopko Stores, Target, Toys "R" Us, Transworld Entertainment and Wal-Mart. Taken together, these retailers sell approximately 85% of all computer and video games sold in the United States.

[216] *See* "Game Questions Frequency Table," Gallup Annual Teen Survey 2003, The Gallup Organization (on file with the Commission).

The M-rated *Grand Theft Auto III* was the number-one selling video game in 2001, *see* www.npd.com/press/releases/press_020207.htm; its M-rated sequel, *Grand Theft Auto: Vice City* was the top seller in 2002, with *Grand Theft Auto III* at number two. *See* www.npd.com/press/releases/press_030128a.htm. Through August of 2003, *Grand Theft Auto: Vice City* was number six on the list of best selling video games in 2003, some ten months after its release in October of 2002. *See* www.npd.com/press/releases/press_031001.htm.

Most of the games in the *Grand Theft Auto* series are rated M.

[217] Forty-eight percent of the younger respondents (males and females aged 13 to 15) indicated that they had played a game in the Grand Theft Auto series, as compared to 37% of

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those 16 or 17. *See Game Questions Frequency Table*, Gallup Annual Teen Survey 2003, The Gallup Organization (on file with the Commission).

[218] Seventy-eight percent of boys reported that M-rated games were among their top five favorites. Forty percent said their favorite game is rated M. *See* The National Institute on Media and the Family, *Eighth Annual Media Wise Video Game Report Card* (December 2003) *available at* www.mediafamily.org/research/report_vgrc_2003-2.shtml.

[219] *See* The NPD Group, Inc., *NPD's Annual 2002 Consumer Purchase Data for the Video Game Industry* (on file with the Commission).

[220] AdCode at 7-10.

[221] *Id.*

[222] *Id.*

[223] Vance Letter, *supra* note 177 at 8 of Attachment D.

[224] As the Commission has noted in its prior reports, the music industry rejects any suggestion that its Parental Advisory Label system should be age-based. The Commission is aware that such a suggestion would require fundamental changes in the music industry's labeling program. Nonetheless, the industry could still adopt standards that lessen children's exposure to ads for such recordings with a Parental Advisory. *See* June 2002 Report at 31.

[225] The Commission previously has suggested that the industries consider adopting ad placement standards that take into account a range of factors, including the percentage of the audience under 17, the total number of children reached, whether the content is youth-oriented, and the popularity with children and apparent ages of the characters or performers. *See* December 2001 Report at 35.

[226] The Commission encourages the music industry to consider implementing parental control mechanisms that would limit children's on-line access of explicit-content material. *See supra* note 160.

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[227] *See* June 2002 Report at 18; December 2001 Report at 35-36. Although the recording industry's labeling program does not provide the reasons for the advisory, one industry member, BMG, does include on its explicit-content labeled recordings an "enhanced" advisory label that indicates whether the recording has been stickered because of "Strong Language," "Sexual Content," "Violent Content," or "Sexual + Violent Content."

Appendix A: Marketing Violent Entertainment To Children: A Workshop On Industry Self-regulation

I. Introduction

On October 29, 2003, the Federal Trade Commission (FTC) sponsored *Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation*, a one-day public forum to discuss the state of self-regulation in the entertainment industry, including children's access to movies, music, and electronic games that have been rated or labeled as potentially inappropriate for them. The workshop featured five panels made up of representatives from industry associations, rating and labeling boards, retailers and retailer trade associations, parent and consumer advocacy groups, and other interested parties. Panel topics included:

- An Overview of the Rating and Labeling Systems;
- Discussion of Rating and Labeling Systems Among Industry, Consumer, and Research Groups;
- Cross-Marketing and Merchandising of Branded Products;
- Retailers' In-Store and Online Practices; and
- Next Steps: The Future Direction of Self-Regulation.[1]

The workshop opened with introductory remarks from FTC Chairman Timothy J. Muris, the Honorable Frank Wolf (R-VA), and the Honorable Joe Baca (D-CA). Noting the Commission's four earlier Reports to Congress on the marketing of violent entertainment to children, Chairman Muris outlined three basic principles that underlie the effectiveness of self-regulation: 1) that industries should market products consistent with their ratings and parental advisories; 2) that parents should have access to useful information on products ratings before purchase; and 3) that retailers should consider ratings and labels in adopting sales policies. Workshop Transcript, pp. 4-5 (hereinafter Tr. 4-5).[2] Showing a videotape of excerpts from several violent video games, Congressman Wolf raised concerns about the difficulty of shielding minors from depictions of graphic violence in entertainment media. Tr. 6. Congressman Baca discussed the reasons why he has proposed federal legislation to restrict the sale to children of certain violent video games, HR-669, the Protect Our Children from Video Game Sex and Violence Act. Tr. 13.

II. An Overview Of The Rating And Labeling Systems

The first panel of the workshop featured representatives of the movie, recording, and electronic game industries discussing their perspectives on the issue of self-regulation. Jack Valenti, President and CEO of the Motion Picture Association of America (MPAA), cited a study that its ratings system, now in its thirty-fifth year, enjoys 98% recognition by American consumers.[3] Among parents with children under 13, 76% described the system as "very useful" or "fairly useful" in helping them decide what movies are appropriate for their children to see. Tr. 25-26.

Mitch Bainwol, Chairman and CEO of the Recording Industry Association of America (RIAA), discussed his industry's approach to self-regulation. In contrast to the methods used by the movie and electronic game industry, the RIAA's system does not include information about the appropriateness of a particular product for children of certain age groups. Music deemed to contain "strong language or depictions of violence, sex or substance abuse" is simply labeled "Parental Advisory Explicit Content." According to Mr. Bainwol, the biggest development in the recording industry is the frequency with which youngsters acquire music by downloading it from peer-to-peer (P2P) networks such as Kazaa and Grokster instead of acquiring it from brick-and-mortar retailers or from authorized online sites such as Apple iTunes, Music Now, or AOL's MusicNet. Tr. 29. Mr. Bainwol pointed to three major challenges posed by this shift in the acquisition of music: 1) P2P networks contain no labeling or parental advisories whatsoever; 2) P2P networks bypass the point-of-sale barriers to acquisition imposed by salesclerks or parents; and 3) as many as half of the P2P files that include the names of major artists are actually pornographic material that merely use the name of the artists to lure consumers, including youth. Tr. 30,

108. Mr. Bainwol also announced at the workshop changes to the RIAA's parental advisory system, including encouraging the use of parental control filters on sites that allow the authorized downloading of music, improving the consistency of terminology used on websites to differentiate between explicit-content labeled recordings and non-labeled music,[4] and working with the FTC and other groups to improve www.parentalguide.org, a "one-stop" website offering parents information about the rating and labeling programs of the movie, electronic game, music, and television industries. Tr. 33-34.

Patricia Vance, President of the Entertainment Software Rating Board (ESRB), emphasized three components of the ESRB's self-regulatory system: 1) rating symbols, which provide general guidance about age appropriateness;[5] 2) content descriptors – thirty standardized phrases that alert parents to content elements that may be of interest or concern;[6] and 3) a code of conduct covering certain aspects of the industry's advertising and marketing practices. Tr. 35, 39. In recent months, the ESRB has added several new content descriptors intended to give consumers greater insight into the specific type of violence in a game, *e.g.*, cartoon violence, fantasy violence, or intense violence. In addition, the industry increased the visibility of ratings by repeating on the back of the game box the ratings symbols already included on the front of the box and by placing the rating next to the content descriptors in an authoritative seal. The ESRB also added the age "17+" to the Mature rating symbol and "18+" to the Adults Only rating symbol. Tr. 38. Ms. Vance showed examples of new public service announcements using celebrities to educate parents about the rating system for electronic games. Tr. 40-41. She noted that ESRB's Code of Conduct extends beyond rating and labeling to cover other marketing practices. For example, the code requires members to ensure that ratings information is legible on all advertising materials, prohibits publishers from targeting ads for M-rated games to those under 17, and imposes sanctions – including relabeling and fines – for code violations. Tr. 39-40. Ms. Vance cited opinion polls that 90% of parents surveyed believe that the ESRB's rating system provides the kind of information they need and that 75% find it to be an effective tool in helping them shield their children from inappropriate material. Tr. 39.

III. Discussion Of Rating And Labeling Systems Among Industry, Consumer, And Research Groups

In the second panel, the MPAA, the RIAA, and the ESRB were joined by consumer and research groups to discuss their observations and concerns about the rating and labeling systems.[7] Vicky Rideout of the Kaiser Family Foundation announced a new study released the day before the workshop demonstrating the pervasiveness of media in the lives of youngsters.[8] According to the study, more than 80% of parents say they have used the movie ratings, as compared with half who have used the music, video game, or television ratings.

Criticisms about the current systems fell into four general categories: 1) confusion about the meaning of terms used to rate or label entertainment products; 2) a lack of transparency and accountability in the systems; 3) the advertising and marketing to young audiences of materials rated or labeled as unsuitable for children; and 4) lax enforcement at the retail level.

One common theme voiced by members of this panel was the tension between keeping systems easy for parents to understand and providing the more detailed reasons for the ratings that many parents find helpful. Although parents appear to prefer content-based systems (ratings that disclose the nature of the material, *e.g.*, the presence of violence, objectionable language, or sexual content) to age-based systems (ratings that give a minimum age for which the product is suitable), the Kaiser Family Foundations's research suggests that parents understand age-based systems better than content-based systems. Tr. 49. David Kinney of PSVratings, Inc., pointed to the difficulty that parents have in grasping the intricacies of separate ratings systems for each form of entertainment.[9] Tr. 75. For example, Nell Minow of Common Sense Media raised concerns with what she perceived to be vague descriptors in the movie ratings system, *e.g.*, "mild thematic elements." Tr. 62. Warren Buckleitner of *Children's Software Revue* cited an instance in which a parent misunderstood the ESRB's "Mature" rating to refer to whether a particular child was mature for his or her age group. Tr. 70. He also suggested that putting content descriptors on the front of the video game box would make it more likely that parents would read and understand the information conveyed by the descriptors. Tr. 70. Vicky Rideout of the Kaiser Family Foundation mentioned that the television rating TV-Y7-FV – which alerts parents to the existence of fantasy violence – was occasionally misinterpreted to mean "family viewing." Tr. 49.

Other panelists pointed to seeming inconsistency within the systems themselves. Daphne White of The Lion & The Lamb Project noted that the ESRB descriptor on the E-rated version of "The Hulk" video game was "violence," whereas the descriptor on the T-rated version of the same game was "mild violence." Tr. 53. She also expressed concern that descriptors such as "blood and gore," "mature humor," "strong language," "use of drugs," or "violence" are insufficient to alert parents to the acts depicted in some popular video games, such as decapitation or urinating on corpses. Tr. 113. Several panelists expressed the opinion that parents would find it easier to use the ratings were the movie, music, and electronic game industries to adopt one uniform system for evaluating products.[10] Tr. 63-64, 74-75, 96.

Another critique raised by some panelists was what they perceived as the lack of clarity in the criteria by which products are rated or labeled. The Lion & Lamb Project's Daphne White noted that there are no published standards to explain to parents the line between a PG and PG-13 movie or a T- and M-rated video game. Tr. 52, 85-86. She also expressed concern that the ESRB descriptors give parents insufficient information to differentiate the meaning and significance of phrases such as "blood," "animated blood," and "blood and gore." Tr. 53. Ms. White and Nell Minow of Common Sense Media commented that there is no system whereby ratings can be challenged by members of the public.[11] Tr. 238-39, 62. Some panelists expressed concerned about "ratings creep," a downgrading over time that results in violent material receiving more lax treatment. Tr. 52, 62-63.

The ESRB's Patricia Vance cited research commissioned by her organization demonstrating that parents generally agree with how video games have been rated. Tr. 38. She also noted the finding in the FTC's 2000 Report that 83% of video game purchases are made by or with adults.[12] Tr. 34, 233. However, Dr. David Walsh of the National Institute on Media and the Family cited a peer-reviewed 2001 study suggesting some disagreement on the rating of violent entertainment.[13] Tr. 99. According to the study, if a movie is rated R or a video game is rated M, virtually 100% of parents agree with the designation. However, when a movie or game is rated PG-13 or T, parents are more likely to believe that the rating was too lenient. Parents surveyed found only 60% of the PG-13-rated movies and fewer than half of the T-rated video games to be suitable for children between 13 and 17. A common reason parents had for disagreeing with the industry rating was a belief that the industry rating was too lax with regard to the depiction of violence.[14] Dr. Walsh also voiced concern that because many major retailers will not carry products with AO or NC-17 ratings, economic considerations may dissuade ratings groups from using these designations even for products depicting the most violence. Tr. 100.

Although a number of panelists voiced appreciation for independent organizations that provide detailed information about content, David Kinney of PSVratings, Inc., expressed frustration that rating groups that are not affiliated with the industry are often denied advance access to new products, thereby making it difficult for them to provide timely information to parents. Tr. 89-90, 109. The Lion & Lamb Project's Daphne White and Common Sense Media's Nell Minow criticized the existing industry systems for not factoring in the opinions of experts in child development or considering the effect of violence on children.[15] Tr. 52, 61. Patricia Vance of the ESRB countered that specialists in child development had been consulted in the establishment of the rating system for electronic games. Tr. 35, 228. Ms. White, Ms. Minow, and Dr. Walsh of the National Institute on Media and the Family also questioned whether the rating and labeling process can ever be transparent as long as it is dominated by members of the industry. Tr. 51, 57, 60.

A third concern related to the advertising and marketing of material rated unsuitable for children in media with a high youth audience. Lara Mahaney of Parents Television Council cited data compiled by her organization demonstrating that some networks regularly advertised R-rated movies and M-rated video games in the prime time "family hour" or during programs with the highest number of viewers under 17. Tr. 65-68. The ESRB's Patricia Vance cited her industry's policy of not advertising M-rating products in print media with more than a 45% readership of children under 17 and on television programs with a viewership of more than 35% in that age group. Tr. 106. She noted, however, that even for programming with a large underage audience, *e.g.*, the Superbowl, the Grammy Awards, or "Survivor," the percentage of young viewers is 15% or less. Therefore, even if children are exposed to advertisements for products deemed potentially inappropriate for them, Ms. Vance maintained that it would be incorrect to suggest that the industry was targeting them. Tr. 106-07. Ms. Mahaney responded that, given that the total viewing audience is 80% adult, the ESRB's percentages are too high because virtually no prime time television program has enough children's viewership to meet the 35% figure. Tr. 107.

Some panelists raised a fourth concern: that even the best rating or labeling system can be circumvented by lax enforcement at the retail level. Tr. 104-05, 211, 234-35. *Children's Software Revue's* Warren Buckleitner noted that parents' access to useful information was being hindered by something as simple as retailers' placement of price tags over descriptors on packaging. Tr. 70. In response to evidence from the Commission's mystery shopper study demonstrating the ease with which many children could purchase products that have been rated as potentially inappropriate for them due to violent content, the ESRB's Patricia Vance cited efforts her industry has taken to train sales staff. Tr. 41, 105. However, she doubted that any system would be perfect, given the pressures that clerks have to move customers through the check-out line quickly. Tr. 105. Daphne White of The Lion & Lamb Project argued that retailers would have stronger incentives to stop the sale to children of movies, music, and electronic games deemed inappropriate for them if, like retailers of tobacco and alcohol, they faced fines or other legal sanctions for non-compliance. Tr. 114.

IV. Cross-marketing And Merchandising Of Branded Products

The third panel of the day explored the growing phenomenon of the cross-marketing and merchandising of branded entertainment products to children. Representatives of the MPAA, the RIAA, and the ESRB were joined by experts in youth and media advertising and members of consumer groups.[16] As background for the discussion, Michelle Erskine of Solutions Research Group pointed to statistics suggesting the overall pervasiveness that media has in the life of children. Tr. 124-25. Pete Snyder of New

Media Strategies cited a recent study done by his company that suggested that 67% of video game consumers are more likely to buy a game with a movie tie-in than a game without a tie-in. Tr. 129. His study of 350 teens and tweens also suggested that for 55% of them, the fact that a video game has been rated M makes it more likely that they will want to buy the product. Tr. 130-31.

Daphne White of The Lion & Lamb Project discussed the growing phenomenon of the sale of multiple entertainment products deemed appropriate for different age groups and yet marketed under the same title or brand, *e.g.*, a video game based on an R-rated movie may receive a T-rating and might have a soundtrack with or without a parental advisory on it. She cited examples of this form of cross-merchandising: an ice cream sundae tied to a PG-13 movie, Tr. 140; children's educational software featuring the same title character as a PG-13 movie, Tr. 138; nationally advertised brands of cookies and crackers with cross-promotions to PG-13 movies, Tr. 141; and a T-rated video game for a movie rated R for violence, Tr. 141-42. Dr. David Walsh of the National Institute on Media and the Family suggested that given the importance cross-marketing plays in a product's financial success, considerations regarding the potential negative effect of cross-marketing on child development will not likely be a part of the calculus. The issue becomes one of profit maximization and not whether playing the E-rated version of a video game tied to an R-rated movie would encourage children to want to see a movie that has been deemed inappropriate for them. Tr. 133-34.

The ESRB's Patricia Vance cited the electronic game industry's self-regulatory code that forbids the inclusion of an M-rated demo on a product rated E or T. She also cited industry standards prohibiting the advertising of M-rated products in print media with more than a 45% readership of children and on television programs with a viewership of more than 35% children. Tr. 143-44. The MPAA's Fritz Attaway commented that part of the movie industry's 12-point code is that studios will review their practices to further the goal of not inappropriately targeting children through the advertising and marketing of films, including promotional activities such as cross-marketing. Tr. 144-45. He also noted that some of the illustrations cited by Ms. White involved characters popularized in comic books or television shows long before the movie tie-ins were created. He believed that it was erroneous to presume that an action figure based on a character such as Spiderman would entice children to see the movie any more than the pre-existing comic strip would. Tr. 145.

It was noted that although internal industry documents indicate that some companies are careful in their licensing agreements to require age-appropriate labeling of products based on R-rated movies or M-rated video games or to specify that such products should not be offered for sale in toy stores, similar restrictions were not found in licensing agreements for products based on PG-13-rated movies. Tr. 146-47.

Dr. Walsh applauded the ESRB's advertising code for forbidding the marketing of products to children based on M-rated video games and suggested that the ESRB's standard should be adopted by other industries. Tr. 151. Industry representatives disagreed with any intimation of a concerted effort to use products rated appropriate for children to attract their interest in entertainment rated or labeled as unsuitable for youngsters of that age. Tr. 148. Daphne White responded that the convergence of entertainment – especially movies and video games – suggests that if the brand is rated as inappropriate for children, all products based on that brand should receive the same rating. Tr. 151-52.

V. Retailers' In-store And Online Practices

The panel opened with a discussion of the results of the Commission's most recent mystery shopper survey, which indicated that 69% of the teenage shoppers were able to buy M-rated video games, 81% were able to buy R-rated DVDs, 83% were able to buy explicit-content labeled recordings, and 36% were successful in purchasing tickets for R-rated films at movie theaters.[17] Members of the panel included national online and brick-and-mortar retailers, as well as representatives of retailer trade associations.[18]

Trade association representatives spoke about their industries' enforcement policies. According to the representatives, retailers in the DVD, electronic game, and theater industries generally enforce policies restricting access by children under 17 to M-rated video games or R-rated movies. Among music retailers, some simply do not stock explicit-content labeled recordings. Other music retailers enforce an age-based sales policy, and ask for proof of age or incorporate a prompt in the store's check-out system. Still others simply sell recordings without regard to age. Tr. 169-70. According to Jonathan Potter of the Digital Music Association and Jules Polonetsky of America Online, authorized purveyors of online music lack the ability to check a purchaser's age in the same fashion as brick-and-mortar retailers; however, many attempt to limit children's access to inappropriate material by, for example, featuring only the non-parental advisory labeled versions of songs on websites geared to youngsters or offering filtering software that will tailor a child's online experience in accordance to a parent's wishes – by preventing a child from downloading music labeled with a parental advisory, for example. Tr. 187, 200-01. Mr. Polonetsky also explained that AOL does not allow advertising for R-rated movies or music labeled with a parental advisory on Internet radio channels geared to teens. Similarly, online retailers' requirement of a credit card can act as an age filter. Tr. 204.

Representatives of the trade associations cited a number of steps their members have taken to educate parents about the rating or labeling systems and to prevent the sale to children of products that may warrant parental caution. Panelists discussed a variety of methods used to educate parents; many distribute in-store educational materials such as posters, shelf talkers, brochures, kiosks, counter cards, etc. Tr. 164-65, 168, 176, 182. In addition, many industry members incorporate ratings education into employee training programs. Tr. 165, 170, 178, 183, 192.

John Fithian of the National Association of Theatre Owners said that his organization sends periodic updates to member theaters explaining the reasons for the rating of upcoming movies so that sales personnel can answer questions from parents. Tr. 178. He also mentioned that NATO members must designate a corporate compliance manager responsible for ensuring enforcement with industry codes at their theaters and send them to semi-annual compliance training. Tr. 179. Raymond Smith, Senior Vice President of NATO member Regal Entertainment Group, discussed practical ratings enforcement approaches adopted by his company. For example, if a child is denied a ticket to an R-rated movie and purchases another ticket instead, the ticket is marked in a way that alerts the usher to monitor the child's movements in case he or she attempts to sneak into the R-rated movie. Mr. Smith's company also requires that parents who purchase tickets for R-rated movies for their children actually attend the movie with them. Tr. 197-98.

Beverly Porway of Toys 'R' Us discussed changes to the physical lay-out of retail stores designed to reduce the sale to children of material deemed inappropriate for them, such as the stocking of M-rated video games on higher shelves or behind sales counters so that they are inaccessible unless a patron specifically asks for them. Tr. 205-06. In addition, whenever sales personnel scan M-rated games in the check-out line, a cash register prompts them: 1) to ask for proof of age if the purchaser looks to be under 25; and 2) to inform adults that the game they are purchasing is M-rated. Tr. 191-92.

Panelists and members of the audience raised a number of issues, including the rating of music videos, Tr. 189; the rating of individual tracks – as opposed to entire albums – in a manner that would differentiate among songs warranting and not warranting a parental advisory, Tr. 188-89; the rating of supplemental materials included on DVDs, Tr. 207; and the ongoing problem of children downloading inappropriate materials from illegal P2P file sharing sites, Tr. 189-90. Another panelist pointed out that the mystery shop results – for the music, DVD, and game industries, at least – show that the industries have a long way to go to improve enforcement at point of sale. Tr. 211.

VI. Next Steps: The Future Direction Of Self-regulation

The purpose of the final panel of the day was to begin a dialogue on ways to address the issues raised in earlier sessions. Panelists included industry representatives, consumer groups, and health advocates.[19] Dr. Michael Rich of the American Academy of Pediatrics and the Center on Media and Child Health opened the discussion by applauding the collaborative spirit exhibited by workshop participants and expressing optimism that new technologies will allow the focused delivery of media content to appropriate audiences. Tr. 215. Commenting on the Kaiser Family Foundation's finding that children between the ages of eight and eighteen are exposed to almost eight hours a day of media, he gave a brief overview of research on the effects of media violence on children. Tr. 219-21.

Panels offered a number of suggestions for future efforts:

- more careful scientific study about whether industry rating systems accurately reflect how parents would rate the movie, music, or video game, Tr. 225;
- wider dissemination and use of www.parentalguide.org, a joint parent education project of the music, electronic game, movie, and television industries, Tr. 226-27;
- more detailed rating information in advertisements and at the point of purchase, Tr. 226, 111;
- closer cooperation among industry members, consumer groups, health advocates, and government agencies on educating the public about rating systems,[20] Tr. 71, 183-84, 225, 242-43;

- more effective self-regulation regarding the advertising and marketing to children of material deemed inappropriate for them, Tr. 105;
- links from industry websites to independent organizations that offer parents in-depth information about the content of movies, video games, or recordings, Tr. 227;
- parental access to alternate sources of information, including educational materials from pediatricians, Tr. 228-29;
- additional encouragement of parents to inform themselves on the influence of media on child development, Tr. 231-32;
- additional encouragement of parents to inform themselves on the use of ratings and labels, Tr. 241;
- continued encouragement of retailers to improve their performance in the FTC's periodic mystery shopper surveys, Tr. 234; and
- continued research on the effect of media violence on children. Tr. 220-21, 225.

Endnotes

[1] The Commission initially planned to include an additional panel of academics to present an overview of the research on the effects of violent media on children. After some of scheduled participants withdrew within days of the event, the panel was cancelled.

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[2] The workshop transcript is available on the FTC website at www.ftc.gov/bcp/workshops/violence/transcript.pdf.

[3] The MPAA's system designates movies with one of the following ratings: **G** (General Audiences. All ages admitted); **PG** (Parental Guidance Suggested. Some material may not be suitable for children); **PG-13** (Parents Strongly Cautioned. Some material may be inappropriate for children under 13); **R** (Restricted. Under 17 requires accompanying parent or adult guardian); and **NC-17** (No one 17 and under admitted).

[4] According to Mr. Bainwol, sites now use terms such as "PA" or "explicit" to designate explicit-content labeled recordings and terms such as "clean" or "edited" to designate non-labeled music. Given the variety of language currently in use, the RIAA pledged to work with sites to encourage consistency in this area. Tr. 33.

[5] The ESRB's system designates electronic games with one of the following ratings: **EC** (Early Childhood. Suitable for ages 3 and older. Contains no material that parents would find inappropriate); **E** (Everyone. Suitable for persons ages 6 and older. Titles in this category may contain minimal violence, some comic mischief and/or mild language); **T** (Teen. Suitable for persons ages 13 and older. May contain violent content, mild or strong language, and/or suggestive themes); **M** (Mature. Suitable for persons ages 17 and older. Titles in this category may contain mature sexual themes, more intense violence and/or strong language); **AO** (Adults Only. Suitable only for adults. Titles in this category may include graphic depictions of sex and/or violence. Adult Only products are not intended for persons under the age of 18.); and **RP** (Rating Pending). In 2002, of the 1229 games rated by the ESRB, almost two-thirds were rated E, slightly more than 25% were rated T, and less than 10% were rated M. Tr. 36.

[6] The ESRB's descriptors include. **Alcohol Reference** (Reference to and/or images of alcoholic beverages); **Animated Blood** (Cartoon or pixilated depictions of blood); **Blood** (Depictions of blood); **Blood and Gore** (Depictions of blood or the mutilation of body parts); **Cartoon Violence** (Violent actions involving cartoon-like characters. May include violence where a character is unharmed after the action has been inflicted);

Comic Mischief (Scenes depicting slapstick or gross vulgar humor); **Crude Humor** (Moderately vulgar antics, including "bathroom" humor); **Drug Reference** (Reference to and/or images of illegal drugs); **Edutainment** (Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product); **Fantasy Violence** (Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life); **Gambling** (Betting-like behavior); **Informational** (Overall content of product contains data, facts, resource information, reference materials or instructional text); **Intense Violence** (Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death); **Mature Humor** (Vulgar and/or crude jokes and antics including "bathroom" humor); **Mature Sexual Themes** (Provocative material, possibly including partial nudity); **Mild Language** (Mild references to profanity, sexuality, violence, alcohol, or drug use); **Mild Lyrics** (Mild references to profanity, sexuality, violence, alcohol, or drug use in music); **Mild Violence** (Mild scenes depicting characters in unsafe and/or violent situations); **Nudity** (Graphic or prolonged depictions of nudity); **Partial Nudity** (Brief and mild depictions of nudity); **Sexual Violence** (Depictions of rape or other sexual acts); **Some Adult Assistance May Be Needed** (Early Childhood Descriptor only); **Strong Language** (Profanity and explicit references to sexuality, violence, alcohol, or drug use); **Strong Lyrics** (Profanity and explicit references to sex, violence, alcohol, or drug use in music); **Strong Sexual Content** (Graphic depiction of sexual behavior, possibly including nudity); **Suggestive Themes** (Mild provocative references or materials); **Tobacco Reference** (Reference to and/or images of tobacco products); **Use of Drugs** (The consumption or use of illegal drugs); **Use of Alcohol** (The consumption of alcoholic beverages); **Use of Tobacco** (The consumption of tobacco products); and **Violence** (Scenes involving aggressive conflict).

[7] Representatives of the MPAA, the RIAA, and the ESRB were joined by Warren Buckleitner, editor of *Children's Software Revue*; David G. Kinney, President and CEO of PSVratings, Inc., Lara Mahoney, Director of External Affairs of the Parents

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Television Council; Nell Minow of Common Sense Media; Vicky Rideout, Vice President of the Kaiser Family Foundation; Dr. David Walsh, President of the National Institute on Media and the Family; and Daphne White, Executive Director of The Lion & Lamb Project.

[8] Kaiser Family Foundation, Zero to Six: Electronic Media in the Lives of Infants, Toddlers and Preschoolers (2003), www.kff.org/entmedia/3378.cfm. According to the study, approximately 25% of two-year-olds have televisions in their bedrooms. *Id.* at 5. By the time they are in the four-to-six-year-old age range, half of all children have played video games and 70% have used computers. *Id.*

[9] Although not the topic of this workshop, the television industry uses its own rating system that designates programs as **TV-Y** (appropriate for all children), **TV-Y7** (directed to children age 7 and above), **TV-Y7-FV** (directed to children age 7 and above and containing scenes of fantasy violence), **TV-G** (suitable for all ages), **TV-PG** (parental guidance suggested), **TV-14** (parents strongly cautioned), and **TV-M** (for mature audiences only).

[10] According to David Kinney, in focus groups conducted by PSVratings, parents found multiple rating systems to be confusing and expressed a preference for a system that would provide more information about content and would apply across the board to movies, music, video games, and television. Tr. 74-75. Nell Minow of Common Sense Media cited a study conducted by her organization showing that 78% of parents surveyed favor a single rating system applied to all media. Tr. 96.

[11] The ERSB's Patricia Vance noted that her organization has a toll-free telephone number and consumer hotline for feedback from parents and other interested parties. Tr. 240.

[12] *See* Federal Trade Commission. *Marketing Violent Entertainment To Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, Appendix F (Sept. 2000), available at www.ftc.gov/reports/violencelappendicesviorpt.pdf.

[13] David A. Walsh & Douglas A. Gentile, *A Validity Test of Movie, Television, and Video-Game Ratings*, 107 Pediatrics 1302 (June 2001).

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[14] *Id.* at 1305-06.

[15] During the question-and-answer period, Milwaukee Alderman Joe Davis observed that Children's exposure to violent media was having deleterious effects on their behavior and could ultimately raise issues of national security. Tr. 115-16.

[16] Panelists included Dean Garfield, Associate Counsel of the RIAA; Michele Erskine, Vice President of Solutions Research Group, Inc.; Pete Snyder, CEO of New Media Strategies; Fritz Attaway, Executive Vice President of the MPAA, Patricia Vance of the ESRB; Dr. David Walsh of the National Institute on Media and the Family; and Daphne White of The Lion & Lamb Project.

[17] Federal Trade Commission, *Results of Nationwide Undercover Survey Released* (Oct. 14. 2003), available at www.ftc.gov/opa/2003/10/shopper.htm.

[18] Panelists included Sean Bersell, Vice President-Public Affairs of the Video Software Dealers Association (VSDA); Jim Donio, Executive Vice President of the National Association of Recording Merchandisers (NARM); John Fithian, President of the National Association of Theatre Owners (NATO); Hal Halpin, President of the Interactive Entertainment Merchants Association (IEMA); Jules Polonetsky, Vice President-Integrity Assurance of America Online, Beverly Porway, Regulatory and Litigation Counsel for Toys 'R' Us, Inc.; Jonathan Potter, Executive Director of the Digital Media Association (DiMA); and Raymond L. Smith, Jr., Senior Vice President & Human Resources Counsel of Regal Entertainment Group.

[19] Panelists included Mitch Bainwol of the RIAA; Douglas Lowenstein, President of the Entertainment Software Association (ESA); Dr. Michael Rich of the American Academy of Pediatrics; Jack Valenti of the MPAA; Patricia Vance of the ESRB; Dr. David Walsh of the National Institute on Media and the Family; and Daphne White of The Lion & Lamb Project.

[20] One industry member voiced concern that attempts to work cooperatively with other groups had not been successful in the past, but expressed optimism that future efforts would be more successful. Tr. 41.

Appendix B: Mystery Shopper Survey

This Appendix reports on the third nationwide undercover or "mystery shopper" survey that the Commission has conducted to determine the extent to which the entertainment industries restrict children's access to R-rated movies, explicit-content labeled music recordings, and M-rated games at the retail level. The Commission first conducted an undercover "mystery" shopper survey for the September 2000 Report to determine whether unaccompanied 13- to 16-year-olds could purchase tickets to R-rated movies, explicit-content labeled recordings, and M-rated games.[1] A follow-up survey was published in the December 2001 Report.[2] For the first time in this survey, the Commission also surveyed practices at stores selling R-rated movies on DVD.

A. Industry Self-Regulatory Policies for Limiting Access

It is the retailers who implement any sales restrictions included in the self-regulatory rating and labeling programs. For movies, in response to the September 2000 Report, the National Association of Theatre Owners ("NATO") adopted a twelve-point initiative that, among other things, reaffirmed its existing ID-check policy for R and NC-17 films and promised to take steps to encourage theaters to enforce the rating system. In addition, NATO members appointed compliance officers to strengthen enforcement of the program. The Video Software

Dealers Association ("VSDA") encouraged retailers to review their ratings education and enforcement policies to ensure compliance with VSDA's standard that R-rated movies and M-rated video games not be sold or rented to persons under age 17 without parental consent.[3]

The International Digital Software Association ("IDSA," now the Entertainment Software Association or "ESA") encouraged retailers to consider adopting a program not to sell M-rated games to persons under 17. The Interactive Entertainment Merchants Association, which supports member retailers' rating education efforts, has indicated that many of its members, including Wal-Mart, Blockbuster, Toys 'R' Us, Electronics Boutique, Target, and Circuit City, have adopted policies restricting the sale of M-rated games.[4] Retailers such as Kmart, Staples, and CompUSA have also adopted policies restricting sales to those under 17. With respect to retailer efforts to limit sales of M-rated games, IDSA previously noted that it "supported these efforts even though the Mature rating itself does not say that a title is not appropriate for a person under 17; rather, the rating says that the content 'may not be suitable' for a person under 17."[5]

For music recordings, the industry's labeling program provides no age-based guidance. According to the National Association of Recording Merchandisers, some music retailers choose not to carry explicit-content labeled recordings or stock only an edited version, while others restrict sales to children. Still other retailers "choose not [to] interfere with parenting decisions and sell entertainment products without regard to age."[6] Some music recording retailers have indicated that they have policies not to sell such recordings to children.

B. The Mystery Shopper Surveys

The 2003 mystery shopper survey followed substantially the same methodology as the two previous surveys. For each, the Commission, through a contractor,[7] recruited 13- to 16-year-olds across the country to attempt to purchase movie tickets, music, or electronic games. Each teenage shopper visited one retail location for one or more of the entertainment products.[8] In all three surveys, shoppers attempted to purchase either a ticket to an R-rated movie, an explicit-content labeled CD,[9] or an M-rated electronic game; for the first time in the 2003 survey, the shoppers also attempted to purchase an R-rated movie on DVD. Parents transported the children to the store or theater but were instructed not to accompany the children during the transaction. The contractor required shoppers to submit proof of age and verification for completed purchases by submission of a receipt.[10] In each survey, the panel was divided almost exactly between boys and girls and between younger and older shoppers (13 or 14 versus 15 or 16).

After attempting purchase, the shopper completed a questionnaire on the contractor's proprietary website.[11] In each survey, the questionnaire asked three questions:

1. Was there a sign, poster, or other information to inform customers of the rating/advisory system or the store/theater's policy on rating/advisory enforcement?
2. Was the child able to buy the product or admission ticket?
3. Did the cashier or clerk ask the child's age before purchase?

C. The 2003 Mystery Shopper Survey

In the 2003 survey, shoppers from 39 states attempted to purchase movie tickets, DVD movies, music recordings, and electronic games at 899 theaters and stores during July and August 2003. The sample size for each industry was 225, with slight variation. Almost half (49%) of the shoppers were female; about half (51%) were younger shoppers (13 or 14 years old). The results of the 2003 survey are reported in Table 1.

Table 1
Total Percentages of Yes and No Responses to 2003 Survey Questions

Product		Movies at the Theater (in percent, of 225 shoppers)	Movies on DVD (in percent, of 226 shoppers)	Music (in percent, of 223 shoppers)	Games (in percent, of 225 shoppers)
Question 1 Was Rating Information Posted?	NO	38	74	79	73
	YES	62	26	21	27
Question 2 Was the Child Able to Make a Purchase?	NO	64	19	17	31
	YES	36	81	83	69
Question 3 Did an Employee Ask the Child's Age?	NO	52	81	87	76
	YES	48	19	13	24

Key Findings

The key finding in this survey was the statistically significant, across-the-board improvement in retailers' performance in restricting children's access to potentially inappropriate content, in comparison with prior surveys (as shown in Table 2). Each of the industries that were previously surveyed were significantly[12] more successful in limiting children's access to potentially inappropriate content in 2003 than they had been in the 2001 survey. Both the electronic game retailers and movie theaters – but not music stores – were significantly more successful in limiting children's access than they had been in the initial survey in 2000.

Table 2

Was the child able to buy the product or admission ticket? (Percent "Yes")

Entertainment Product Type	2000 Survey Results	2001 Survey Results	2003 Survey Results
Movie Theater Ticket	46%	48%	36%
Movie on DVD	n/a	n/a	81%
Music Recording	85%	90%	83%
Electronic Game	85%	78%	69%

For each type of entertainment product, more shoppers noted that rating information was posted, and reported that the retail clerk or cashier had asked the shoppers' age. While these changes were not statistically significant in most cases, as shown in Table 3, they were in the same positive direction for each industry. Comparing the current survey to the first survey in 2000, for each of the industries previously surveyed, more teen shoppers noted signs or other information informing customers of the rating or advisory system or the venue's policy on enforcement in 2003 than in 2000; these differences were significant in each case. Another statistically significant difference from the 2000 survey was that more game retailers asked the shoppers' age.

Table 3

Results on Availability of Rating Information/"Ask Age" Questions

Entertainment Product Type	Does the venue provide information about ratings or ratings enforcement? (Percent "Yes")		Did the cashier or clerk ask the child's age? (Percent "Yes")	
	2001	**2003**	**2001**	**2003**
Movie Theater Ticket	59%	62%	39%	48%*
Movie on DVD	n/a	26%	n/a	19%
Music Recording	12%	21%*	10%	13%
Electronic Game	26%	27%	21%	24%

* Denotes a statistically significant difference from the 2001 survey. Data for comparison were not available for DVD retailers.

As in the previous surveys, theaters displayed rating information, asked young shoppers their ages, and restricted purchases more consistently than other entertainment retailers. Music retailers again were the least likely to provide information about the parental advisory, check shoppers' ages, and restrict purchases. DVD retailers' practices, surveyed for the first time, were approximately comparable to the music retailers' results for each measure, with slightly more DVD retailers posting rating information, asking age, and restricting purchase.

Availability of Information about the Rating or Labeling Systems

At theaters, 62% of the shoppers reported seeing posters, signs, or other information about the rating system. The figures for the other three industries were in a lower range: 27% saw rating information at electronic game retailers, 26% at DVD retailers, and 21% at music retailers.[13] More shoppers at music stores (21%) reported that they had seen rating information than in the 2001 survey (12%).

Purchase Data

While there is room for improvement in each industry, theaters have the best record in limiting sales of rated or labeled entertainment to children under 17. The 2003 survey results show that 36% of the teenage shoppers were successful in purchasing tickets for admission to an R-rated film at movie theaters. By contrast, 69% of the teenage shoppers were able to buy M-rated games, 81% were able to buy R-rated movies on DVD, and 83% were able to buy explicit-content labeled recordings. As noted earlier, sales restrictions are not part of the music industry's parental advisory program but individual retailers may adopt policies on their own initiative.

Age-Check Data

As a corollary to the purchase question, shoppers also noted whether the store or theater asked the shopper's age when the teen approached the cashier to purchase the product or ticket. Music retailers asked the age of 13% of the shoppers, DVD retailers 19%, game retailers 24%, and movie theaters 48%. The extent to which movie theaters checked the ages of the teen shoppers increased from 39% in the 2001 survey to 48%, a significant difference. More stores selling music and games also asked age, although these changes were not significant.

Age, Gender, and Major Chain Comparisons

As one would expect, older shoppers were more successful in purchasing a ticket to an R-rated movie, an explicit-content labeled recording, or an M-rated electronic game than younger shoppers. Shoppers' success in purchasing R-rated movies on DVD, by contrast, did not vary significantly according to the age of the shopper. The youngest shoppers, 13-year-olds, were able to purchase rated or labeled entertainment at 73% of DVD retailers and 69% of the music retailers, compared to 56% of electronic game retailers and 25% of movie theaters.[14] More girls than boys were able to purchase R-rated DVDs – possibly because cashiers asked only 15% of girls their age, compared to 23% of boys.

A comparison of major[15] chains in each industry showed that the largest theater circuits, DVD retailers, and music retailers were more likely to display signs, posters, or other information about the rating system than non-majors. Moreover, major movie theater chains and DVD sellers were more likely to restrict sales to minors and to ask age. Major music retailers were less likely to restrict sales and to ask age than non-majors. At major theater chains, 28 of 99 shoppers (28%) attempting to buy tickets to an R-rated movie were successful;[16] at large music retailers, 114 of 127 shoppers (90%) were able to purchase explicit content-labeled recordings;[17] and at large electronic game retailers, 92 of 132 shoppers (70%) were able to purchase M-rated electronic games.[18] At large DVD retailers, 89 of 120 shoppers (74%) were able to purchase R-rated DVDs.[19]

There were no statistically significant differences between major and non-major game retailers. The Commission also analyzed separately, as in the December 2001 Report, the results for seven major game retailers that were recognized in the December 2001 Report as having policies to restrict sales of electronic games to minors. Toys 'R' Us, Kmart, Wal-Mart, Target, Circuit City, Staples, and CompUSA were more likely than other game retailers to post information about the rating system (42% vs. 22%), to restrict sale (45% vs. 26%),[20] and to ask age (36% vs. 19%). These seven chains allowed 29% of the 13-year-olds (5 of 17) to purchase M-rated games. While other retailers have announced enforcement policies since 2001 – so the results cannot be characterized as a comparison of stores with policies versus those without – the relative success of these retailers' enforcement in relation to the industry as a whole suggests that retailers' commitment to enforce restrictive age policies can make a difference. Still, even at these retailers, a majority of teen shoppers (55%) were able to purchase an M-rated game.

Comments on the Undercover Shops

As part of the mystery shopper survey, the parents were asked to provide one or two sentences of commentary about the purchase attempt and describe any interaction that occurred between the child and the employees at the store or theater. The comments shed light on industry practices in a way that numbers alone do not. Many of the comments reflect that the cashier sold the product without a second thought. In contrast, some teen shoppers came across cashiers who told them that they (the cashiers) would lose their jobs for selling the product to the teen. Other shoppers encountered clerks who were complicit in the process, selling the product with full knowledge that the child was below the restricted age. One phenomenon was that strangers sometimes offered to stand in for the parent so that the child could purchase the product. Selected verbatim comments follow:[21]

- When the child asked for tickets to Terminator 3, the cashier seemed astonished that she wanted to see this movie at her age and asked, "Do you know that is an R-rated movie?" The cashier did not allow the child to buy the product. (Movie at theater, age 15)
- The employee asked to see the child's ID. She looked around, said he was close enough, and sold him the ticket. (Movie at theater, age 16)
- The child attempted to purchase an M-rated video game but the cashier asked for a parent [sic] consent. The cashier offered to hold the game until a parent was present. (Game, age 13)
- The clerk even asked another clerk if it was okay to sell an R-rated movie. [The purchase attempt was successful.] (DVD, age 13)
- My child asked for a copy of Soldier of Fortune II, which was in a locked display case. The clerk got it for him, sold it to him, and asked him to come back in to let him know how he liked the game. (Game, age 14)

- Child presented the CD to cashier and made the purchase with no questioning. (Recording, age 13)

- This employee successfully stopped my son from making this purchase. There was a replacement item purchased. (Game, age 13)

- When the employee discovered the child was only 13, he asked if his parents were with him. Once he established that the child was alone, he said, "Sorry buddy, I can't sell you this, or I'll get fired." (DVD, age 13)

- The employee asked the child to which movie he wanted to buy a ticket. The child said, "Bad Boys II." He sold the child the ticket. Another employee was asking for identification from customers. (Movie at theater, age 16)

- The employee asked if the child was 17. He said he was almost 16 and the employee continued with the transaction. (Game, age 15)

- The store clerk asked if he could help my daughter and her friend, who was also 13 years old. They said they were looking for a birthday gift for their little brother, and the store clerk suggested the above M-rated title. (Game, age 13)

- The employee did not ask the child's age. The employee said, "I'll put you in as a child so you can get the cheaper price." (Movie at theater, age 15)

- The man behind the counter was worried about the age of the child. In fact he was trying to save him money by having him buy a pre-viewed [sic] one. (Game, age 14; purchase attempt was successful)

- There was a woman with a yellow Granger T-shirt, that neither [the child] or I knew who said, "I will vouch for her." She did tell the cashier that she was not with her. (DVD, age 13; purchase attempt was successful)

- The clerk asked the child his age and very politely informed him that she could not sell him the movie. A customer behind him in line said that she was his neighbor, she isn't, and would vouch for him but the clerk declined. (DVD, age 14)

- The package had a white sticker over the rating. The employee did not ask for my child's age, and the child was allowed to buy the product. (DVD, age 15)

- The employee asked the child if it was "cool with his mom" that he bought the CD even though it carried the parental advisory. No further inquiries or proof of age were asked, and the child was allowed to purchase the product. (Recording, age 15)

- My child was able to purchase an R-rated DVD. The clerk did not ask for an age, and there were no signs posted stating they would not sell R-rated DVD's to minors. (DVD, age 14)

- There were three employees at the counter when my daughter asked for the ticket to the 9:30 show. They did not ask her age, and they gave her the student rate without asking for her ID. The theater was showing two PG-13 films also. (Movie at theater, age 14)

- She asked for the game, and then this conversation followed: "Are you 18?" "No." "Are you 17?" "No." "OK, well technically I can't sell this to you, but if anyone asks, you didn't get it here." (Game, age 14)

- My son was informed that he was not old enough to purchase the ticket, and that he would have to be accompanied by an adult. Also, he was told the movies he could see for his age. (Movie in theater, age 13)

- The employee asked for proof of age and told my son, "No one here will sell you a ticket to that movie." (Movie in theater, age 15)

- The employee did not look at the game while selling it. The employee just scanned it and took my child's money. (Game, age 14)

- My child went through the U-scan, and it said to show verification of age to the cashier, but it went away without the child having to show her driver's license in order to complete the purchase. (Recording, age 16)

- My son took the CD to the register. He had his money out as he handed the CD to the clerk. She looked at the CD, and asked if he had identification. He said he didn't. She said he couldn't buy it. (Recording, age 14)

- My child observed a sign stating they didn't allow teens under 17 to enter R-rated films. The ticket was purchased during a slow period, and there were no adults in sight. No one asked his age. (Movie in theater, age 15; purchase attempt was successful)

- My child was able to purchase a CD with the parental advisory label. There were no signs posted, and the clerk did not ask for age or identification. (Recording, age 15)

- The employee told my daughter that the video game was Mature in case it made any difference to her. The employee did not ask my daughter how old she was, and she was allowed to buy the product. No signage was visible that explained the rating system. (Game, age 15)

- The cashier in the music/movie department did not question my daughter when she purchased the R-rated DVD. There were signs posted at multiple registers saying they required proof of age for such purchases. (DVD, age 16)

- No information regarding a rating/advisory system was offered on the sales floor. At the checkout an associate completed the child's CD transaction without asking his age. (Recording, age 15)

- The cashier said, "Hello, will there be anything else?" When the child said no, she rang up the sale, saying thank you as she gave him the change and the R-rated DVD purchase. (DVD, age 16)

- The child asked an associate for assistance in removing the video game from the locked case. The child then walked over to the cash register, and was able to purchase the video game with no questions asked. (Game, age 16)

Mystery Shopper 2003 Survey Questionnaire

1. Item child attempted to purchase
    ___ R-rated DVD
    ___ R-rated Movie Ticket
    ___ M-rated Video Game
    ___ Music Recording with Parental Advisory

2. Name of motion picture at theater, music recording, video game, or DVD the child attempted to purchase: ______________________

   For movie theaters and DVD's: provide title; For music recordings: provide artist's name and title; For video games: provide manufacturer name and title.

3. Did you see any sign, poster, or other information to inform customers of the rating/advisory system or the store/theater's policy on rating/advisory enforcement?
   ___ Yes
   ___ No

4. Was the child able to buy the product?
   ___ Yes
   ___ No

5. Did the employee at the store/theater ask your child's age?
   ___ Yes
   ___ No

6. Purchase Comments

   Provide 1-2 sentences of commentary about purchase. Describe any interaction that occurred between your child and store/theater employees.

7. Name of store/theater visited: ______________

8. City/State where store/theater is located:
   ____

9. ZIP Code where store/theater is located:
   ____

10. For movie theaters:
    Number of movies currently shown at the theater
    ___ One
    ___ Two
    ___ More than two

11. Identifying information appearing on receipt/ticket

    Enter information that details the name and location of the store/theater exactly as it appears on the receipt/ticket. If the original purchase was refused and an alternate purchase was made, enter the information from that purchase.

Evaluator Profile:

12. Parent's Evaluator ID _____

13. Child's Age _____

14. Child's Gender
    ___ Male
    ___ Female

15. Child's Ethnicity
    ___ Hispanic Origin (of any race)
    ___ American Indian, Eskimo or Aleut
    ___ Asian or Pacific Islander
    ___ Black
    ___ White

Tables of Mystery Shopper Survey Data

1. Tables of Mystery Shopper Results by Age of Shopper

Was the shopper able to make the purchase?

a. Movie Theaters

	13 years old	14 years old	15 years old	16 years old	Total
No	49 75%	34 71%	42 65%	18 38%	143 64%
Yes	16 25%	14 29%	23 35%	29 62%	82 36%
Total	65	48	65	47	225

b. Music Stores

	13 years old	14 years old	15 years old	16 years old	Total
No	20 31%	7 15%	9 14%	2 4%	38 17%
Yes	45 69%	41 85%	54 86%	45 96%	157 83%
Total	65	48	63	47	223

c. Electronic Game Stores

	13 years old	14 years old	15 years old	16 years old	Total
No	30 44%	11 23%	21 34%	7 15%	69 31%
Yes	38 56%	36 77%	41 66%	41 85%	156 69%
Total	68	47	62	48	225

d. DVD Movie Stores

	13 years old	14 years old	15 years old	16 years old	Total
No	18 27%	9 18%	13 21%	4 8%	44 19%
Yes	49 73%	40 82%	49 79%	44 92%	182 81%
Total	67	49	62	48	226

Was the shopper asked his/her age?

a. Movie Theaters

	13 years old	14 years old	15 years old	16 years old	Total
No	32 49%	23 48%	31 48%	31 66%	117 52%

Yes	33 51%	25 52%	34 52%	16 34%	108 48%
Total	65	48	65	47	225

b. Music Stores

	13 years old	14 years old	15 years old	16 years old	Total
No	55 85%	43 90%	53 84%	44 94%	195 87%
Yes	10 15%	5 10%	10 16%	3 6%	28 13%
Total	65	48	63	47	223

c. Electronic Game Stores

	13 years old	14 years old	15 years old	16 years old	Total
No	54 79%	38 81%	40 65%	40 83%	172 76%
Yes	14 21%	9 19%	22 35%	8 17%	53 24%
Total	68	47	62	48	225

d. DVD Movie Stores

	13 years old	14 years old	15 years old	16 years old	Total
No	54 81%	39 80%	45 73%	44 92%	182 81%
Yes	13 19%	10 20%	17 27%	4 8%	44 19%
Total	67	49	62	48	226

2. Tables of Mystery Shopper Results by Gender

Was the shopper able to make the purchase?

	Males	Females
Movies at Theater		
Respondents	114	111
Respondents Able to Purchase	36	46
Percent Able to Purchase	32%	41%
Music		
Respondents	112	111
Respondents Able to Purchase	90	95
Percent Able to Purchase	80%	86%
Games		
Respondents	114	111
Respondents Able to Purchase	73	83
Percent Able to Purchase	64%	75%

Movies on DVD		
Respondents	115	111
Respondents Able to Purchase	86	96
Percent Able to Purchase	75%	86%

Was the shopper asked his/her age?

	Males	Females
Movies		
Respondents	114	111
Respondents Who Were Asked Their Age	60	48
Percent Who Were Asked Their Age	53%	43%
Music		
Respondents	112	111
Respondents Who Were Asked Their Age	15	13
Percent Who Were Asked Their Age	13%	12%
Games		
Respondents	114	111
Respondents Who Were Asked Their Age	27	26
Percent Who Were Asked Their Age	24%	23%

Movies on DVD		
Respondents	115	111
Respondents Who Were Asked Their Age	27	17
Percent Who Were Asked Their Age	23%	15%

3. Tables of Purchase Behavior by "Major" Chain vs. Non-"Major" Chain

Did the shopper see any sign, poster, or other information to inform customers of the rating/advisory system or the store/theater's policy on rating/advisory enforcement? (Percentage of "YES" Responses)

Type of Store or Theater	**Movies**	**Music**	**Games**	**DVDs**
Non-Major	55%	14%	30%	17%
Major chain	72%	26%	25%	33%

Was the shopper able to purchase the item? (Percentage of "YES" Responses)

Type of Store or Theater	**Movies**	**Music**	**Games**	**DVDs**
Non-Major	43%	74%	69%	88%
Major chain	28%	90%	70%	74%

Was the shopper asked his/her age? (Percentage of "YES" Responses)

Type of Store or Theater	Movies	Music	Games	DVDs
Non-Major	41%	20%	24%	13%
Major chain	57%	7%	23%	25%

Endnotes

[1] *Appendix F, Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* ("September 2000 Report"), *available at* www.ftc.gov/reports/violence/appendicesviorpt.pdf. The September 2000 survey comprised 1,158 theaters and stores.

[2] *Marketing Violent Entertainment to Children: A One-Year Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* ("December 2001 Report"), *available at* www.ftc.gov/os/2001/12/violencereport1.pdf.

The 2001 Mystery Shopper Survey comprised 900 theaters and stores.

[3] Retailers that participate in the program, titled "Pledge to Parents," also agree not to rent or sell NC-17 movies or AO-rated electronic games to anyone under 18.

[4] *See* Statement of Hal Halpin, President, Interactive Entertainment Merchants Association, FTC Workshop on Industry Self-Regulation (October 29, 2003), *available at* www.iema.org/news.php# (visited Nov. 4, 2003).

[5] *See* Testimony of Douglas Lowenstein, President, Interactive Digital Software Association, House Subcommittee on Telecommunications and the Internet, July 20, 2001. IDSA also stated that "the ultimate decision on what policies to adopt in stores properly lies with the individual retailers who are the

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best judge of the relationship they want with their own customers." *Id.*

[6] NARM also indicated that many retailers will accept returns if a parent concludes that a recording is inappropriate for his or her child. *See* NARM, *Parental Advisory: A Message to Parents About Children and Music*, *available at* www.narm.com/Content/NavigationMenu/Public_Affairs/Parental_Advisory2/Parental_Message/Parental_Message.htm (visited Nov. 4, 2003).

[7] Second to None was the contractor.

[8] No shopper visited more than one location for each type of entertainment product.

[9] For music, one shopper went to Wal-Mart, which does not carry explicit-content labeled recordings. That attempt was excluded from the sample.

[10] The contractor required shoppers to submit proof of age and verification for completed purchases by submission of a receipt; if they were not able to make a purchase, the shoppers were to buy another item at the store or a ticket to another movie to get a receipt, except in cases where the shopper went to a movie theater showing only one R-rated movie.

[11] Parents completed the questionnaire on the website after getting the information from the child (*e.g.*, whether the child was able to purchase the product).

[12] Note that differences cited in the analysis of the mystery shopper data are statistically significant differences, with $p<0.05$, unless otherwise noted. The terms "significant" or "significantly" are used in the statistical sense only.

[13] Rating information may have been posted in additional stores and theaters, but not noticed.

[14] By comparison, in the 2001 survey, 13-year-olds were able to purchase at 87% of music stores, 66% of electronic game stores, and 33% of movie theaters.

[15] For purposes of this appendix, so-called "major" chains include only the very largest theater circuits and retailers in each industry. The "non-major" category includes independent stores as well as chains – including some large chains – that are

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not among the nation's very largest sellers of that category of product.

[16] "Major" theater chains visited by the shoppers: American Multi-Cinema, Inc. (including General Cinema), Carmike Cinemas, Inc., Century Theatres, Cinemark USA, Inc., Loews Cineplex Entertainment Corp. (including Cineplex Odeon), Marcus Theaters, National Amusements, Inc., and Regal Cinemas, Inc. (including Hoyts Cinemas Corp. and United Artist Theatre Circuit, Inc.).

[17] The "major" stores visited by shoppers were owned by the following companies: Best Buy Co., Circuit City Stores Inc., Kmart Corp., MTS, Inc. (Tower Records), Musicland Group, Inc., Target Stores, Inc., Trans World Entertainment Corp., and Wherehouse Entertainment, Inc.

[18] The "major" retailers visited by the shoppers: Best Buy Co., Inc., Electronics Boutique Holdings Corp., GameStop Corp (including Babbage's, FuncoLand, and Software Etc.), KB Toys, Kmart Corp., Target Stores, Inc., Toys 'R' Us, Inc., and Wal-Mart Stores, Inc.

[19] "Major" DVD retailers were Best Buy Co., Inc., Blockbuster Inc., Circuit City Stores Inc., Kmart Corp., MTS, Inc. (Tower), Musicland Group (including Suncoast Motion Picture Company), Target Stores, Inc., and Wal-Mart Stores, Inc.

[20] In 2001, 73% of the shoppers were able to purchase at these seven chain stores.

[21] Note that these comments are not necessarily representative of the shoppers' experiences as a group. The shopper's age is provided in the parenthetical following each comment.

Appendix C: Data Collection Methodology And Television And Print Demographics

In this Report, the Commission has examined whether violent R-rated films, explicit-content labeled music, and M-rated video games continue to be marketed to children under the age designated in the rating (or, in the case of labeled music, to children under 17), and also whether rating information is included in advertisements for these products. The Commission examined numerous media sources, including media popular with teens in terms of total teen audience or percentage of viewers under 18. This Appendix describes these sources and the media monitoring the Commission undertook to gather data for this Report, and sets forth demographic data for the audiences for the television programs, websites, and publications discussed in the Report.

I. Popular Televison [sic] Shows Among Teenagers

The Commission monitored advertising that occurred during eight weeks between May and July 2003 on network and cable television, including programs in syndication, with a particular focus on the after-school and early-prime time slots when youth are most likely to watch television. The Commission also reviewed data showing where each particular ad for an R-rated movie, M-rated game, or explicit-content labeled recording first aired between June 2002 and early September 2003.

A. Network, Cable, and Syndicated Television Monitoring

The Commission contracted with a commercial advertising tracking firm, Video Monitoring Service ("VMS"), to track advertisements for R-rated, M-rated or explicit-content labeled products on popular teen television programs. In selecting which television shows to review, the Commission focused on programs that were among the most popular with teens in terms of total teen audience or percentage of viewers under 18. For a period of eight weeks between May and July 2003, VMS continuously monitored the cable, network, and syndicated[1] programs set out in Tables A and B. All of these programs aired between 5 and 10 p.m. The television audience data reported in the tables below is for audiences under age 18, or for audiences aged 2-17, as indicated. Given that R-rated movies and M-rated electronic games are restricted only for children under 17, data for audiences under 17 would be most relevant; however, the age breakdowns set forth in the tables are the standard categories used for television audience measurement.

There were 59 ads for 7 violent R-rated films,[2] 31 ads for 13 different explicit-content labeled recordings, and 11 ads for 2 violent M-rated electronic games aired on the monitored programs.

Table A: Network and Cable Television Shows Monitored

Program	Average[3] Audience Age 2-17 (thousands)	Average Total Audience (thousands)	Audience Under 18 (%)	Network
7th Heaven	1624	6555	25%	WB
106th & Park	233	535	44%	BET
The Bernie Mac Show*	2496	9163	27%	FOX
Direct Effect	122	317	38%	MTV
Gilmore Girls	1310	5159	25%	WB
King of the Hill*	2971	9978	30%	FOX
Malcolm in the Middle*	3438	10636	32%	FOX
Oliver Beene*	3054	9907	31%	FOX
Rap City	186	423	44%	BET
The Simpsons*	4184	13825	30%	FOX
Smallville	1618	6642	24%	WB
Total Request Live	251	545	46%	MTV
WWE Smackdown	1702	5541	31%	UPN

* Due to scheduling changes during the monitoring period, the television programs marked with an asterisk deviated at times from the time slot for which Nielsen data was obtained. As a result, VMS monitored also some additional programs, a few of which has substantial teen audiences, including *American Idol* (Wednesday nights) (23% under 18) and *Cedric the Entertainer* (27% under 18). Advertisements for rated or labeled products that aired during these programs were included in the totals reported above.

The syndicated programs monitored by VMS are set out below in Table B. VMS also monitored ad placements on *The Simpsons*. Although demographic data are not available for that program, it is perennially ranked as one of the most popular programs for youth.[4]

Table B: Syndicated Television Programs Monitored

Program	Average Audience Age 2-17 (thousands)	Average Total Audience (thousands)	Audience Under 18 (%)	Network
The Hughleys	597	2072	29	Syndicated
King of the Hill	1512	5275	29	Syndicated
Sabrina the Teenage Witch	726	1619	45	Syndicated
Steve Harvey	661	2491	27	Syndicated

B. "First Airing" Data for Television Advertisements

To supplement the television advertising monitoring described above, the Commission obtained "first airing" data from VMS. These data provide, among other information, the date, time, station, and program on which each different advertisement for a violent R-rated movie, explicit-content labeled recording, or violent M-rated game first aired. These data document only the first showing of an advertisement, and provide no information about additional airings of the ad on that program or others.

The Commission reviewed first airing data for the period June 2002 through early September 2003. Focusing on advertisements initially shown on programs airing between 4:00 p.m. and 10:00 p.m., the Commission found that 19 ads[5] for 17 violent R-rated films or DVDs/home videos premiered on monitored programs – identified in Tables A and B above – or on other programs with substantial youth audiences.[6] Advertising for 33 different explicit-content labeled albums appeared on the monitored programs or on other programs with substantial youth audiences.[7] Fifteen ads for 11 violent M-rated games appeared on the monitored programs or on other programs with substantial youth audiences.[8]

II. Print Media

A. Magazines Reviewed to Assess Ad Placement

From June 2002 through October 2003, the Commission reviewed magazines with majority or substantial youth audiences including game enthusiast magazines, skateboarding magazines, music publications, wrestling magazines, and general interest teen magazines. Many of these magazines had been previously identified in the marketing plans reviewed for the September 2000 Report as magazines used when the industries' target audience included children under 17. Table C provides the names of the publications, the particular issues reviewed, and the demographics of readers (updated from the Commission's December 2001 Report, unless otherwise noted).

Table C: Youth-Oriented Print Publications Reviewed

Magazine	Issues Reviewed	Age Demographics
100% Independent Playstation 2	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, Holiday 2002, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 10/03	46% age 12-17 Mean Age: 23
CosmoGirl!	6-7/02, 8/02, 9/02, 10/02, 11/02, 12/02-1/03, 3/03, 4/03, 5/03, 6-7/03, 8/03, 9/03, 10/03	Median Age: 16.5 (data from December 2001 Report)
Electronic Gaming Monthly	6/02, 7/02, 8/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 10/03	30% - 40% age 16 and under[9]
GamePro	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03	57% age 16 and under[10] Mean age: 18
Metal Edge	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03	Average age: 21
Nintendo Power	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7-8/03, 9/03, 10/03	Median age: 13.4[11]
Right On!	6/02, 7/02, 8/02, 9/02, 12/02, 5/03, 7/03, 8/03, 10/03	Female median age: 15 Male median age: 18 (data from December 2001 Report)[12]
Seventeen	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 9/03	37% between 12 and 17 Median age: 21.2
Teen People	8/02, 10/02, 11/02, 12/02-1/03, 3/03, 4/03, 5/03, 6-7/03, 8/03, 9/03, 10/03	Median age: 15.6
Thrasher	7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 9/03, 10/03	77% under 18
Tips & Tricks	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 9/03	43% under 17 Average age: 21[13]
World Wrestling Entertainment	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 9/03, 10/03	Data in industry documents indicates that the under-17 audience share may currently be between 30% and 40%.[14]
YM	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 9/03, 10/03	Median age: 16.1 (data from December 2001 Report)[15]

The Commission also obtained data from Simmons Market Research Bureau, Inc., on the popularity of many of these magazines with young children and teens. As part of its annual National Consumer Survey, Simmons interviews teens and younger children on whether they read certain magazines.[16] These results, aggregated from Simmons surveys in the Fall of 2002 and the Spring of 2003, show several trends.

Game enthusiast magazines such as *GamePro* and *Electronic Gaming Monthly* were much more popular with young males, while magazines such as *Seventeen* and *YM* were much more popular with young females (based on responses of whether they read or looked into all four of four recent issues). For example, *Electronic Gaming Monthly* and *GamePro* consistently ranked in the top 10 magazines read by young males.[17] *Electronic Gaming Monthly* ranked #8 for pre-teen boys 9-11 years old, #6 for younger tween and teen boys 12-14 years old and #2 for older teen males 15-16 years old. *GamePro* ranked #6 with pre-teen boys 9-11 years old, #2 with younger tween and teen boys 12-14, and #9 with males 15-16 years old. Simmons data indicate that younger pre-teen and teen boys (those 9-11 years old and 12-14 years old) appear to prefer *GamePro*, while older teen males (15-16 years old) prefer *Electronic Gaming Monthly*.

Although game enthusiast magazines were some of the least read by young females, *Seventeen, Teen People*, and *YM* were the top magazines read by young females. *Seventeen* ranked #3 with females ages 12-14 and #1 with females ages 15-16. *Teen People* was #1 and #3 with females ages 12-14 and 15-16, respectively. *YM* ranked #2 with females in both the 12-14 and 15-16 year old age groups.

Wrestling and skateboarding enthusiast magazines were more popular with young males than females. *World Wrestling Entertainment* magazine ranked #26 with males 12-14 years old and #6 with males 15-16 years old. *Thrasher* (skateboarding enthusiast magazine) ranked #23 with males 12-14 years old and #26 with males 15-16 years old.

B. Magazines and Newspapers Reviewed to Assess Rating Information

To assess whether or not a rating or rating reason was displayed clearly and conspicuously in an advertisement for a rated or labeled movie, music recording, or electronic game, the Commission examined the magazines mentioned above as well as the magazines and general circulation newspapers set out in Table D below. Because rating information is primarily for parents, the Commission reviewed general circulation periodicals, and not just periodicals aimed at children. These general circulation periodicals were not used to assess whether or not ads were targeted to children.

Table D: Other Print Publications Reviewed for Rating Information

Magazines	**Issues Reviewed**
Computer Gaming World	7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 10/03
Rolling Stone	6/20/02, 7/4/02, 8/8/02, 9/19/02, 10/31/02, 11/14/02, 12/12/02, 3/20/03, 4/3/03, 5/15/03, 6/12/03, 5/15/03, 6/12/03, 7/10/03, 8/21/03, 9/18/03, 10/2/03
Spin	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 9/03, 10/03
Vibe	8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 5/03, 6/03, 7/03, 8/03, 9/03, 10/03
Wizard	6/02, 7/02, 8/02, 9/02, 10/02, 11/02, 12/02, 3/03, 4/03, 6/03, 7/03,8/03

Newspapers	**Issues Reviewed**
Chicago Sun-Times	9/20/02, 9/27/02, 10/4/02, 10/11/02, 10/18/02, 11/1/02, 11/8/02, 11/15/02, 11/22/02, 12/6/02, 12/13/02, 12/20/02, 12/27/02, 6/6/03, 6/13/03, 6/20/03, 7/11/03, 7/18/03, 7/25/03, 8/15/03
Chicago Tribune	3/14/03, 3/21/03, 3/28/03, 4/4/03, 4/11/03, 5/9/03, 5/16/03, 6/6/03, 6/20/03, 7/4/03, 7/11/03, 7/18/03, 8/15/03
Los Angeles Times	9/5/02, 9/12/02, 9/19/02, 9/26/02, 10/3/02, 10/10/02, 10/17/02, 10/24/02, 10/31/02, 11/7/02, 11/14/02, 11/21/02, 11/28/02, 12/5/02, 12/12/02, 12/19/02, 12/26/02, 3/13/03, 3/20/03, 3/27/03, 4/3/03, 4/10/03, 4/17/03, 4/24/03, 5/1/03, 5/15/03, 5/22/03, 5/29/03, 6/5/03, 6/12/03, 6/19/03, 6/26/03, 7/10/03, 7/17/03, 7/24/03, 7/31/03, 8/7/03, 8/28/03, 9/4/03, 9/11/03, 9/18/03, 9/25/03
New York Daily News	10/18/02, 11/8/02, 11/15/02, 8/22/03
New York Post	10/11/02, 10/18/02, 11/1/02, 11/8/02, 11/15/02, 11/27/02, 12/6/02, 12/13/02, 12/20/02, 3/14/03, 3/21/03, 3/28/03, 4/4/03, 4/11/03, 4/25/03, 5/2/03, 5/9/03, 5/16/03, 5/23/03, 5/30/03, 6/6/03, 6/13/03, 6/20/03, 6/27/03, 7/18/03, 7/25/03, 8/8/03, 9/12/03
New York Times	10/18/02, 10/25/02, 11/1/02, 11/8/02, 11/15/02, 11/22/02, 11/29/02, 12/6/02, 12/13/02, 12/20/02, 12/27/02, 3/7/03, 3/14/03, 3/21/03, 3/28/03, 4/4/03, 4/11/03, 4/18/03, 4/25/03, 5/2/03, 5/9/03, 5/16/03, 5/23/03, 5/30/03, 6/6/03, 6/13/03, 6/20/03, 6/27/03, 7/4/03, 7/11/03, 7/18/03, 7/25/03, 8/1/03, 8/8/03, 8/15/03, 8/22/03, 8/29/03, 9/5/03, 9/13/03, 9/26/03

III. Website Demographics

Table E below sets out a list of certain websites on which R-rated movies, M-rated games, and/or explicit-content labeled recordings were advertised or planned to be advertised, according to documents submitted for this Report; the average audience share under age 18 for all of these was 30% or greater, as measured by unique visitors, from April to June 2003.[18]

Table E: Website Audience Demographics

Website	% of Visitors Age 2-17
alloy.com	61%
bet.com	39%
comedycentral.com	35%
cosmogirl.com	59%
ea.com	31%
eagames.com	37%
ebgames.com	33%
gamespot.com	33%
gamespy.com	36%
gamestop.com	37%
game-revolution.com	40%

gamezone.com	35%
ign.com	40%
mtv.com	38%
seventeen.com	60%
teenpeople.com	53%
ugo.com	44%

Endnotes

[1] The syndicated programs aired in New York City on channels 5, 9 and 11 on Fridays from 5-8 p.m. between May 9, 2003 and July 4, 2003, and in Los Angeles on channels 5 and 11 on Mondays from 5-7 p.m. between May 5, 2003 and June 30, 2003.

[2] This total includes two ads for a film that was not rated at the time the ads aired, but ultimately was rated R.

[3] The audience numbers appearing in Tables A and B came from data obtained from Nielsen Media Research for the time period of September 23, 2002 until April 22, 2003

[4] *See* April 2001 Report, Appendix A at A-4 and n.7.

[5] In cases where more than one different advertisement for a particular motion picture, music recording, or game appeared in the first airing data, each different ad has been counted separately.

[6] Using Nielsen data, the Commission identified other programs with substantial youth audiences in addition to those monitored. For motion pictures, these included UPN's *Girlfriends* (30% under 18).

[7] For music recordings, the other programs with substantial youth audiences included MTV's *WWE Heat* (24% under 18).

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[8] For electronic games, the other programs with substantial youth audiences included WB's *Jamie Kennedy* (28% under 18).

[9] Two different sources of demographic data indicate under-17 audiences of 30% and at least 40%, respectively.

[10] The under-17 audience share reflects data for the subscription version of this magazine.

[11] Data in industry documents indicate an under-17 audience share of at least 80%.

[12] Data in industry documents indicate an under-17 audience share of more than 60%.

[13] Similarly, data in industry documents indicate an under-17 audience share of more than 40%.

[14] Data from the Commission's December 2001 Report indicated that 62% of the magazine's audience was aged 12 to 17.

[15] Data from industry documents indicate an under-17 audience share between 45% and 50%.

[16] The *Simmons Spring 2003 Teen Study*, administered to Teens, 12-17, asked about the frequency in which Teens, aged 12-17, read or look at 84 magazines. The *Simmons Spring 2003 Kids Study*, administered to children, aged 6-11, covered 25 magazines. Copies of the surveys are on file with the Commission.

[17] Simmons asked survey participants to indicate how many of every four issues of a selected list of magazines they recently "have read or looked at." *Official U.S. Playstation Magazine* also ranked in the top 10 for boys 9-11, tween and teen boys 12-14, and males 15-16.

[18] The Commission reviewed Nielsen//NetRatings data that was based on its panel of Internet users. Nielsen//NetRatings measures and reports Internet audience behavior based on data collected from home users in the United States.

Appendix D: Internet Surveys

This Appendix sets forth, for the Motion Picture, Movie Recording, and Electronic Game Industries, the results of the Internet website surveys conducted by the Commission during the summer and fall of 2003.

I. Motion Pictures

A. Motion Picture Websites

The Commission examined websites advertising the following 20 motion pictures in August 2003: *28 Days Later, Bad Boys II, Better Luck Tomorrow, Buffalo Soldiers, City of Ghosts, The Dancer Upstairs, Freddy vs. Jason, Gigli, The Hard Word, House of 1000 Corpses, Identity, Jeepers Creepers 2, The Magdalene Sisters, A Man Apart, The Matrix Reloaded, Open Range, Phone Booth, Swimming Pool, Terminator 3: Rise of the Machines,* and *Wrong Turn*. The movies were selected based on the following criteria: they had a release date between April 1, 2003 and August 31, 2003, received an R rating, and had a rating reason that involved violence. The studios that released these films included MPAA members as well as non-MPAA members.

Motion Picture Website Review Results

	Summaries by Site		Percentage
	Yes	No	Yes
Does the site display the movie's rating?	20	0	100%
On the home page or teaser page?	18	2	90%
Is the word "Restricted" readable?	20	0	100%
Is the rating visible without scrolling?	16	4	80%
Does the site display the movie's rating reason(s)?	20	0	100%
On the home page or teaser page?	18	2	90%
Are the reason(s) readable?	20	0	100%
Are the reason(s) visible without scrolling?	16	4	80%
Can a visitor view a trailer for the movie at the site?	20	0	100%
Does the site provide a link to:			
MPAA.org?	16	4	80%
filmratings.com?	19	1	95%
parentalguide.org?	19	1	95%
Can a visitor purchase tickets to the movie at the site?	4	16	20%
Does the site display the rating during the purchase process?	4	0	100%
Does the site display the rating reasons during the purchase process?	2	2	50%

B. Motion Picture Theater Chain Websites

The Commission examined websites for the following motion picture theater chains: AMC, Carmike, Century Theatres, Cinemark, Clearview Cinemas, GKC Theaters, Goodrich Quality Theaters, Kerasotes Theatres, Landmark Theatres, Loews Cineplex, Marcus Theatres, National Amusement, Regal Cinemas, United Artists, and Wallace Theater Corp. With the exception of AMC, these theater chains are all members of the NATO.

Theater Website Review Results

Does the site display the films' MPAA ratings?	15 of 15	100%
Does the site display or provide a link to films' rating reason(s)?	15 of 15	100%
Does the site provide information about the MPAA rating system?	6 of 15	40%
Does the site link to rating information at MPAA.org, parentalguide.org, or filmratings.com?	5 of 15	33%
Does the site sell tickets, either directly or through a third-party website?	10 of 15	66%

C. Retailer Websites – Motion Picture DVDs

The Commission examined the practices of five online retailers in September and October 2003 – Amazon.com, BestBuy.com, CircuitCity.com, Sam Goody.com, and TowerRecords.com – with respect to five violent R-rated movies: *Blood Work, Gangs of New York, Identity, Red Dragon,* and *Road to Perdition.*

Motion Picture DVD Retailer Review Results

	Amazon	Best Buy	Circuit City	Sam Goody	Tower Records
Does the site display the movies' ratings?	5 of 5	5 of 5	5 of 5	5 of 5	5 of 5
Is it the correct rating?	5 of 5	5 of 5	5 of 5	5 of 5	5 of 5
Is the rating visible without scrolling?	0 of 5	5 of 5	5 of 5	5 of 5	0 of 5
Does the site display the movie's rating reasons?	0 of 5	5 of 5	5 of 5	5 of 5	5 of 5
Are they the official MPAA reasons?	n/a	5 of 5	5 of 5	5 of 5	5 of 5
Are the reasons visible without scrolling?	n/a	5 of 5	3 of 5	5 of 5	5 of 5
Does the site provide a link to MPAA.org, filmratings.com, or parentalguide.org?	0 of 5	0 of 5	0 of 5	0 of 5	0 of 5
Does the site provide any information about the rating system?	No	Yes	No	No	Yes

D. Rental Websites – Motion Picture DVDs

The Commission surveyed these rental sites: Netflix.com, Filmcaddy.com, and Movielink.com. The Commission reviewed practices pertaining to the same five movies reviewed for DVD retailer sites – *Blood Work, Gangs of New York, Identity, Red Dragon,* and *Road to Perdition* – in September and October 2003.

DVD Rental Website Review Results

	Netflix.com	Filmcaddy.com	Movielink.com
Does the site display the movie's correct MPAA ratings?	5 of 5	5 of 5	5 of 5
Is the rating visible without scrolling?	5 of 5	5 of 5	5 of 5
Does the site display the movie's official rating reasons?	5 of 5	0 of 5	5 of 5
Are the reasons visible without scrolling?	5 of 5	n/a	5 of 5
Does the site provide a link to MPAA.org, filmratings.com, or parentalguide.org?	0 of 5	0 of 5	0 of 5
Does the site provide any information about the MPAA rating system?	No	No	Yes

II. Music Recordings

A. Artist and Recording Company Websites

The Commission reviewed official artist and recording company websites for 20 different explicit-content labeled recordings. The recordings were selected based on their release date and by their appearance in *Billboard's* list of top-selling music recordings. The websites reviewed were: www.daunbreakables.com, www.metallica.com, www.lizphair.com, www.staind.com, www.joebudden.com, www.50cent.com, www.blucantrell.com, www.crookedlettaz.com, www.coldonline.com, www.intothematrixmusic.com, www.madonna.com, www.typeonegative.net, www.3eb.com, www.mestcrapp.com, www.djkayslay.com, www.smileemptysoul.com, www.gangstarronline.com, www.godsmack.com, www.marilynmanson.com, and www.lilkim.com.

Artist and Recording Company Website Review

	YES		NO	
	#	%	#	%
Does the site display the album's parental advisory label?	12	60%	8	40%
On the home page or teaser page? (of 12)	8	67%	4	33%
Are the words in the advisory readable? (of 12)	8	67%	4	33%
Is the label visible without scrolling? (of 12)	9	75%	3	25%
Can a visitor purchase the album at the site or, through a link, at a third-party site?	15	75%	5	25%
Is the album's PAL or other advisory language displayed on any page that must be visited during the purchase process? (of 15)	10	67%	5	33%
Can a visitor play all/part of a music video at the site?	18	90%	2	10%
Can a visitor play all/part of the album at the site?	19	95%	1	5%
Does the site provide a link to RIAA.org or parentalguide.org?	3	15%	17	85%
Does the site provide any detailed information about the Parental Advisory Label system?	0	0%	20	100%
Does the site provide lyrics?	5	25%	15	75%

B. Retailer Websites – Music Recordings

The Commission reviewed five music retailer sites: Amazon.com, Bestbuy.com, Circuitcity.com, Samgoody.com, and TowerRecords.com. Cdnow.com, which had been reviewed in the past, is now teamed with Amazon.com and for this review was replaced with Circuitcity.com. The recordings examined at these retailers' websites were *Get Rich or Die Tryin'* by 50 Cent; *Liz Phair* by Liz Phair; *The Street Sweeper Vol. 1* by DJ Kayslay; *Smile Empty Soul* by Smile Empty Soul; and *Life is Killing Me* by Type O Negative.

Music Retailer Website Review

	Amazon	Best Buy[1]	Circuit City	Sam Goody	Tower Records
Does the site indicate, either through a Parental Advisory Label or other language, that the album has explicit content?	3 of 5	4 of 4	5 of 5	5 of 5	5 of 5
Does the site display at checkout the Parental Advisory Label or other language indicating explicit content?	2 of 5	1 of 4	0 of 5	5 of 5	5 of 5
Can visitors play at the site audio or video clips from explicit albums?	5 of 5	0 of 4	0 of 5	5 of 5	5 of 5
Does the site provide a link to parentalguide.org?	No	No	No	No	No
Does the site otherwise provide any detailed information about the Parental Advisory Label system?	0 of 5	4 of 4	0 of 5	0 of 5	0 of 5

III. Electronic Games

A. Game Publisher Websites

The Commission examined the following 20 electronic game websites in August 2003: *Aquanox 2: Revelation, Casino, Inc., Chrome, Codename Nina, Counter-Strike: Condition Zero, Crimsonland, Devastation, Die Hard Vendetta, Dino Crisis 3, Hunter the Reckoning – Wayward, Outlaw Volleyball, Postal 2, Purge, Return to Castle Wolfenstein, Silent Scope Complete, Soldier of Fortune 2: Double Helix, SWAT: Global Strike Team, The X-Files: Resist or Serve, Tom Clancy's Rainbow Six 3*, and *True Crime: Streets of L.A.* Each of the games selected was released in 2003 with an M-rating and a violence descriptor.

Electronic Game Websites

Electronic Game Publisher Questions	Summaries by Sites		Percentage Yes
	Yes	No	
Does the site display the ESRB rating icon?	15	5	75%
On the home page or teaser page? [of 15]	14	1	93%
Is the rating icon correct? [of 15]	13	2	87%
Is the word "Mature" readable? [of 13]	11	2	85%
Is the rating icon visible without scrolling? [of 15]	6	9	40%
Does the site display the game's content descriptors?	9	11	45%
Are the descriptors readable? [of 9]	9	0	100%
Are the descriptors readable without scrolling? [of 9]	4	5	44%
Is the visitor required to hold the cursor over the rating icon to view the descriptors? [of 9]	6	3	67%
Can a visitor play or view at the site a demo for the game?	15	5	75%
Is the rating icon displayed adjacent to name of game? [of 15]	3	12	20%
Are the game's content descriptors displayed adjacent to the name of the game? [of 15]	3	12	20%
Does the site provide a link to:			
ESRB.org?	8	12	40%
parentalguide.org?	0	20	0%
Does the site provide any information about the ESRB rating system?	1	19	5%
Can a visitor purchase the game at the site?	12	8	60%
Is the game's rating displayed on any page that must be visited during the purchase process? [of 12]	11	1	92%
Are the game's content descriptors displayed on any page that must be visited during the purchase process? [of 12]	3	9	25%

B. Retailer Websites – Electronic Games

The Commission reviewed five retailer websites: Amazon.com, BestBuy.com, CircuitCity.com, EBGames.com, and GameStop.com. CircuitCity.com was substituted for ToysRUs.com in this Report because Amazon.com and ToysRUs.com use the same Amazon.com site.

Electronic Game Retailer Websites

Electronic Game Retailer	Amazon	Best Buy	Circuit City	EB Games	Game Stop
Does the site provide the game's ESRB rating in either icon or written form?	5 of 5	5 of 5	5 of 5	4 of 5	4 of 5
Is it the correct rating?	5 of 5[2]	5 of 5	4 of 5[3]	4 of 4	4 of 5
Is the word "Mature" readable?	3 of 5	5 of 5	5 of 5[4]	4 of 4	5 of 5[5]
Is the rating visible without scrolling?	5 of 5	5 of 5	5 of 5	4 of 4	5 of 5
Does the site display the game's content descriptor?	0 of 5	0 of 5	1 of 5	4 of 5	0 of 5
Is it the official ESRB content descriptor?			0 of 1	2 of 4	
Is the descriptor visible without scrolling?			1 of 1	4 of 4	
Does the site link to ESRB.org or to other information about the rating system?[6]	4 of 5	5 of 5	5 of 5	5 of 5	5 of 5

Endnotes

[1] Best Buy sold only the "clean" version of one of the five recordings examined.

[2] One game had the correct "Mature" rating on the Web page but also had a small "RP" icon on the game box that was visible when magnified.

[3] One game was mistakenly identified as "Rating Pending" on the Web page, although an image of the box art did display a small "Mature" icon.

[4] One game was assigned an incorrect "Rating Pending." That rating was readable.

[5] One game was assigned an incorrect "Teen" rating, when it was actually rated "Mature." That "Teen" rating was readable.

[6] Circuit City linked to the ESRB website and provided information on the rating system on an internal web page. The other sites did not link to ESRB.org but did link to information about the ESRB rating system on an internal web page.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Title Omitted In Printing]

EXHIBIT 2

BILL ANALYSIS

SENATE JUDICIARY COMMITTEE
Senator Joseph L. Dunn, Chair
2005-2006 Regular Session

AB 1179
Assembly Member Yee
As Amended September 2, 2005
Hearing Date: September 8, 1005 [sic]
Civil Code
AMT/MM:cjt

PURSUANT TO RULE 29.10

SUBJECT

Violent Video Games: Sales to Minors

DESCRIPTION

This bill would prohibit the sale or rental of violent video games to minors under 18 years old, and would require that such games be clearly labeled before being imported into or distributed in California. Violators of either provision would be subject to liability for up to $1,000. Sales clerks would be exempt from liability, so long as they did not hold a management position or an ownership interest in the retail business. A minor's parents, grandparents, aunts, uncles, and legal guardians would also be exempt from the terms of the bill. It would be an affirmative defense to liability for unlawfully selling a violent video game to establish reasonable reliance on evidence that a purchaser or renter was not a minor, or to establish that a manufacturer failed to label a violent video game as required under the bill.

The bill would offer two alternate definitions of "violent video game." The first definition would mirror the language used to define "obscene" speech. The second definition would mirror federal statutes and jury instructions that relate to aggravating factors that warrant death penalty convictions.

BACKGROUND

(more)

This bill follows a line of attempts in this and other states to limit the sale and rental of "violent video games" to minors. Proponents have argued that these attempts are supported by numerous scientific studies which indicate that minors who play violent video games may be more likely to act aggressively than other minors and may suffer other negative emotional and psychological effects.

Last year the Legislature passed AB 1793 (Yee), Chapter 630, Statutes of 2004, requiring video game retailers to post signs notifying customers of a current industry rating system that may be used to identify age-appropriate video games, and requiring retailers to make information explaining the rating system available on request. Another bill, AB 1792

(Yee, 2004), which would have prohibited the sale or rental of "violent video games" to minors under age 18, failed in the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee.

Other states have successfully enacted statutes in recent years to restrict minors' access to violent video games. However, those statutes were found unconstitutional on First Amendment and/or vagueness grounds. [See, e.g., *Interactive Digital Software Assoc. v. St. Louis County* (*IDSA*) (8th Cir. 2003) 329 F.3d 954; *American Amusement Machine Assoc. v. Kendrick* (7th Cir. 2001) 244 F.3d 572; *Video Software Dealers Assoc. v. Maleng* (D.C. Wash. 2004) 325 F. Supp. 2d 1185.] The author notes that an Illinois statute was recently signed into law that restricts the sale of violent video games to minors.

This year, AB 450 (Yee) was introduced in a renewed attempt to prohibit the sale or rental of "violent video games" to minors. It was amended in the Assembly Judiciary Committee to address some of the constitutional issues raised in recent court decisions. The bill passed the Assembly Judiciary Committee, but failed its first hearing in the Assembly Arts, Entertainment, Sports, Tourism, and Internet Media Committee. Although the bill passed on its second vote in that committee, it has not been brought to a vote on the Assembly Floor.

On September 2, 2005, the last day for amending bills without a rule waiver, the author gutted and amended AB 1179 (Yee) to insert language largely identical to the text of AB 450. The primary difference between the bills is that AB 1179 would prohibit the sale or rental of "violent video games" to minors under 18 years old, while AB 450 would have prohibited the sale or rental of violent video games to minors under 17 years old.

CHANGES TO EXISTING LAW

Existing law, the U.S. Constitution, provides that "Congress shall make no law ? [sic] abridging the freedom of speech." [U.S. Const. Amend. 1.]

Existing law, the California Constitution, provides that "A law may not restrain or abridge liberty of speech or press." [Cal. Const. Art. 1 2 [sic].]

Existing law requires video game retailers to post signs in prominent areas of a retail establishment to provide information about a video game rating system or to notify customers that a rating system is available to aid in the selection of video games. The law also requires retailers to make information explaining the rating system available on request. [Bus. & Prof. Code 20650.]

Existing law prohibits the sale, lease, rental, or provision of any video game intended for use by any person under 18 years old, which contains any commercial advertisement, brand names, trademarks, or copyrighted slogans of alcoholic beverages or tobacco products in the design, presentation, packaging or advertisement of the video game. [Penal Code 308.5.]

This bill would make a legislative finding that exposing minors to depictions of violence in video games makes minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior. It would also make a finding that even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

This bill would make a legislative finding that the state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games.

This bill would prohibit the sale or rental of violent video games to minors who are under 18 years of age. This prohibition would not apply when a minor's parent, grandparent, aunt, uncle, or legal guardian rented or sold a violent video game to the minor. It would also be an affirmative defense to establish: (1) that a defendant or his or her employee or agent reasonably relied upon evidence that a purchaser or renter was not a minor; or (2) that a manufacturer failed to label a violent video game as required under the bill.

This bill would define "violent video game" as a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does *either* of the following:

a) Comes within all of the following descriptions:

   i) A reasonable person, considering the game as a whole, would find [it] appeals to a deviant or morbid interest in minors;

   ii) It is patently offensive to prevailing standards in the community as to what is suitable to minors;

   iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

b) Enables a player to virtually inflict serious injury upon human beings or characters with substantially human characteristics in a manner which is especially, heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

This bill would define the terms "heinous," "cruel," "depraved," "torture," and "serious physical abuse," and would list pertinent factors to consider in determining whether violence is especially heinous, cruel, or depraved.

This bill would provide that violent video games which are imported into or distributed in California for retail sale shall be labeled on the front face of the package, as specified.

This bill would make a person who violates any provision of the bill subject to liability for up to $1,000, with the exception that a person who is employed solely in the capacity of a salesclerk or other similar position, and who does not hold an ownership interest or a management position in the business, may not be held liable.

This bill would provide that a violation may be prosecuted by any city attorney, county counsel, or district attorney, and that a violation may be reported to the city attorney, county counsel, or district attorney by an adult acting on behalf of a minor to whom a violent video game was sold or rented.

This bill would state that its provisions are severable.

COMMENT

1. Stated need for the bill

The author contends that this bill is a necessary response to the potential negative impacts that violent video games may have on minors under 18 years old. The author states:

> Since teens are wiring the circuits for self control, responsibility and relationships they will carry with them into adulthood, they are more impressionable than we thought. Active participation by youth in playing violent video games has a greater impact than

watching television. Youth choose actions where they are rewarded for causing violence to another character. Repetition greatly increases learning and also causes youth to identify with the aggressor in the game. Dozens of studies on violent video games, including an analysis of 54 independent samples with 4,262 participants, show five major effects: playing violent games leads to increased physiological arousal, increased aggressive thoughts, increased aggressive feelings, increased aggressive behaviors, and decreased pro-social or helping behaviors. These studies include experimental studies (that show playing violent video games actually causes increases in aggression), correlational studies (where long-term relations between game play and real-world aggression can be shown), and longitudinal studies (where changes in children's aggressive behaviors can be demonstrated). Furthermore, students who played more violent video games had greater involvement in physical fights, became desensitized to violence, and developed pro-violence attitudes and increased tolerance of violence. The American Academy of Pediatrics Policy Statement on Media Violence stated that playing violent video games accounts for a 13% to 22% increase in adolescents' violent behavior. When considering the negative impact violent video games have on youth, the evidence is strong: playing violent video games has more effect on increased youth aggression than second-hand smoke has on causing cancer, or lead exposure links to decreased IQ?

The author acknowledges that the entertainment industry has undertaken self-regulatory measures to prevent minors under 17 years old from renting or buying games that are "M-rated," e.g., that contain mature content which may include mature sexual themes, more intense violence, and/or strong language. But the author argues that self-regulation has been unsuccessful, as discussed in Comment 3 below.

2. First Amendment concerns

The First Amendment right to free speech must be a chief consideration if the bill's restrictions would limit the distribution of materials that are "protected speech." The First Amendment does not prohibit every restriction on protected speech, but it requires that restrictions be carefully weighed and limited. Appropriate questions here are therefore whether "violent video games" are protected speech and, if so, whether the bill is appropriately tailored to limit access to that speech.

a) Whether violent video games are "protected speech"

Video games have been found to be "protected speech" in several recent court decisions, one court explaining that games are protected because they "contain stories, imagery, ageold themes of literature, and messages, even an ideology, just as books and movies do." [*IDSA*, 329 F.3d 954 (internal quotations omitted); see also *Kendrick*, 244 F.3d 572.]

The author notes that some speech which is considered "protected" for adults may be deemed unworthy of protection for children in certain cases. [See *Ginsberg v. New York* (1968) 390 U.S. 629.] But this distinction has only been made in narrow circumstances where the question was whether the speech was "obscene." Obscenity is one of the few categories of speech which has historically been unprotected under the First Amendment. [See *Miller v. California* (1973) 413 U.S. 15.] In *Ginsberg* the Supreme Court held that children's access to certain pornographic magazines could be restricted without any violation of the First Amendment, even though those magazines were not "obscene" according to adult standards, because the magazines could properly be deemed obscene according to community standards for children. [*Ginsberg*, 413 U.S. at 636.]

The obscenity standard that was tailored to child-specific standards in *Ginsberg* could not be equally applied here. This is because several federal courts have held that materials which do not contain "depictions or descriptions of sexual conduct" may not be treated as obscenity, even when those materials contain objectionable violence. [*IDSA*, 329 F.3d at 959; *Maleng*, 325 F.Supp. 2d at 1185.] As the *Maleng* court explains:

> Sexually-explicit materials were originally excluded from the protections of the First Amendment because the prevention and punishment of lewd speech has very little, if any, impact on the free expression of ideas and government regulation of the sexually obscene has never been thought to raise constitutional problems. The same cannot be said for depictions of violence: such depictions have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation.

A limited application of the *Ginsberg* case to speech regarding sexual conduct is consistent with the Supreme Court's statement in *Erznoznik v. Jacksonville* that:

> speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors. [422 U.S. 205, 213-14 (1975).]

Under the reasoning offered in the above cases, the speech that would be restricted under this bill would not be deemed obscene, even for minors, and would therefore be considered "protected speech."

Nevertheless, one of the two definitions offered in AB 1179 for "violent video games" directly follows the *Ginsberg* obscenity standard, and applies the terms of the obscenity definition to video games where certain violent acts may be committed by a game character. It is questionable whether this definition is appropriate under existing law. Neither the *IDSA* or the *Maleng* decision is binding in California, but those decisions and the precedent upon which they rely may be persuasive to a California court.

SHOULD AB 1179'S DEFINITION THAT MIRRORS THE OBSCENITY DOCTRINE BE RETAINED, DESPITE CASES HOLDING THAT "OBSCENITY" RELATES ONLY TO SEXUAL CONDUCT?

b) Whether the proposed restrictions are necessary and narrowly tailored to serve a compelling state interest

When speech is deemed "protected speech," any restrictions on its content must be "necessary to serve a compelling state interest," and "narrowly tailored" to achieve that interest. [*Republican Party of Minn. v. White* (2002) 536 U.S. 765, 774-75.] This standard has been applied by courts considering similar violent video game restrictions for minors. [See *IDSA*, 329 F.3d at 958; *Maleng*, 325 F.Supp.2d at 1186.]

Courts have repeatedly recognized that a state has a legitimate and compelling state interest in safeguarding both the physical and psychological well-being of minors. [*Sable Comm., Inc. v. FCC* (1989) 492 U.S. 115.] The appropriate questions are therefore whether the bill's proposed restrictions on the sale and rental of violent video games are (1) necessary and (2) narrowly tailored to achieve the stated interest of safeguarding minors.

i. Whether the proposed restrictions are necessary

The author argues there is clear evidence that violent video games increase children's aggressive behaviors, thoughts, and attitudes, and that they jeopardize children's psychological health by decreasing emotional empathy and pro-social helping behaviors.

Opponents note that the courts which have evaluated similar statutes found the restrictions proposed in those measures to be unsupported by scientific evidence. The court in *Kendrick* noted that there was no demonstrated causal connection between the playing of violent video games and any violent acts, and found there was no evidence that the interactive character of the games – rather than images which might be equally evident in movies or other unrestricted materials – that caused the negative impacts. [244 F.3d at 578-79.] In *IDSA*, the court discounted a study which indicated only that "more aggressive thoughts are reported and there is frequently more aggressive behavior" after minors played violent video games, when there was no further evidence of actual psychological damage. [329 F.3d at 958-59.]

The author asserts that the studies relied upon here demonstrate both a causal connection to acts of violence and actual psychological damage. In contrast, opponents assert that the studies relied upon are largely the same as the studies rejected by the courts, without any new primary or experimental research. Opponents also argue that the restrictions are not "necessary" because any impact on a child caused by video game violence will be very small in comparison to other factors that may contribute to aggression, including real-world interactions and exposure to other types of media violence. It is unclear whether the evidence upon which this bill is based would support a finding that the proposed statutory restriction is necessary.

DOES THE EVIDENCE SUPPORT A LEGISLATIVE FINDING THAT THE PROPOSED RESTRICTIONS ARE NECESSARY?

ii. Whether the proposed restrictions are narrowly tailored

In support of a finding that the proposed restrictions are narrowly tailored to achieve the stated interest, the author notes that the definition of "violent video game" (actually one of two definitions, the first being the obscenity definition discussed in Comment

2(a)) is limited to violence that is "heinous, atrocious, and cruel," and is perpetrated against a game character that is human or has "human-like characteristics."

Although these limitations would undeniably narrow the statute's scope, it is not clear that the narrowing effect would effectuate the stated purpose of the statute. The statute is designed to address studies which indicate that playing violent video games may have undesirable physical and mental effects on minors. But it is not evident that these studies identify "heinous, atrocious, and cruel" violence as causing the significant negative effects that the bill attempts to address.

The author contends that the "heinous, atrocious, and cruel" limitation is offered in response to the *Maleng* court's statement that the speech restrictions imposed by that statute were overly broad because the definition of "violent video games" was "expansive and d[id] not attempt to regulate the dissemination of video games on the basis of the extremity of the violence portrayed." [325 F.Supp.2d at 1190.] However, the *Maleng* court was evaluating its statute based on experts' testimony asserting "that 'ultra-violent' video games cause aggression and must be regulated in order to further the state's compelling interests."

[*Id.* at 1189.] Here, the studies used to justify the state's compelling interests do not

> apparently relate to "ultra-violent" video games or video games that feature "heinous, atrocious, and cruel" violence. It is unclear what types of "violent" video games were used in the studies referenced by the author, and the author's comments sometimes treat the violent video games discussed in the studies as interchangeable with the M-rated games which are currently subject to industry self-regulation.
>
> Because there does not appear to be a direct correlation between the proposed limitations and the negative effects discussed in the studies relied upon by the author, it is unclear that the proposed definition of "violent video game" is narrowly tailored to address the state's compelling interests, rather than simply tailored for the sake of a more "narrow" statute.

WOULD SOME OTHER STANDARD MORE EFFECTIVELY IMPOSE LIMITATIONS NARROWLY TAILORED TO ADDRESS THE COMPELLING INTERESTS AT STAKE?

3. Opponents contend industry self-regulation is a less restrictive alternative

Opponents argue that existing laws and regulations are further evidence that the bill's proposed restrictions are not "narrowly tailored" to address a compelling state interest, since those measures are "less restrictive alternatives" that may be used to address the same compelling state interests. Specifically, opponents note that the Entertainment Software Rating Board (ESRB) already assesses and rates video games based on their content and age-appropriateness, and that members of the industry have voluntarily submitted to the restrictions of these ratings. Opponents note that the ESRB's rating system has been praised by the Federal Trade Commission (FTC) as the most comprehensive rating system of the three entertainment industries.

The ESRB rating system uses six age-based ratings and about 30 content descriptors to provide information about the content of the game. The six age-based ratings are:

> EC or Early Childhood-suitable for ages 3 and older. Games contain no material that parents would find objectionable.
>
> E or Everyone-suitable for ages 6 and older. Games may contain minimal cartoon, fantasy, or mild violence and/or infrequent use of mild language.
>
> E10+ or Everyone 10 and Older-suitable for ages 10 and older. Games may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.
>
> T or Teen-these games may be suitable for ages 13 and older. Games may contain violence, suggestive themes, crude humor, minimal blood and/or infrequent use of strong language.

> M or Mature-suitable for ages 17 and older. Games may contain mature sexual themes, more intense violence, and/or strong language.
>
> AO or Adults Only-suitable for adults only. Games may include graphic descriptions of sex and/or violence. These products are not intended for persons under the age of 18.

Each video game rated by the ESRB has the age-based rating symbol printed on the front and back of the game box, and the back of the box displays content descriptors that may explain why the game received the rating it did.

Examples of the content descriptors include "animated blood," "comic mischief," "mild violence," "intense violence," "strong language," "suggestive themes," "strong sexual content," "drug reference" and "use of drugs."

The author acknowledges that the ESRB rating system is currently in place, but argues that its implementation has been unsatisfactory.

> Recent studies show that the voluntary rating and enforcement system implemented by self-regulatory associations or entertainment producers have had limited success on decreasing youth access to Mature (M) rated video games. In a phone survey of clerks at forty-six stores in 12 states, only 76% of respondents say they understand the ratings they are supposed to enforce and only half of the stores reported training employees in the

> use of the ratings. In many of the stores that have reported they have training, further questioning revealed the "training" only included installing cash register prompts. Eight[y]-nine percent (89%) of stores surveyed said they now have policies restricting the sale of M-rated games to those under seventeen. Despite this, clerks still sell these video games to under-aged youth. During 2004, the National Institute on Media and the Family had children between the ages of seven and fourteen attempt to purchase M-rated games in thirty-five stores. Youth succeeded 34% of the time. While the overall purchase rate was 34%, boys as young as seven were able to buy M-rated games 50% of the time. A nationwide undercover survey of stores completed by the Federal Trade Commission in 2003 corroborated these findings. In this study, 69% of unaccompanied 13 to 16-year-olds purchased M-rated games and only 24% of cashiers asked the youth's age.

Opponents respond that between 85% and 90% of retailers have recently implemented programs to prevent the sale and rental of M-rated games to minors. They argue that this new program will help to reduce improper sales of M-rated games to minor, and note that recent studies indicate sales of M-rated and AO-rated games to minors were prevented 66% of the time this year, an improvement from 45% the year before.

Opponents also argue that limitations on who can sell or rent video games is not the only way to successfully limit minors' access to M-rated games, since information on the ESRB rating system is readily available to parents. In addition to the information included on the box of each video game, last year's AB 1793 (Yee) created a statutory requirement for video game retailers to prominently post signs advising consumers about the rating system, and to provide information explaining the rating system upon request. Opponents argue that making this information available to parents will play a large role in protecting minors from exposure to violent video games, citing FTC statistics which indicate that parents are involved in 8 out of 10 video game purchases or rentals.

4. Whether the terms of the bill are unconstitutionally vague

Opponents argue that the terms of the bill fall short of the level of clarity required by the First Amendment. Under *Grayned v. City of Rockford,* a legislative enactment must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." [408 U.S. 104, 108.]

Opponents challenge the bill's application to "characters with substantially human characteristics," arguing that this term could apply to aliens, talking beasts, robots, cartoon-type characters, and a broad range of other video game characters. Opponents also challenge the language used to define "heinous, atrocious, and cruel" violence. Those definitions require findings, for example, that virtual victims were "conscious" of specified abuse or that players had a specified intent or state of mind with respect to a virtual killing. Opponents argue that it is unclear how a virtual character could be found to be "conscious of abuse" or how it could be found that a video game player "intends to virtually inflict a high degree of pain" or "relishes the virtual killing or shows indifference to the suffering of the [virtual] victim." Determinations of consciousness and intent are clearly appropriate in assessing the severity of violent acts committed by (and against) real people. But those terms are more unwieldy and difficult to apply in the context of virtual characters or players whose ultimate "intent" is simply to progress through the levels of a computer game.

The Assembly Judiciary Committee analysis noted that the terms discussed above, which define "heinous, atrocious, and cruel" conduct, survived a vagueness challenge in a death penalty case. [Citing *United States v. Jones* (5th Cir. 1998) 132 F.3d 232.] That holding may not resolve the vagueness issues discussed above, however, because those questions relate specifically to problems that stem from the difficulty of applying those standards to virtual characters in a video game setting.

In discussing vagueness issues for another violent video game statute, the *Maleng* court stated:

> The problem is not, as defendants suggest, that a retail clerk might be unaware of the contents of a particular game. The real problem is that the clerk might know everything there is to know about the game and yet not be able to determine whether it can be legally sold to a minor. The effects of such vagueness are particularly troublesome where First Amendment rights are implicated. Not only is a conscientious retail clerk (and her employer) likely to withhold from minors all games that could possibly fall within the broad scope of the Act, but authors and game designers will likely 'steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked.'

[325 F.Supp.2d at 1191.]

These vagueness concerns may be further intensified by the potentially broad scope of responsibility for determining what video games are "violent" under the bill. AB 1179 would require every violent video game that is imported into the state for retail sale to be appropriately labeled, and would impose liability up to $1,000 for violations of this requirement. The author indicates that the requirement is intended to put the responsibility on manufacturers to determine what video games are violent. But it is possible that there would also be situations where large retailers want to import games from an out-of-state store to an in-state store for retail purposes. In such cases, it is unclear whether the responsibility for labeling would fall on the manufacturer (who may not have intended the game for sale in California) or the retailer. A wide variety of entities might therefore be responsible for making the difficult assessment of what video games are restricted under the statute.

As discussed below in Comment 5, opponents indicate that the labeling required under this bill would not be implemented on a national scale. Indeed, nation-wide labeling based on the AB 1179 standard would not be permitted to the extent that legislation in other states required labeling in accordance with different "violent video game" definitions.

ARE THE DEFINITIONS IN THE BILL TOO VAGUE TO PROVIDE A REASONABLE OPPORTUNITY FOR MANUFACTURERS AND RETAILERS TO DETERMINE WHAT GAMES ARE RESTRICTED?

5. Opponents say the bill would be unreasonably burdensome to implement

The California Retailers Association (CRA) contends that this bill's requirement of additional labeling would place extreme and unreasonable burdens on retailers. CRA asserts that implementation problems would arise because this labeling would have to be California-specific, while the voluntary ESRB labeling system would continue to be applied nationwide. Although the author argues that AB 1179's definitions may ultimately be integrated with the ESRB rating criteria, it is unclear that any kind of integration would be possible when Illinois has enacted violent video game restrictions that rely on a different definition. In order to do state-specific labeling, the CRA maintains that retailers would be required to change their software programs to account for different labels on identical games to be sent to different destinations, and that new UPC (Universal Product Codes) would have to be assigned to violent video games that would be sent to California.

6. Opponents note that government regulation has not proven necessary for other entertainment industries

Opponents point out that other entertainment industries, such as the motion picture, recording, and publishing industries, are not subject to the sort of statutory restrictions this bill would impose on the video game industry. Notably, the motion picture industry has been voluntarily self-regulated for approximately 40 years. Given the apparent success of other self-regulating industries, opponents to the bill argue that current self-regulating mechanisms for video games should be given an opportunity for similar success.

Some opponents note an additional concern that the regulations proposed in the bill would set a precedent for imposing regulations on violent speech in other entertainment industries. Indeed, some supporters of the bill readily agree that the bill's proposed regulations on violent video games should be expanded to movies, songs, and books which contain violent images or descriptions that could be harmful to children. Given the broad scope of free speech interests associated with music, movies, books, and video games, opponents argue this bill could be the start of a journey down the slippery slope toward endangering important First Amendment rights.

7. Opponents argue the bill could chill video gaming development

Opponents maintain that the proposed regulation would subject video game developers to a chilling effect, asserting that:

> Game creation is a massively complex mix of science and art. From software engineers to script writers to animators to music composers, there is a great need for talented, creative and educated individuals that must work in unison to see a game become a reality. In step with the growing need for talent, universities and colleges-over 50 just in the state of California-are implementing game development courses and degree programs.

Opponents are concerned that the regulations proposed by this bill would "stagnate this important cultural medium and its future evolution."

8. Whether 17 or 18 is the appropriate age of minority

The restrictions proposed in AB 1179 would be applied to minors under 18 years old, but the previous bill, AB 450, would have applied to minors under 17 years old. Opponents argue that the age of majority should be returned to 17 years old, since restrictions currently placed on movies and music both define 17 as the age of majority. Opponents also note that the industry's self-imposed regulation of video games restricts M-rated games to people 17 years old and older.

The author's staff indicates that the author selected 18 as the age of majority in this bill mainly for ease of implementation purposes. The author's staff notes that a recently enacted Illinois statute would restrict access to violent video games by minors under 18 years old, and suggests that manufacturers may have an easier time implementing various state statutes on a nationwide level if they can use the same "18" label. In practice, however, interchangeable labels would only be of limited use because the definition of violent video games in Illinois is significantly different from the definition proposed in this bill.

IF APPROVED, SHOULD THE RESTRICTION ON ACCESS FOR MINORS BE SET AT 17 OR 18 YEARS OLD?

9. Additional implementation issues

The author's staff acknowledges that certain logistical concerns may remain to be resolved. Specifically, his staff acknowledges that it may be appropriate to delay the effective date of the bill to allow for an evaluation of what games should be restricted under the bill, and to allow for the labeling of such games. His staff also acknowledges that it may be appropriate to "grandfather in" the video game stock that is already held in California retail outlets. The grandfather clause contemplated by the author may not address all situations where grandfathering may be appropriate. In particular, it would not apparently protect secondary markets such as Goodwill shops that resell preexisting stock from other retail outlets, or that sell used games.

SHOULD PROVISIONS BE MADE TO DELAY THE EFFECTIVE DATE OF THE BILL, AND TO GRANDFATHER IN EXISTING STOCK AND USED GAMES THAT MIGHT BE RESOLD?

10. Committee options

Because this bill is a gut-and-amend bill that is being heard under Senate Rule 29.10, it may not be amended in committee. It may be passed out of committee without amendment, it may be sent to the

Floor without recommendation, or it may be held as a two-year bill.

Support: Alliance for Children of San Mateo and Santa Clara Counties; California Alliance Against Domestic Violence; California Commission on the Status of Women; California State PTA; California Psychiatric Association; California Psychological Association; California State Conference of the National Association for the Advancement of Colored People; Capitol Resource Institute; City of Norwalk Department of Public Safety; Cruz Bustamante; dramaworks; Feather River College; Girl Scouts, Junior Leagues of California State Public Affairs Committee; Maidu Cultural and Development Group; Muir Trail Council; NAACP Legal Defense and Educational Fund, Inc.; Northern California Society of Public Health Education; Q Entertainment; Parents Television Council; Santa Clara County After School Collaborative; Plumas County Child Care and Development Planning Council; Plumas Rural Services, Inc. Domestic Violence Services; Portola CARES Resource Center; Sierra Valley Even Start Family Literacy Program; Stanislaus County Children's Council; Support Network for Battered Women; Sutter Lakeside Community Services; The Child-Responsible Media Campaign; Women's Mountain Passages; 66 individuals

Opposition: Activision; American Civil Liberties Union; American Electronics Association; California Broadcasters Association; California Chamber of Commerce; California Retailers Association; Electronic Arts; Entertainment Software Association; Independent Film & Television Alliance; Interactive Entertainment Merchants Association; International Game Developers Association; Motion Picture Association of America, Inc.; National Association of Theatre Owners of California/Nevada; Recording Industry Association of America; The Media Coalition, Inc.; TechNet; Video Software Dealers Association; Wal-Mart; Eight Individuals

HISTORY

Source: California District of the American Academy of Pediatrics; Common Sense Media; Girl Scout Councils of California [co-sponsors]

Related Pending Legislation: AB 450 (Yee), which contains roughly the same terms as this bill but limits sales and rentals to people younger than 17, is on the Assembly Floor.

Prior Legislation: AB 1792 (Yee, 2004), which failed in the Assembly Committee on Arts, Entertainment, Sports, Tourism, and Internet Media, would have prohibited the sale, rental, or exhibition of violent video games to minors under 18 years old, defining "violent video games" as games that (1) appeal to a minor's morbid interest in violence, (2) allow infliction of serious injuries on human-like characters in a way that is especially heinous, atrocious, or cruel, and (3) lack serious literary, artistic, political, or scientific value for minors.

AB 1793 (Yee), Chapter 630, Statutes of 2004, requires video game retailers to post signs in prominent areas of the retail establishment to notify customers that a rating system is available to aid in the selection of video games, and to make information explaining the rating system available on request.

Prior Vote: Not relevant. Bill was gutted and amended.

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VIDEO SOFTWARE DEALERS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California; BILL	CASE NO. C 05-4188 RMW (RS) DECLARATION OF KATHERINE A. FALLOW

LOCKYER, in his official capacity
as Attorney General of the
State of California; GEORGE
KENNEDY, in his official capacity
as Santa Clara County District
Attorney, RICHARD DOYLE, in
his official capacity as City
Attorney for the City of San Jose,
and ANN MILLER RAVEL, in her
official capacity as County
Counsel for the County
of Santa Clara,

Defendants.

I, Katherine A. Fallow, hereby declare as follows:

1. I am a partner with the law firm of Jenner & Block LLP, located at 601 13th Street, N.W. Suite 1200, Washington D.C. I am authorized to practice law in the District of Columbia and the State of Massachusetts and am admitted *pro hac vice* in this action. I am counsel of record and one of the attorneys representing Plaintiffs in this matter, Video Software Dealers Association ("VSDA") and Entertainment Software Association ("ESA"). I have personal knowledge of, and could competently testify to, the facts stated below.

2. In the matter of *ESA v. Blagojevich*, 404 F. Supp. 2d 1051 (N. D. Ill 2005), I was one of the attorneys representing ESA. As part of my representation of ESA in that matter, I attended proceedings on November 13, 2005 and November 14,

2005 in the Northern District of Illinois before the Honorable Mathew F. Kennelly. A true and correct copy of the November 13, 2005 transcript hereto as Exhibit A. A true and correct copy of the November 14, 2005 transcript hereto as Exhibit B.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 31st day of March, at Washington D.C.

/s/ Katherine A. Fallow
Katherine A. Fallow

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ENTERTAINMENT)
SOFTWARE) No. 05 C 4265
ASSOCIATION, et al.,)
Plaintiffs,) Chicago, Illinois
) November 14, 2005
v.) 10:00 a.m.
)
ROD BLAGOJEVICH, et al.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MATTHEW F. KENNELLY

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[3] (The following proceedings were had in open court:)

THE CLERK: 05 C 4265, Entertainment v. Blagojevich.

THE COURT: Good morning.

MR. SMITH: Good morning, your Honor.

THE COURT: Can I get the lawyers' names for the record, please?

MR. SMITH: For the plaintiffs, Paul Smith, David Sanders, Katherine Fallow, and Kathleen Hartnett, all from Jenner & Block.

MR. KASPER: Michael Kasper.

THE COURT: Hang on a second.

MR. KASPER: I am sorry.

THE COURT: The fourth name?

MS. HARTNETT: Kathleen Hartnett, H-a-r-t-n-e-t-t.

THE COURT: Okay.

MR. KASPER: Michael Kasper, K-a-s-p-e-r, on behalf of defendant Blagojevich.

MS. LIU: Laura Liu, L-i-u, on behalf of defendant Blagojevich.

MR. DEADY: Patrick Deady, D-e-a-d-y, on behalf of defendant Blagojevich.

MR. GARCIA: Stephen Garcia on behalf of defendant Devine.

MR. DRYJANSKI: Andrew Dryjanski, D-r-y-j-a-n-s-k-i, for defendant Madigan.

[4] MS. PARSELL-BURKE: Ellecia Parsell-Burke,

P-a-r-s-e-l-l-B-u-r-k-e, on behalf of defendants Madigan and Blagojevich.

THE COURT: Okay, you can all have a seat.

There are a couple of things to go over before we start. First of all, there was –

Augie, there is one thing you can do. There was a motion for leave to file supplemental authority by the plaintiff noticed up for today. That is granted. I am just going to – here, I will give you the cover sheet on it there.

All right. Just in terms of making sure that I have gone over everything that I am supposed to have, on the motion for preliminary injunction, there is the motion, the memorandum in support and appendix. There are responses by – there is a response by defendant Devine. There is a response by defendant Blagojevich with a number of exhibits. Then there is a reply brief that also has a number of exhibits attached to it.

There is a motion to dismiss by defendant Madigan that is fully briefed. There is a motion to dismiss by defendant Devine that is fully briefed. Then there is the motion for partial summary judgment by defendant Blagojevich on one aspect of the case, and I didn't require briefing of that, but it is discussed – at least the legal aspect of it is discussed in the preliminary injunction motion to some extent.

My intention, I think, is to deal with the motions to [5] dismiss as part of the preliminary injunction hearing. So I am not going to rule on those ahead of time. I will say I was a bit curious as to why the one defendant who does not have any responsibility for law enforcement didn't file a motion to dismiss. You would seem to me to be the most logical person to file one.

Since, you know, arguably, this involves jurisdiction or jurisdictional issues, in other words, whether there is a case or controversy with a particular defendant, I guess I would like to know why you didn't file one.

MR. KASPER: We did file a motion to dismiss, your Honor.

THE COURT: A motion to dismiss on the grounds of lack of jurisdiction?

MR. KASPER: On the basis of standing.

THE COURT: I never saw it.

MR. KASPER: I believe we did. It has been fully briefed.

THE COURT: Do you have a copy?

MR. DEADY: We didn't bring it over, Judge. We can get a copy.

THE COURT: I never saw it. I have got one from Madigan, I have got one from Devine, I have got a combined response to Madigan and Devine.

MR. SMITH: We can get a copy, your Honor.

[6] THE COURT: No, no, I have got that motion. That is the motion for lack of standing.

No, I am talking about a motion along the lines of what Madigan and Devine filed. In other words, they filed motions saying, we are not doing anything to enforce this law.

MR. KASPER: Correct.

THE COURT: I would imagine the governor doesn't do anything to enforce the law. So why isn't that argument part of yours? Is there something I am missing?

MR. KASPER: Judge, the governor did not want to file a motion along those lines. He was a supporter of this law when it was passed by the general assembly, and he wants to defend it.

THE COURT: Isn't that something, though, that I need to deal with, whether somebody raises it or not?

MR. SMITH: Your Honor, my understanding of the Eleventh Amendment defenses is that while they are somewhat jurisdictional in nature, they are waivable as well, and the failure to raise such a defense doesn't require you to address it.

THE COURT: I mean, I am not sure this is really a – I mean, I guess it is an Eleventh Amendment issue, I guess, along the lines of the Madigan and Devine issues.

So, in other words, the short answer is you didn't file one because you didn't want to. You would rather defend [7] the law than say you don't have jurisdiction over me.

MR. DEADY: Judge, let me –

Pat Deady, Judge.

With respect to the motion to dismiss that was filed with respect to standing, the discussion among the counsel for the governor was, until the standing issue was resolved, he didn't believe he had to raise what was the Eleventh Amendment or the other issue raised with respect to –

THE COURT: Then why did the motion for summary judgment get filed? There seems to be a bit of an inconsistency there.

MR. DEADY: Well, Judge, we thought we had to defend based on the way that you had set the briefing schedule. The governor –

THE COURT: I didn't tell anybody to file a summary judgment motion. I just told you to respond to the motion for preliminary injunction. You guys did that on your own.

So, pardon me, but I am not buying the explanation. I mean, I am not just trying to jerk people around here, but I would like to know, because even if it is a quasi-jurisdictional issue, and even if it's waivable, I think I am entitled to know why the issue isn't being raised because it may bear on whether I consider it on my own motion or not.

MR. KASPER: Yes, I think that is a fair summary of what the governor's position is.

[8] THE COURT: What is a fair summary?

MR. KASPER: That he is interested in defending the constitutional and statutory –

THE COURT: Well, I will think about that in the final analysis, I suppose.

I gather that most of the evidence that is going to be presented, or maybe all the evidence that is going to be presented, has to do with the aspect of the legislation that concerns violent video games. Am I right about that?

MR. SMITH: That is correct, your Honor.

MR. KASPER: Yes.

THE COURT: I am hoping and more than hoping – I am expecting – that in the arguments at the end, there is also going to be some discussion about the aspect that deals with sexually explicit video games.

MR. KASPER: We are prepared.

MR. SMITH: Our position on that is a legal one, your Honor.

THE COURT: I understand you're planning on doing that.

Then the other question – and nobody needs to deal with this now but deal with it at the end – has to do with I guess what I will generically refer to as the labeling requirements. It's more to it than that. It's the labeling and the signs and all of the other associated things that go [9] along with it. I guess one of my questions is –

I mean, there has been discussion in the briefs about the propriety of that from a constitutional standpoint. I didn't see a whole lot of discussion about the issue of severability. So I would like people to think about that and talk about it we when get to the end of the case.

I think that takes care of all the issues that I wanted to raise with you ahead of time.

Do people want to do opening statements or do you just want to start out? I mean, I have read all the briefs. I reread them several times over the weekend. I don't need to be refreshed with your arguments.

MR. SMITH: My sense, your Honor, and just a suggestion, is we have witnesses here –

THE COURT: Fine, let's start with the witnesses.

MR. KASPER: All right.

THE COURT: That's fine. Have you talked about how we are doing this, who is going first?

MR. SMITH: We actually have an order, your Honor, which is primarily based on the convenience of the witnesses.

THE COURT: That is fine, no problem.

MR. SMITH: You have read it all anyway. It is going to be kind of one of our guys, one –

THE COURT: It doesn't matter. So who is going first? What witness is going first?

[10] MR. KASPER: The first witness is William Kronenberger, who is one of the state's –

THE COURT: Is he here?

MR. KASPER: Yes.

THE COURT: Is there a motion to exclude witnesses or is there not a motion to exclude witnesses?

MR. SMITH: There is no motion from us. They are all experts, your Honor.

THE COURT: So nobody is asking me to do that, okay. So we will start with Dr. Kronenberger.

The first thing I have to do is get water. Come on up here.

(Brief interruption.)

THE COURT: Go ahead.

WILLIAM G. KRONENBERGER, DEFENDANTS' WITNESS, DULY SWORN DIRECT EXAMINATION

BY MS. LIU:

Q Good morning, Dr. Kronenberger. Could you state your name for the full record?

Could you state your full name for the record, please?

A My name is William George Kronenberger.

K-r-o-n-e-n-b-e-r-g-e-r.

THE COURT: Keep your voice up. Even though there is a microphone, pretend there's not one.

BY MS. LIU:

[11] Q Could you give us a brief history of your educational background?

A Yes. I have a bachelor's degree in psychology from Xavier University. I have a master's degree in clinical psychology from Duke University where I was a James B. Duke Fellow.

I have a PhD in clinical psychology from Duke University as well.

Q Do you have any training in any specialty area of psychology?

A Yes. I am trained in pediatric psychology, which is the study of children's essentially biology and illness and how that interfaces with behavior in children.

Q Do you have any particular training in any other areas of psychology?

A Well, I did complete an internship as a part of my training, which is – it is not didactic schooling per se, but you go and you do a practical on-site training. As part of that internship, I did rotations in pediatric psychology and in neuropsychology.

As part of my training in pediatric psychology in graduate school at Duke University, I also did rotations in child clinical psychology and neuropsychology in hospital settings and in pediatric psychology hospital settings.

Q Dr. Kronenberger, where do you presently work?

A I am –

[12] THE COURT: You need to keep your voice up, too. Just pretend there's no microphone. That's the whole deal.

THE WITNESS: I am an associate professor at Indiana University School of Medicine in the department of psychiatry. And I –

My clinical work, my day-to-day work, is within a children's hospital called Riley Hospital for Children, and there is a large clinic within that hospital called Riley Child and Adolescent Psychiatry Clinic.

THE COURT: That is in –

THE WITNESS: That is in Indianapolis, Indiana.

BY MS. LIU:

Q As part of your role as associate professor, do you have any other responsibilities other than your clinical practice?

A Yes. I do essentially three broad sets of responsibilities there. I do teaching; I do service work, which is a fairly broad area; and then I do research. My clinical work is considered by the university to be part of my service work.

Q What type of work is involved at the Riley Child and Adolescent Psychiatry Clinic?

A At the Riley Child and Adolescent Psychiatry Clinic, I engage in those three missions: Teaching, service and research. And quite a bit of what I do there involves clinical work. This is work with children and adolescents who are referred to our clinic because of behavioral disorders of one [13] sort or another.

At Riley Child and Adolescent Psychiatry Clinic, I am referred to as the co-chief of the ADHD and disruptive behavior disorders specialty clinic. Every clinic has a chief and a co-chief, if that helps explain what that is.

I am also the chief of the psychological testing clinic at Riley Child and Adolescent Psychiatry Clinic, and I am — within Indiana University School of Medicine, I am the director of the section of psychology.

Q Now, do you also in your clinical practice treat any adults?

A I do treat adults. Predominantly those are adults who have attention deficit hyperactivity disorder because of the origination of that disorder in childhood and its persistence through adulthood, for continuity of care. I will occasionally treat adults with other disorders on an ad hoc basis. I do have training in adult clinical psychology as well.

Q Do you also evaluate and test adults?

A I evaluate and test adults for ADHD, not routinely for other things, for learning disorders, I should say, which often are a part of ADHD assessments.

Q Now, you mentioned that the type of disorders that you treat in your clinical practice involve ADHD and types of behavioral disorders?

A That is correct.

[14] Q Can you give us examples of the particular behavioral disorders that you are referring to?

A Yes. ADHD is attention deficit hyperactivity disorder. It's a disorder that involves essentially two broad sets of symptoms. One set is inattention and disorganization, and these are symptoms like difficulty sustaining attention, difficulty staying focused on a topic, trouble having – engaging in mentally demanding tasks and trouble staying organized.

The hyperactivity and impulsivity is the second set of symptoms in ADHD, and these are things like talking too much, having trouble with interrupting or butting into what people are doing. In younger kids you see a lot of fidgeting, trouble staying seated. In adults it tends to be more getting overly kind of excited and boisterous.

I should clarify that for the ADHD diagnosis, you can have really one of the two sets and still meet the diagnosis. Most of the children and adolescents that we see, though, have both together.

The other set, the DBD part, refers to disruptive behavioral disorder, and these are disorders that involve persistent oppositionality or rule-breaking behavior, and there are two types of those disorders. Oppositional defiant disorder tends to be associated with younger children although you can have it in adolescents, and that is more just a [15] persistent oppositionality, resistance, defiance, anger, things like that.

Conduct disorder is the second disruptive behavior disorder, and that tends to involve more serious, status-type offenses, fire setting, fighting. Many children with delinquency, for example, will qualify for a conduct disorder diagnosis.

So I treat with kids with attention deficit disorder and hyperactivity disorder and disruptive behavior disorder in that clinic.

Q Now, are the symptoms that you generally see in your clinical practice for children and adolescents different or the same than those displayed by adults that you treat?

A We see developmental changes in symptoms, and as a matter of fact, we will alter our treatments and our approaches and our assessments based on that.

For example, with ADHD in childhood, you might see more fidgeting and getting up out of the seat. In a 6-year-old in a classroom, that wouldn't be unusual in ADHD to see a child getting up when they are not allowed, wandering around the classroom, things like that.

That would be quite unusual in a 15-year-old, for example. So that is an example of a symptom that would be different in adolescents. And it would be considered, frankly, quite strange in an adult, for example, if someone in here were [16] to get up and just start wandering around the room. So there are developmental differences in the symptoms.

Then in the treatments there are developmental differences as well. With children and adolescents, we tend to rely more on the environment for setting up situations that will promote good behavior. With adults, there tends to be a little more self-awareness and self-control, and we will work more with the adults on engaging them actively and setting up their life to acquire the better control.

You see a similar thing with oppositional defiant disorder and conduct disorder where there tends to be less control at the younger ages, somewhat more control at the older ages.

Oppositional defiant disorder and conduct disorder, you really don't see persisting into adulthood per se. At least it is not really followed into adulthood because if it continues on the path of delinquency, then it becomes criminality and it goes over to a different system in adulthood.

Q Now, you indicate there's a qualitative difference in the treatment protocols. Why is that?

A It's because there's differences in the way that children and adolescents and adults process information that they actually have different strengths and weaknesses, and certainly you see a progression of increased self-control as you reach [17] toward adulthood.

We have, for example, behavior checklists where there are norms that show that, that you get increased self-control.

Q In the course of your clinical practice, how do you generally come to evaluate a patient who potentially has ADHD or some other disruptive behavior disorder?

A Typically in children and adolescents, what happens is they arrive at my clinic because something is happening that is impairing their quality of life: They are struggling in school, their teachers notice problems, they are rejected by their peers.

And parents – sometimes the teacher brings it up, sometimes the parent brings it up, but a determination is made by the adults in their life that these things are interfering with their quality of life, and at that point they would come down for an evaluation. And the rationale for treatment is to improve the child's quality of life or the adolescent's quality of life.

Q When you say quality of life, are you referring to certain tangible behavior?

A These could range from things, social rejection, all the way to failure, flunking out of school, detentions, things that could – yes, relatively concrete stuff in their day-to-day life.

Q Do you perform any types of tests in the lab or checklists [18] and tests for some of the areas concerning attention?

A Yes, we do.

I should clarify that when we make a diagnosis of attention deficit hyperactivity disorder, we rely on interviews and information obtained predominantly from parents and then using school information as well. We do not use lab-based tests to make the diagnosis.

Once the diagnosis is made, then we need to make decisions about where the weakness areas are, things that we need to do to improve functioning.

Lab-based tests can help us to understand how the individual is processing information, so that then we can make recommendations to parents and teachers to promote better processing of that information. So they are not used in the diagnosis, but they are used in the understanding.

Q What type of lab tests are you referring to?

A To some extent that would depend on the diagnosis and what the child is showing.

Frequently we will look at IQ tests because IQ tests tell us something about how well they are able to understand what is going on in their world. We will look at other tests of specific functions like attention and concentration and memory to – if we think that those are problem areas.

Now, in ADHD and, to a large extent, in disruptive behavior disorders as well, self-control can be an issue; and [19] so because concentration and inhibition are involved in self-control, we will sometimes use tests of what are called executive functions. And examples of tests like that are the the Stroop color-word test, the Conners continuous performance test. These are tests that we use fairly frequently in my clinic.

Q Can you describe for us in general how you use the Stroop color-word test in general?

A Sure. The Stroop color-word test essentially is a test – it has multiple parts, but the key part of it involves words: Red, green and blue. They are written in different colors of ink. So you might have the word "red" and it's written in green ink, or the word "blue" and it's written in red ink.

The individual has to tell you the color of the ink the word is printed in, ignoring the word that is printed in each item. Now, reading words tends to be a relatively automatic thing for people to do and it's fairly easy. Naming colors is more difficult.

So what the individual has to do as they are naming these colors is they have to resist that impulse, the much easier impulse to just name the word or read the word and say the color.

What you see in individuals that have trouble with that inhibition is they will periodically, sometimes fairly frequently, they will read the words, and you have to say, "no, [20] name the color." And so that tells us something about their ability to inhibit an easier response in favor of a more difficult response.

We use that test because it has been correlated with measures of disinhibition, and specifically with ADHD symptoms in the real world. ADHD symptoms are good measures of inhibition because that is kind of the core part of that disorder, but inhibition is present in other disorders as well.

The Conners continuous performance test is kind of a similar thing. You see letters flash by on a screen one at a time. They are about maybe an inch to an inch and a half high. They flash by at one-, two- or four-second intervals. Nine out of ten letters are not Xs and you're supposed to hit the space bar on your computer after every letter that is not an X.

So what happens is you get used to hitting that space bar 90 percent of time. Then an X comes up and you are not supposed to hit the space bar. So like any task that you do repetitively, you have to hold back on the pressing of the space bar when the letter X comes up. So that is an inhibition of that easier response as well as a focus on that test.

And like the Stroop, the Conners continuous performance test has been correlated with real world behaviors.

Q Now, you state that some of these tests involve testing a child's ability to exercise executive functioning. What do you mean by executive functioning?

[21] A Executive functioning, broadly speaking, is the ability to plan, organize, direct, and carry out behavior that is oriented toward a goal. So it's basically that process that keeps you on task through a process of behavior to reach a goal.

In kids, particularly kids with ADHD and disruptive behavior disorder, what you see being a problem in executive functioning is disinhibition, essentially that they don't inhibit responses that interfere with their ability to reach a goal.

So the Conners continuous performance test and the Stroop color-word test measure that type of executive functioning.

Q Other than the Stroop color-word test and the Conners continuous performance test, are there any other types of testing that could be used to check a child or adolescent's executive functioning skills?

A Yes, there are lots of executive functioning tests. And there's multiple areas of executive functioning.

So when you are doing testing, you're picking an important candidate area to evaluate; and the reason that we use the Stroop and the Conners is that there is – that those tests both in terms of, you know, clinical background and what we know clinically and in terms of correlations and research studies have been shown to correlate with real world behaviors of interest. Executive functions in the real world I guess is [22] what I would say.

Q Dr. Kronenberger, have you conducted any firsthand studies or research on aggressive behavior in children or adults – actually, I am sorry – children or adolescents?

A Yes.

Q Do you conduct this by yourself or do you collaborate with other researchers?

A Virtually all of my research and certainly all of my research on aggressive behavior is as part of a research team. So we have teams of people that bring together different abilities so that we can do the research.

Q In general, what type of specialists or practitioners make up this team?

A To some extent it depends on what we are studying. In the case of our studies using neuroimaging, we have clinical psychologists, neurologists, social worker, neuroradiologists, physicists and neuroscientists on the team.

Q Then do you consult with each other throughout the course of the studies, or is everybody independent?

A We meet regularly.

When we go over findings, we meet when we can as a whole group. Obviously, occasionally people are out of town and things like that, but we try to bring the group together as many people as are there to review research finding and to share our interpretations of different results from our [23] different perspectives.

Q Have you conducted any firsthand studies or research on exposure to media violence?

A Yes.

Q In the particular context with adolescents, have you done any firsthand research studying the exposure of media violence on adolescents?

A Yes.

Q Did you find any type of relationship between the exposure to media violence and these teens?

A Yes. We have one study where we showed that teens with more – with histories of disruptive behavior disorder and aggressive behavior report, and their parents report, more media violence exposure than teens from what we call a control sample that did not have that history.

Q What types of media are you referring to when you say that you study media violence?

A We study teens' and parents' reports of television and video game violence.

Q Is it all video games?

A Well, when we ask them the questions, we ask them questions about different types of video games, but some of those questions are also about violence in video games.

Q Have you done any research involving media violence exposure in adolescent brain activity?

[24] A Yes.

Q Have any of these studies been reported or published in any publications?

A Yes. We have –

Well, again, depending on how you define brain functioning, we have one publication in a peer review journal that used functional MRI. We have one publication of a peer review journal that used what we call neurocognitive testing. We have, well, two presentations that we rely on that involved functional MRI as well.

[25] Q Dr. Kronenberger, are you being retained as an expert in this lawsuit?

A Yes.

Q And are you aware that the lawsuit involves a statute or a law related to violent video games?

A Yes.

Q What have you been asked to do as an expert in this case?

A I've been asked to provide opinion and interpretation of my research.

Q Are you asked to make any types of conclusions about your research?

A Well, I've been asked to state how I interpret my research results. Oh, also I think I was asked if my research results were consistent with a part of the finding of the legislature.

Q And what is your understanding as to what part of that Illinois legislature finding you're supposed to –

A I would have to see it to know the exact quote, but in so many words it says violent video games affect the brain functioning of children.

MS. LIU: Your Honor, I would like to introduce some documents to the witness.

THE COURT: As far as exhibits, have people talked about them so that we don't need to go through some huge foundational thing? I'm guessing that – are you talking about journal articles, things like that?

[26] MS. LIU: These are all documents that either have been attached to his declaration, including the declaration, or part of the pleadings.

THE COURT: Okay. Is there any objection to the use of any of those? Fine.

MS. LIU: May I approach the witness, your Honor?

THE COURT: That's fine. No need to ask. Just go ahead and do it.

BY MS. LIU:

Q Dr. Kronenberger, I'm handing you what's been marked as Defendants' Exhibit Number 1. Would you take a look at the document and let me know if you've seen this before?

A Yes. This is my declaration.

Q Could you identify for the record what it is?

A This is my declaration, and there's attachments in the back, and I can't say whether they were – I assume they were part of my declaration before

THE COURT: They were.

BY THE WITNESS:

A And should I check to see if all of the key articles are here or -- I mean, it looks like it's the key articles that are here.

BY MS. LIU:

Q Now, you mentioned that there's some articles attached or presentations. Can you just identify for the record what those [27] are that's attached to your declaration?

A The one in the back, the last one, is the Matthews 2005 article, and I usually just refer to it as the Matthews 2005 article. It looks like going forward the next one –

THE COURT: It looks like a power point of some kind.

BY THE WITNESS:

A Actually, yeah, it's a presentation. It almost – actually, I think it's a mix of – it looks like the Kalnin presentation. Yeah, it is. It's the Kalnin 2005 presentation. And I think that that's all there – there were other presentations. There was one other – let's see. One other presentation by Wang in 2002 that I used in my declaration, and there was – in terms of neurocognitive functioning, there was an article that I first authored in 2005 that's not attached, but it's there.

BY MS. LIU:

Q Did you participate in the two articles or presentations, the Kalnin 2005 you've referred to and the Matthews publication? Did you participate in those particular documents?

A Yes, to differing degrees, obviously, in each one, but I was a key participant in each one.

Q And did these documents or materials form part of the basis for your opinions or your statements in your declaration?

A Yes.

[28] Q And you also mentioned that there are some other articles on neurocognitive testing?

A That there was an article that I first authored in Journal of Clinical Psychology where we used two neurocognitive tests and two, essentially, behavior checklists where we had parents and teens report on the teens' behavior in the real world.

Q Dr. Kronenberger, I'm handing you what's been marked as Defendants' Exhibit 2 and Defendants' Exhibit 3, and can you identify those for the record?

A Yes. These are the two peer-reviewed published articles that I first authored.

Q And what do you mean by peer review?

A When you send an article to a peer review journal, what happens is the editor gets the article, and they send it out to people that the editor has identified as experts in that area of the field, and then they review it and decide if it's worthy of publication in the journal, and they provide feedback on strengths and weaknesses of the article.

And at a very basic level, they say whether it should be published in the journal or not. They also say if it should – if they feel like it's publishable information, they'll provide questions that they have about it. Some journals are blind peer-reviewed, which means that they – you know, the author doesn't know who the reviewers are. And again, to the best of my knowledge, both of these are blind [29] peer-reviewed journals.

Q And can you just identify for the record which is 2, which is 3? These exhibits. Just identify for the record.

A Oh, sure. Oh, sorry. You mean the exhibit number? Yeah. Two I sometimes refer to as the Journal of Clinical Psychology article. It is the one where we use tests of neurocognitive functioning, namely the Stroop color-word task and the Conners continuous performance task. We did use other measures in that study, but –

Q And are you the primary or principal author on this publication?

A Yes.

Q Can you identify the next one, Exhibit 3?

A Exhibit 3 is an article where we looked at differences between adolescents with either disruptive behavior disorder and aggressive behavior versus control adolescents who did not have that kind of behavior on measures of media violence exposure.

Q And are both these articles, the Kronenberger articles under Defendants' Exhibit 3 and 2, they also form part of the basis for your opinions or the statements contained in your declaration?

A Yes.

Q When were you first retained as an expert in this case?

A I got a phone call in August – or I returned a phone call [30] in August to I believe it was Matt Ryan of the Governor's office, and then a few weeks later – well, probably within about a week, I agreed that I would be retained in the case, and then a few weeks later, I think, is when I was put in touch with your firm.

Q Now, are you being compensated for your work in this case?

A Yes.

Q What is your compensation arrangement?

A $200 an hour.

Q What did you do to prepare your declaration in this case?

A I reviewed literature. I used my own background knowledge and my own clinical background. I wrote drafts and communicated with you about them. I asked you questions about what a declaration is and how to write one. I think that basically captures it.

Q Did you look at any scientific literature that would form part of the basis for your opinion?

A Yes.

Q And did you also look at your own publications?

A Yes.

Q Do you know what functional magnetic resonance imaging is?

A Yes.

Q Can you describe that for us?

A Functional magnetic resonance imaging is a –

THE COURT: Why don't you just call it fMRI so she [31] doesn't have to write it down every time.

THE WITNESS: Great.

BY THE WITNESS:

A fMRI is a neuroimaging technique that allows you to detect activation in certain regions of the brain using relatively noninvasive technology, meaning you don't have to put something in somebody's bloodstream or anything like that. The way that that activity is detected is based on the blood flow to certain regions of the brain and some of the magnetic properties of blood flow.

So, activity in regions of the brain is inferred based on changes in blood flow to certain regions of the brain. And so, you'll hear the word or the acronym BOLD, which is blood oxygen level dependent, which is just a fancy way for saying we look at magnetic properties of the blood to detect the blood flow to certain areas of the brain, and based on that you infer changes in brain function.

BY MS. LIU:

Q And have you used fMRI in any of your studies or research firsthand?

A As a part of my research team, yes.

Q When did you use fMRI in particular?

A We used fMRI in our – essentially in our studies of adolescent media violence exposure and brain functioning.

Q And what are you trying to measure when you say activation [32] in the brain?

A Well, we're trying to measure the activity in certain regions of the brain based on literature review and also just general understanding of what the functions of different regions of the brain may be and what activation in those regions is associated with.

Q So, can you give us an example, for instance, of what fMRIs will show you in terms of brain activation and what else is going on?

A Sure. So, you may do fMRI while an individual is engaged in a certain task in the scanner. If it's functional, typically you're going to have the individual engaged in some task in the scanner because there's got to be a function going on. So, they'll engage in some task in the scanner, and then the fMRI essentially captures the difference, the change in blood flow during that task, as compared to a control task. You essentially attempt to separate out some other things that are going on in that task from whatever function it is that you're trying to get at.

And so, if you have an individual doing a concentration task, you would try to design a control task that accounts for everything except the concentration in that concentration task, compare the blood flow in those two tasks, and then the activation in that region of the brain would be associated with concentration. And, for example, in [33] concentration it's common to look in the prefontal cortex and the anterior cingulate cortex of the brain.

Q Why do you say it's important to look at the prefrontal cortex or the anterior cingulate cortex?

A Well, in our group, essentially, number one, you go on people's backgrounds and background knowledge, and the prefrontal cortex and the anterior cingulate cortex was pretty much generally agreed on in our group as critical areas involved and associated with attention and concentration, self-control, inhibition. The other thing that you go on is you review relevant literature that has already studied the functions of those areas.

Q Dr. Kronenberger, do you or have you ever designed any research using fMRI?

A Yes. Again, as a part of that clinical team.

Q In particular, any research or studies using fMRI in the media violence exposure in adolescent brain activity research you've discussed?

A Yes, I have designed.

Q And the exhibits that we've introduced, the publications and the papers, the two that are attached to your declarations and then the two that are authored by you, do any of these involved fMRI studies?

A The two that are attached to the declaration involve fMRI. The two – can I call them Exhibit 2 and Exhibit 3?

[34] THE COURT: Sure.

BY THE WITNESS:

A The Exhibit 2 and Exhibit 3 were from the same study where fMRI was the – the same project, I should say, where fMRI was part of that project, but they don't use the fMRI methods. There's also another one that I don't have that I relied on that's Wang 2002, and that used fMRI.

BY MS. LIU:

Q And was that cited in your declaration?

A Yes.

Q Do you design any of the actual fMRI paradigm that's being used?

A Yes. I should clarify that when we say paradigm, we mean essentially the task that the subject is doing in the scanner. So, the way our team works is the neuroradiologist and the pediatric psychologist – that's me – sit down, and I work on the task that I expect will be relevant in the scanner, again because I do a lot of psychological testing, and the tasks in the scanner look a lot like tests, and the neuroradiologist also knows a little bit about testing, but a lot about neurology and neuroradiology, and we collaborate on looking at the data, the literature, and our background to make an inference that that particular task is going to activate a region of the brain that's a region of interest to us.

Q What is your understanding of neurocognitive testing?

[35] A Neurocognitive testing is not neuroimaging. It is essentially laboratory-based performance tests. And by laboratory-based, I mean office-based. Essentially they come into a testing office. So, it's a laboratory-based performance test where we evaluate how well the subject, the participant or patient, does on that test, and that reflects an ability that has been shown to relate to an aspect of brain functioning.

Q And have you yourself ever designed or codesigned any neurocognitive testing specifically with studies related to media violence exposure and adolescent brain activity?

A Yes.

Q And are they also reflected in the exhibits we've discussed?

A Yes.

Q Can you briefly describe your research on the relationship between media violence exposure and adolescent brain activity?

A At the most general level, our research has sought to look at differences between adolescents with high versus low exposure to violent media, and then we have looked at certain processes, certain activation of brain regions that we've identified as candidate regions based again on literature, review, and understanding of the context of science to be important or relevant to look at.

Q And your research, this is all people under the age of 18?

A Yes.

[36] Q They do not include any adults?

A No.

Q And were there parts of this research? Have you completed all of the research?

A There are – essentially, right now we are in what we call phase three. We call them phases. A phase really is just a big research project. It essentially is a protocol that you write. And there have been two phases that we've completed. And I'm not sure how's the best way to go through them all, but there's phase one, which was our first research, and in phase one what we intended to do was to look at adolescents with high versus low media violence exposure, and based on our review of the literature, what we sought to do – essentially, there's literature that shows that media violence exposure is related to aggressive behavior. Then there's additional literature that shows that aggressive behavior is associated with activation in certain brain regions.

And so, following that line of reasoning, we looked at those brain regions, wanting to come back and see if there was that relationship with high versus low media violence exposure. And phase one was looking at the brain regions that tended to be more associated with self-control and inhibition and things like that because that had been written about, and these were prefrontal regions and the anterior cingulate cortex.

Phase two essentially took the direction a little more [37] into the emotional area because there had also been writing and research about aggression in emotional areas – I should say areas of the brain that were associated with emotional functioning.

Phase three is experimental study where – I can talk about that.

Q Now, you were involved in the design of – let's talk about phase one. Let's start with phase one.

A Okay.

Q You were involved in the design of the study?

A Yes.

Q How did your team select subjects?

A We advertised widely. We wanted to get a broad set of subjects. We received numerous phone calls, probably in the low one hundreds. We do a screening process, and the screening process is to make sure that they meet criteria that we set for study entry.

So, probably most relevant was we wanted to look at two clinical groups in phase one. One was again this DBD group which I've talked about before, disruptive behavior disorder. So, these are kids with either oppositional defiant disorder or conduct disorder, which I described earlier. But we also required that they have what was called aggressive features, and this was one of, I forget, seven or nine criteria that are specified in conduct disorder that we identified as being [38] reflecting aggression. So, we had that group. They had to have the DBD diagnosis and the aggressive feature.

The other group was the control group, and that group had to have no diagnosis using the Diagnostic and Statistical Manual that's used in psychiatry. It's called the DSM-IV. So, they had to have no diagnosis and no visit to a mental health professional in the past three years. So, those were our two groups.

When people called in, we screened them for one or the other, and, as a result, some got screened out, and there's other reasons. They don't need screening. Sometimes when they find out the time demands of the study, they say no. We ended up with 71 participants that actually showed up for a visit. It was a two-visit protocol. We ended up with 71 that showed up for visit one.

Q How do you screen for this DBD group in your subject selection?

A Well, there's a two-stage process. When we say screening, what we mean is they call in on the phone, and we hate to have them drive all the way down to find out that they can't participate in the study. So, there's a very brief screen that takes place on the phone. We don't really use that in our research. That's more for the convenience of the subject.

Then when they come down, we establish the diagnosis of – we look at three diagnoses very carefully, ADHD, conduct [39] disorder, and oppositional defiant disorder, and we use a measure called the Kiddie SADS, which is – it's called a semistructured diagnostic interview. It's K-i-d-d-i-e S-A-D-S. Actually, K-SADS is another abbreviation for it, which may be easier.

The Kiddie SADS essentially takes the diagnostic criteria in the diagnostic manual and operationalizes them so that the individual who's making the diagnosis, they will make a highly reliable diagnosis. And Kiddie SADS is considered a gold standard of diagnosis. For example, Kiddie SADS is used in studies when you're looking at disorders and in medication and you're submitting them to the FDA. So, it's considered a high standard.

For all other diagnostic criteria besides ADHD, conduct disorder, and oppositional defiant disorder, we used a questionnaire that essentially has many other criteria from many other disorders, and then when the parents finish completing that questionnaire saying whether they were present or absent, if there were patterns where they said things were present or absent, then we sat down and conducted more of an unstructured clinical interview with them in order to establish whether their report on the questionnaire seemed to fit. So, that was for the other diagnosis.

Q Now, during the selection process for your subjects, do you control or match for any particular variables?

[40] A Yes. Well, in phase one and – well, actually, I believe in all of our studies thus far we have matched for age plus or minus two years, IQ plus or minus a half standard of deviation, which works out to about seven or eight IQ points, and gender, and we match our DBD and control groups on that so that there is not a systematic difference between the DBD and control group.

So, as a result, only though 71 might show up at our door at visit one, the amount we use in analysis might be lower because we can't be confident – of course, you can't know ahead of time that everybody's going to have a match.

Q Do you have to make any assumptions about the subjects that you're selecting?

A Assumptions.

Q About the control group or the DBD group related to your research.

THE COURT: He's wondering what you're looking for. So, be more specific.

BY MS. LIU:

Q Do you need to make any assumptions about why you would use the DBD group for this research?

A Well, the reason that we sampled it, yeah. We're doing high versus low media violence exposure, so the questions were why use the DBD group. The reason we're doing the DBD group is if you remember our logic of progressing from media violence [41] exposure, aggressive behavior, and brain functioning, we wanted a group that had that aggressive disruptive behavior so we could look at them in the context of the brain functioning studies, as well. There's not a lot of literature out there on fMRI and aggressive adolescents, and so we felt like it was important to include that sample in our research. You know, we also wanted to look at – we also wanted to see whether aggressive history made any difference in terms of our findings.

Q Now, how do you measure media violence exposure in this experiment?

A We have a measure called the MEM, the media exposure member, M-E-M, and the MEM – it's a complex measure, but it boils down to essentially six scores that you get at the end point. I should say as long as you all understand that we're simplifying here. But there's six scores. There's a measure of television violence exposure reported by the adolescent in the past week, and we do that by literally taking the adolescent through their past week and asking them exactly which television shows they watched, asking them what they saw on the television shows in terms of different kinds of violence and injury and things like that.

We do a similar thing with video games over the past week from the report of the adolescents. You have television past week adolescent report, video game past week adolescent [42] report. Then we ask the adolescents to make an estimate of the past year. So, in general how many hours of television do you watch during the week in the past year. Then we go through the same kind of steps with like the levels of injury or violence on television in the past year. So, then you get an adolescent estimate past year report. You do the same thing with video games. You get an adolescent past year video game.

And then we go to the parents, and we ask them for the past year how much violence their adolescent has been exposed to in television, in video game from the parents' perspective. So, you get six measures. Television past week adolescent, video game past week adolescent, television past year adolescent, video game past year adolescent, television past year parents, video game past year parents. So, you have these six indexes. Oh, I should say the reason we don't do past week parent is the past week thing, remember, is like a daily diary, and parents simply don't have that level of knowledge about what their adolescent is doing every minute.

Then what we did is we looked at do these – assuming that there is this thing called media violence exposure, there should be some correlation between some of these, and we used a technique called factor analysis and looked at how well these six things hung together, and what we found was that five of them hung together fairly well, well enough for us to add them together. A sixth one, parent report of adolescent television [43] violence exposure during the past year did not hang together with the first five sufficiently well for us to include it on the media violence measure.

I know it's a long explanation, but since it's kind of our measure of media violence, it's kind of important to know. So, it's those six things, but not the sixth, not the parent television violence exposure. So, we add together the five to get a media violence exposure index.

And then in our fMRI studies what we do is we go one step further and we divide the adolescents into high and low media violence exposure by essentially just cutting right down the middle. Anybody above is high. Anybody below is low. Mostly that's for convenience of the fMRI results.

In the neurocognitive study, which is the Kronenberger one, the statistics that I run, I can just use the media violence exposure index as a continuum, just exactly as we add it together and calculate it.

Q So, you mentioned you use the MEM, the violence index for fMRI when you're doing scanning, and you also use it in the neurocognitive testing?

A Right. We used it as our measure of media violence exposure. We don't do it in the fMRI, but yeah. I mean, we don't do it in the scanner. You know what I'm saying.

Q What are the tasks that you use in the fMRI scanning?

A In phase one, which again phase one you can think of more [44] as our phase where we tended to look at frontal lobe functioning and anterior cingulate functioning. In phase one we used what's called a counting Stroop in the scanner, and I described the Stroop color-word before where the interference is between the words you read and the color of ink that the word is printed in. Well, in the scanner we opted to use what's called a counting Stroop, which has been used by other people, too, but – or versions of it have been used by other people.

THE COURT: Say again. A counting –

THE WITNESS: Counting Stroop.

BY THE WITNESS:

A So, you still try to get the interference, but –

THE COURT: Stroop.

THE WITNESS: Stroop. It's not a great – Stroop basically means you kind of – it's easier to do one thing, but you got to hold back and do the other. So, it's easier to read the word, but you got to hold back and do the color.

THE COURT: Okay.

BY THE WITNESS:

A The counting Stroop what happens is you might see – the stimulus might be one, one, one, the numeral one three times, and you have to push a button corresponding to three. And then it might be two. So, the numeral two, but it's only one time. You have to push a button corresponding to one.

[45] The easier task, obviously, when you see a numeral is just to name the numeral, but in the counting Stroop, in the key part of the task, what happens is you have to push the button that's for the harder thing to do, which is say the number of numerals that you see.

THE COURT: How many times you've seen it, in other words.

THE WITNESS: Well, it's how many numerals are there. So, if it's two, two, two, the answer is three, not two.

THE COURT: Got it.

BY THE WITNESS:

A And what you'll find is some subjects will hit two because, you know, that's kind of like "Two. Oh, sorry," you know. "That was a mistake." Because again the easier response is the numeral identification. So, we use the counting Stroop.

As an aside, the reason we use the counting Stroop in the scanner is people are pretty good at identifying one, two, and three with certain fingers, but red, green, and blue don't go with fingers quite as easily. It's not that you can't do it in the scanner, but it's not as intuitive, and our concern was that we would get other patterns of brain activation that might interfere with our results a bit. You can still do it, but, anyway, we like the counting Stroop better.

So, that was one of our measures that we used, and that was what was used in the Matthews study. What we used in [46] the Wang study, which was a presentation – and I should say I'm calling them different studies, but you're talking about the same project.

BY MS. LIU:

Q We're still on phase one.

A Phase one.

In the Wang study it was a little bit different. We used a comparison of two video game – simulated video game play, basically. We couldn't have the subjects play the video game in the scanner because of the technology. You can't have metal, you know, in a real powerful magnetic field. It interferes with the magnet, and it can be dangerous. And so, they've made some joysticks that you can get in there, but we weren't comfortable and actually at the time we ran this data may not have even had them yet. So, we tried to find the best way we could to simulate video game play.

The other thing that we wanted to make sure happened was that everybody did the same video game while they were in the scanner. Of course, the only way to do that is to have some videotape that you run. So, when I call it video game play, I should clarify. I hate to make mistakes or be inexact. I really don't mean video game play. I mean simulated video game play. It wasn't just video game watching because what we told them was you're going to see a video in the scanner, and it's either going to be a James Bond video game, which is a [47] first person shooter game where you go through these kind of hallways and you shoot people, and or it's going to be a car racing game, which is kind of a competitive racing game. And we told them we want you to watch it, but we also want you to simulate play. We want you to push a button if you want to shoot. We want you to push a right or left button if you want to turn. Again, I freely acknowledge that, you know, it's simulation and not actual play. On the other hand, the fact that we had them doing something we felt was more accurate than just having them watch the video game play. So, that was the Wang study.

And what we did was we subtracted out the activation during the James Bond game from the activation during the car racing game because otherwise you end up with – you know, you don't know if it's video games in general or whatever. You try to match them as closely as you can.

I should say in the Stroop task you do the same thing. So, even though you have the one, one, one or two, two, you have a subtraction task where – because they also have to watch or push buttons, you have a subtraction task, and for that it's just X, X or X, X, X. So, there are no numerals, but they're just responding to the number.

THE COURT: Pause for a second.

THE WITNESS: I'm sorry.

THE COURT: When you say in the scanner, what does [48] this equipment look like? Physically what's it like?

THE WITNESS: It looks just like an MRI. So, it's a tube.

THE COURT: It's a tube.

THE WITNESS: They lay down on a – kind of a moving table. Different fMRIs are done different ways. In our fMRI, they have like a prism where we can show things on a computer screen and – a mirror, you know, and they can see it on the mirror, and then we watch the computer screen so we can, you know, make sure that the task is actually going on. And then there's like this – their hand is down, and it's on like a pad where they can push buttons.

THE COURT: So, in other words, the person is prone, as they would be in a normal MRI test.

THE WITNESS: Absolutely.

THE COURT: And what they're seeing, they're seeing it on a mirror that's reflecting a computer screen, and they've got some sort of a keypad at their hand that they're using to push as you described.

THE WITNESS: That's exactly what happens. And while the – I mean, it is an MRI. There's like computer programming and physics, and this is why I work with a team.

THE COURT: I just wondered if it was a different type of device altogether. Okay. Go ahead.

BY MS. LIU:

[49] Q So, in your MRI study, what are you looking for when you're scanning the brain?

A So, we wanted to look at two things in phase one. As a first part of our studies, looked at differences between the control group and the disruptive behavior disorder group to see if we were getting differences in brain activation between a group that was known not to have aggressive behavior and a group that was known to have persistent aggressive behavior, and we looked in candidate brain regions that we had identified based on our earlier understanding, and in phase one those candidate brain regions were the dorsolateral prefrontal cortex and the anterior cingulate cortex. If it's too inconvenient, I'll spell them out every time, but DLPFC is dorsolateral prefrontal cortex, and ACC is anterior cingulate cortex.

So, we compared control and DBD groups on their activation in those regions. And I should say if I say functioning, what I mean is activation. This is essentially based on that blood oxygen level thing that I talked about before.

So, you have these two groups. You're comparing them on their functioning. You have these candidate regions that have been shown in other studies of aggression and brain functioning to be potentially important areas associated with differences between groups.

[50] Then the second level of differences is high versus low media violence exposure. So first we look at control versus DBD to help us understand the brain regions. Then we look at high versus low media violence exposure.

Q Why are you choosing the dorsolateral prefrontal cortex and the anterior cingulate cortex?

A There are two regions – two reasons.

One reason is that individuals who have summarized the literature on brain functioning and aggressive and violent behavior have said the prefrontal cortex, including the anterior cingulate cortex, is an important region of the brain in this type of behavior. It tends to be associated – actually lower activation or deficits or injuries to that region tend to be associated with aggressive or violent behavior.

They also identify some regions that they think are more related to emotional functioning or anger.

Now, that wasn't the purpose of phase one, but I can talk about that when we get to phase two.

So the prefrontal cortex is a large area. The anterior cingulate cortex, you know, is an area. And then you design, you know, tasks that you think your subjects can do and that you think are good tasks for them to do in the scanner and that relate to the real world.

So we chose the Stroop because it had been widely [51] used, it related to real world behavior, you know, and we knew from prior study that the Stroop tended to result in activations of the anterior cingulate cortex and a subregion of the prefrontal cortex called the DLPFC. Now, there are other regions of the prefrontal cortex, but we did not expect -- this is based –

Actually I do mean we, the team, did not expect based on our experience that we would see activation broadly outside of the dorsolateral prefrontal cortex and the anterior cingulate cortex. So those were our regions of interest within the broader prefrontal cortex.

Q If we just look at what the results from the published finding under the Matthews 2005 article were, can you tell me what were the findings?

A Yes. In Matthews 2005, and, again, that was the study that used the counting Stroop, when we did the first comparison of controls compared to DBDs, we found activation of the anterior cingulate cortex.

the ACC, and activation of the left dorsolateral prefrontal cortex in the control group.

In the dorsolateral prefrontal cortex, the key areas there are the middle frontal gyrus and the inferior frontal gyrus. These are two key areas of the dorsolateral prefrontal cortex. So you have the dorsolateral prefrontal cortex and then subareas, the middle frontal gyrus, inferior frontal gyrus. That was in the controls.

[52] In the DBD group, we did not find the anterior cingulate activation. We found activation on both sides of the brain bilaterally of the middle frontal gyrus. So this is a part of the dorsolateral prefrontal cortex.

Now, based on prior research and our expectations, our interpretation of that was that the control sample showed increased activation in the anterior cingulate cortex and in certain important regions of the dorsolateral prefrontal cortex; namely, the inferior frontal gyrus that was different from the DBD group.

So then we looked at high versus low media violence exposure. In that article really our focus was on – we decided to focus on control, the control sample with high versus low media violence exposure. There are a few reasons for that.

Actually we also did look at all high versus all low media violence exposure, but if you look at all high and all low media violence exposure, while it is an important comparison, in your low media violence exposure group, you are going to have some kids that have DBDs and are aggressive. So you have – you just have to be aware that you have got kind of a mix of people there.

If you use your control sample, you know that you have an all non DBD group. Then you can compare high and low media violence exposure within the control group. When we did that, [53] we found that the low media violence exposure control group showed activation in the anterior cingulate cortex, ACC, and the left inferior frontal gyrus, that part of the dorsolateral prefrontal cortex.

That matched up to a large extent the increased act – or the activation of the anterior cingulate cortex and the activation of the left inferior frontal gyrus matched up with what we had seen in controls and we didn't see that in DBDs.

When we then turned our attention and looked at the controls with high media violence exposure, we found that they showed activation in the left middle frontal gyrus. Again, that is a part of the dorsolateral prefrontal cortex, but it's the part also that we saw activation in the DBD sample.

So in terms of – you know, you start a study, you have your expectations, your candidate areas, you're looking. You might get exactly what you expect and you might have some deviations.

And so to kind of characterize it, where do we get exactly what we expected? Anterior cingulate cortex, we found low media violence exposure and controls associated with anterior cingulate cortex activation. That was consistent with that line of reasoning that I talked about.

We also found for a key region of the dorsolateral prefrontal cortex; namely, the inferior frontal gyrus – we found low media violence exposure and controls associated with [54] increased activation of that region. Where we did not get what we expected was this middle frontal gyrus area where we found more activation in the middle frontal gyrus in the DBD sample and in the control high media violence sample.

Now, we did have the control with high media violence showing that similarity to the DBD sample, but, again, a priori, we did not expect a dorsolateral prefrontal cortex region to show increased activation in either the DBD group or the high media violence exposure group.

So I know that's a long explanation, but that's –

THE COURT: Let's take a break right there. We are going to go until 12:30. So we will take a 10-minute break.

THE WITNESS: Okay.

(Brief recess.)

MS. LIU: Your Honor, I just wanted to address briefly a point.

The parties, both sides, actually stipulated previously to the qualifications of the experts to testify on the scope of their declarations. So I just wanted to put that on the record.

THE COURT: Okay, that is fine with me. I have read all of it, so people don't need to go through that except to the extent that you think is necessary.

BY MS. LIU:

Q Dr. Kronenberger, you were testifying earlier about the [55] different findings with respect to activations in the adolescent brain activity.

A Yes.

Q Under the Matthews study, the 2005 study, is that correct?

A Yes.

Q I think you had described the dorsolateral prefrontal cortex and what it does. You also talked about the amygdala. What does the ACC – how is that implicated in brain activity?

A The anterior cingulate cortex has been found to be activated in tasks that involve choice between maybe an easier thing and a harder thing or two things that are sort of equally impulsive for you to choose between. Typically it's where the ACC is activated.

And from those studies, people have inferred that the ACC is an important region of the brain in inhibition of automatic responses and choice between two responses where you have to inhibit an easier response in favor of a more difficult one.

It has also been found to be less active in individuals with a history of aggressive behavior.

Q Now, you mentioned that there were two fMRI studies that came out of this phase one. One was recorded in Matthews 2005. You also talked about a simulated video game play –

A Yes.

Q – study.

[56] Can you talk about the results from that one?

A Yes. The simulated video game play study was a presentation done by Wang in 2002. That was our research team. And I think I described a little bit about the methodology, so I won't go over that again.

But essentially subjects played simulated play of either a violent or a nonviolent game in the scanner, and we looked at differences in brain activation.

Again, we did our initial comparison between the adolescents with – the control adolescents and the adolescents with DBDs looking at differences in brain activation.

What we found there – and, again, using the violent video game as the paradigm, what we found there was the control adolescents showed activation in the left and right middle frontal cortex. And, again, if you remember, the DLPFC, two of the key regions of the DLPFC are the middle frontal cortex -- sorry – the middle frontal gyrus – I apologize – and the inferior frontal gyrus.

So the control adolescents in the video game study showed activation in the middle frontal gyrus.

The DBD adolescents in that simulated video game play study showed activation in the inferior frontal gyrus.

When we then went and again looked at control subjects with high versus low media violence exposure, the control subjects with high media violence exposure showed activation of [57] the inferior frontal gyrus, and the control subjects with low media violence exposure showed activation of the middle frontal gyrus.

So, in that case again, we had our control subjects with low media violence exposure showing activation in an area; namely, in that case, the middle frontal gyrus that corresponded to the control group, and the control subjects with high media violence exposure showing activation in a region of the brain, the inferior frontal gyrus that corresponded to the DBD group.

It's notable that – again, you take a step back and you say, okay, you went into the study with a hypothesis; you were looking at the dorsolateral prefrontal cortex, and you were – you know, you were expecting to find based on, again, prior research, increased or greater activation in your control group and in your low media violence exposure group than in your DBD group and in your high media violence exposure group.

That was the case for a key region of the dorsolateral – of the DLPFC; namely, the middle frontal gyrus.

However, again, we had results that were a little different than our expectations in terms of the inferior frontal gyrus. In that case the control high media violence exposure was showing some similarities to the DBD group, though.

Another issue to consider is that you remember in the [58] Matthews study, it was the middle frontal gyrus that tended to track with the DBD and the high media violence exposure group, and the inferior frontal gyrus that tended to track with the control and low media violence exposure group.

So in some ways you had the different brain areas being activated differently in the two studies. What is important to remember there is that the Matthews study used a Stroop test which involves a fair amount of concentration, and people typically don't say that it's so exciting that they could do it for hours.

In the Wang study, what we were studying, the paradigm in the scanner was a video game task, and that typically is seen as more interesting or more engaging, and people do report that they can do that for hours. So, yes, the brain function areas were different, but the paradigms themselves were quite different.

From a clinical standpoint, where that is relevant is what I see clinically in my practice is that individuals with ADD, attention deficit disorder, and DBD, disruptive behavior disorder, are able to stay focused typically on video games.

Video game focus is not concentration and I – I'm borrowing from another psychologist here. I didn't come up with this concept. But video game – staying involved in a video game this psychologist calls fascination, and I think that there is reason to assume that.

[59] As a matter of fact, it's well-known, and we teach our residents that you should not make a diagnosis of ADHD or impaired executive functioning based on whether someone can focus on a video game. Many parents of children with impaired executive functioning ADHD who I see at our clinic come in and say the child has no attention deficit disorder when they are playing a video game.

Where you see an attention deficit disorder is when you have to do concentration which is different from fascination. Concentration is when you have to force yourself to engage in the task. It is not the kind of thing that typically grabs people's attention for hours. So I will have parents say: Well, I can't tell if somebody has ADHD – if my child has ADHD or not because you sit him in front of a video game and he is totally focused for hours. I don't think he has attention deficit there. But his teacher says, as soon as it comes time to read or to sit quietly in the group or to listen, he has attention deficit disorder. What we explain is those are different stimuli.

So I know that is a long explanation. We talked about concentration and fascination, but it sort of fits with our understanding of why we may have seen differences in the brain regions in the Matthews study and the Wang study. The one similarity, though, is that in both studies, the high media violence exposure control group tends to track in brain [60] functioning. Now, it's not exact, it's not perfect, but it tends to be similar to the DBD group whereas the low media violence exposure control group tends to be similar to the control group.

So that is how we interpret the relevance of those results. That's the Wang study.

Q You also mentioned that you performed some lab-based neurocognitive testing as part of phase one?

A Right. That's the Kronenberger study, and it's the Kronenberger journal of clinical psychology study.

In the journal of clinical psychology study, what we wanted to do was to also look at performance indexes outside of the scanner to see if we would find the same sorts of results outside of the scanner and behavior that we were hypothesizing would be associated with our results in the brain functioning studies that I talked about before.

So we used four measures in that study. Two were laboratory-based neurocognitive measures. One was the Stroop color-word test which I have described before. Another was the Conners continuous performance test which I described before as well.

The other two measures were parent report of the child's – or the adolescent's ADHD symptoms in the environment. We used a behavior checklist for that. So there's 18 criteria for ADHD, and you can answer "never, [61] sometimes, often, very often." And the parent answers that and you can get a score for ADHD.

The reason we use the ADHD score is that attention deficit hyperactivity disorder is the psychiatric disorder where the symptoms have been thought of as being most core to an executive functioning deficit. So we thought the ADHD measure – the ADHD symptom report from the parents would be a good measure of executive function. We explain that in the article.

We did the same thing from the adolescent's self-report. So we asked the adolescents how hyperactive, how impulsive are you, and there is a scale that you use. Again, it tends to be a scale that is used more for ADHD. The same logic of reasoning, we use it as an executive functioning.

So to sort of summarize, two measures of executive functioning in the lab, one measure of parent-rated executive functioning behavior checklist in the real world, one measure of adolescent's self-reported functioning behavior checklist in the real world, executive functioning behavior checklist in the real world.

We then took our media exposure measure, our media violence index, and correlated it with each of those four. The first thing we did was we said, just what is the correlation, and we found that there was a significant positive correlation between – or I should say it depends on which direction the [62] measure was scored. But there was a significant correlation between media violence exposure and poorer scores, so increased media violence exposure and poorer scores on each of those four measures of executive functioning.

The next step we went to was to say, can we control for or can we account for maybe some of the variables that might be sort of contributing to this relationship but are not media violence exposure. So you can do a technique called a regression where you can statistically take out the contribution of these other variables to your correlation.

And I believe we controlled for seven variables. Let's see if I can get them: Age, sex, IQ, total media exposure – now, that's different from media violence exposure; this was just the total amount of media that they said that they watched or played in video games – whether they had a DBD diagnosis or not and whether they had an ADHD diagnosis or not. So we controlled for those six or seven, at any rate, variables.

We knew when we did that that it was a stringent test. It's stringent because statistically the more variables that you put into this type of equation, the greater your risk that you will find that there is no relationship between two things when there really is a relationship. And it is a statistical principle.

In general, with a sample size of our size, you're [63] pushing your luck when you start to enter more than five variables or so, and we already had more than that. We thought it was justified because we wanted to do a very stringent test.

What we found – when we accounted for all those variables was the Conners continuous performance test – so one of the lab-based tests – and the parent report of executive functioning ADHD in the environment continued to show that positive relationship with media violence exposure. So those two continued to be positive.

The Stroop color-word test was no longer statistically significant, but it was right on the margin. And the reason the margin makes a difference there is that is when you start to say maybe we made a mistake putting too many variables in, and if we had a bigger sample, it would have been statistically significant.

Now, you can't say without doing it, but you can warn that that might have happened. Remember the zero order correlation when we just correlated Stroop and media violence exposure was significant.

The self-report of executive functioning problems in the environment, that dropped out. That was no longer statistically significant. It didn't go down to zero, but it was not on that borderline. Our explanation in the article for that one was – and this is fairly well-known clinically – is that individuals are not – particularly individuals with [64] executive functioning problems, are not very good at reporting on their own executive functioning because, if you remember, part of executive functioning is monitoring performance.

Well, if you are not good at monitoring your performance, but then I ask you about your performance, to some extent you may not be as good at rating yourself as other people are. For that reason, we do not use children's self-report to diagnose ADHD. We actually use an observer report, a parent report. So that was one thing that we thought might have contributed to the problem with that variable.

So to summarize: Two variables, one performance variable, parent report of executive functioning remains significant in the aggression equation. Stroop was not non-significant but on the borderline where we were worried about a power problem, and self-report dropped out.

And all of the zero order correlations, when we just did the correlations, all of those were statistically significant in that relationship.

I think that is about the meat of that study.

Q So your results for high media violence exposure, what was in general the summary of the results?

A In terms of just correlations, so not accounting for the other variables, the higher the media violence exposure, the worse they performed on these four measures of executive functioning.

[65] When we accounted for the very large number of other variables, that relationship continued to exist for two of our measures of executive functioning. A third one was close, and that sort of throws a question mark up, and a fourth one dropped out.

Q Now, did you also make any findings that were reported in the aggressive behavior publication?

A Yes. The aggressive behavior publication, essentially what the purpose of that publication was was to look at the control and the DBD group and look at their levels of media violence exposure to see if the DBD group was reporting more media violence exposure during the past week and year using that same media violence exposure measure.

What we found was – remember, we have that global measure that has the five media violence indexes. On that global measure, the adolescents with DBDs were reported, and their parents reported, more media violence exposure during the past year.

And then there actually were a few other indexes that we looked at that showed differences as well, but the most stable index and the one that we have used throughout our studies is the global media violence exposure index.

Q Did you correlate media violence in general or were there any independent correlates for video game violence versus television violence?

[66] A Yes. Well, one of the purposes of that study, because we developed the media exposure measure, was we needed to explain to people what it was and how it related, and that is when we did that factor analysis stuff.

There was a question about whether video game violence exposure would be correlated with television violence exposure, and, you know, there were differing opinions about this. I mean, one potential thing could be that the more kids watch violent television, the less time they have for violent video games. So maybe they would be inversely related.

Another possibility was, well, maybe they would seek out both together because that interest would occur across television and video games. So that was an open question, and we wanted to see what we would find.

What we found was that television violence exposure and video game violence exposure as rated by either the self-report or parent report, those indexes that I talked about, they were correlated, and the correlation was about .35 to .4, you know, thereabouts.

So there was a relationship and a positive relationship. So the more television violence exposure that was reported, the more video game violence exposure that was reported.

We did in a post hoc analysis, meaning after we got our results of the study, we looked at whether –

[67] You see, we found differences between groups in overall media violence exposure, but you could ask a question of: Well, is your difference between your DBD and your control group because of the television violence exposure or is it because of the video game violence exposure?

So we did a post hoc analysis. What that means is we didn't say going in we were going to do it. It wasn't until we got the results that we thought, oh, boy, people are going to ask this question, and we should do that analysis.

So what we did was we did what's called a partial correlation where you can look at the unique relationship between television violence exposure and membership in the DBD or control group and the unique part of the relationship between video game violence exposure and membership in the DBD or control group.

And what we found is that both were statistically significant. So there was a unique contribution of both television and video game violence exposure to that group membership, DBD versus control. So that is when we actually got into parsing that media exposure measure into video game and television in that Kronenberger article, which I sometimes refer to as the first article because it really was the first thing that we did even though publication-wise it might have come out about the same time as the others.

Q Dr. Kronenberger, you also described earlier phase two of [68] your studies with your IU research team.

A Correct.

Q Can you describe what the hypothesis that you set out to test in that phase was?

A Yes. I alluded to these – our literature view and background knowledge had – we had looked at media violence exposure and aggressive behavior and then aggressive behavior and brain functioning and looking at the parts of brain functioning that were associated with aggressive behavior. The parts of brain functioning that were associated with aggressive behavior, one group had been the prefrontal cortex that we had looked at in phase one.

The other group of structures were brain structures that had been hypothesized and it had been playing games as a family can also be a fun way to spend time together.

suggested that they were associated with emotional functioning and in particular what we call threat arousal stimuli. And these parts of the brain have been grouped under the name limbic system, l-i-m-b-i-c, system.

And the particular area that has been talked about quite a bit is the amygdala, a-m-y-g-d-a-l-a.

And the amygdala has been talked about as sort of a threat processing or as important in threat processing. And there is research that shows amygdala activation in situations that involve threat or when stimuli are presented that involve fear or distress or negative emotion. So we wanted to look at [69] those regions of the brain.

In order to do that, we developed a paradigm called emotional Stroop. So here we have Stroop again, but this one is different. In emotional Stroop, we have the colors, okay, and unlike counting Stroop where we had an easy way to do numbers, we had to go to colors at this point.

In emotional Stroop we had colors, and there were words that were printed in different colors. And in the activation part, or the part that we were looking at, the words were things that involved aggression or harm, things like hit, kill, murder, rape, so words that would connote that.

In the –

Now, remember, you always subtract out a control condition from the – so they are still doing color naming, but the control condition was verbs that were not aggressive: run, jump, things like that. So in one part of the test they would have these aggressive words, and in the other part of the test, they would have these nonaggressive verbs. Their task was to say what color of ink the word was printed in.

And our expectation was that because those aggressive words would involve aggression, threat, that we would see activation in the limbic system and, again, in particular the amygdala.

Now, I should say this is phase two. So this is a new sample. Everything that I have been talking about up until now [70] was phase one. In phase two we recruited a whole new sample of adolescents. Essentially the DBD control, the recruitment procedure, et cetera, for all intents and purposes was the same, but we are doing emotional tasks. When we did the emotional Stroop in the scanner, what we found –

And, again, remember you start with comparing control and DBD. We found that the control group showed activation of the anterior cingulate cortex, and I believe also the dorsolateral prefrontal cortex. The DBD group showed increased activation of the amygdala.

Actually I have been talking about so many studies, if you don't mind, I am going to refer to this just to keep me on point, if that is all right.

Do I need to say the Matthews study?

Q Just for the record, you know, which?

A I am looking in my declaration at the back here where –

Q Are you referring –

A I am sorry, Kalnin.

Q The Kalnin 2005 paper?

A Yes.

Q It's attached to your declaration.

A And this is a paper presentation out of phase two, right.

So the first comparison, again, controls and DBDs. The DBDs show more activation in the amygdala which, again, is one of those limbic, l-i-m-b-i-c, system structures, and the [71] parahippo-campal, p-a-r-a-h-i-p-p-o-c-a-m-p-a-l, gyrus, which is another structure that I believe is part of the limbic system. My interest was more in the amygdala.

Individuals with high media violence exposure when they did those tasks also showed activation of the parahippocampal gyrus and the amygdala, and individuals with low media violence exposure did not. They showed dorsolateral prefrontal cortex activation.

Q Now, even though –

A I do have to say, as I look at this, I don't see Kalnin reporting the ACC and DLPFC activation in the control group on this presentation. So I may be going from recollections of our discussions or I may be in error. I believe he has submitted his own declaration that people can refer to to see what he says.

Q Does this emotional Stroop task, in particular phase two test, are these results consistent with any of the phase one findings even though it is a different paradigm?

A In terms of the fact that the individuals with high media violence exposure showed a pattern of brain functioning – a pattern of brain activation, I should say, in amygdala and parahippocampal gyrus regions that was similar, the high media violence exposure and the DBD groups showed similarities there.

Remember, that was a pattern of similarities that we had also seen in our phase one studies. I think it is [72] important to remember that this is sort of the – one of the kind of down-the-line results that you look at. It is not like we just kind of took brains and said, wherever they are similar, that's what we are going to say.

Remember, this is built on a mountain of other research and theory that had us looking in certain candidate brain regions that were associated with certain things. And people were saying, you know, when you do this certain task, you get activation of this certain brain region, not just some, well, we are going to look generally within the brain and wherever they both show activation. So there is a progression from the literature to a theory to then actually looking at the brain functioning --

Q Now, you indicate that there has been support or literature for the fact that there is certain activation in an area when you look at that brain area and associate with a task. Is that exclusive of all other areas that could be activated?

A No. When I say "certain," what I mean is a long time ago, there was this discussion about whether, you know, different brain areas can have certain functions or whether the whole brain was involved in everything.

And what I am saying is that there is a certain task that you do in the scanner, and then you look at a certain brain area for activation, and you choose that brain area based on a theory. And then you have this theory, and then you look [73] at the results and you say whether they are consistent with your theory or whether they are not consistent with your theory.

But I guess what I am saying is we selected our brain areas to look at for activation based on, you know, other research, our background knowledge, speculation, you know, clinical experience, things like that.

Q Are you involved in any other current or ongoing research related to exposure to media violence and adolescent brain activity?

A We have started phase three which –

Phase three, the methodology is essentially we have adolescents come in and they are randomly assigned to play either a violent video game or a non-violent exciting video game. Then within 10 minutes, we do a scan.

Its different from the other phases in that we have random assignment, but that has just gotten started. There are not results that you can speak to. I only bring it up to kind of show that there is a progression of this research.

[74] Q And have we covered your opinions with respect to – or your description of the research in phase one and phase two of the studies?

A I think so.

MS. LIU: That's all I have.

THE COURT: Cross. I guess I should ask, but I assume none of the other defendants want to ask questions.

MS. LIU: I'm sorry. May I approach?

THE COURT: That's fine.

MS. LIU: Your Honor, I'm sorry. I actually meant to request if I could admit Defendants' Exhibits 1, 2, and 3.

THE COURT: They're admitted.

MS. LIU: Thank you.

THE COURT: I assume none of the other defendants want to ask questions. I'm getting shakes no.

MR. DRYJANSKI: No.

THE COURT: Okay. Go ahead, Ms. Fallow.

MS. FALLOW: Good morning, your Honor.

CROSS EXAMINATION

BY MS. FALLOW:

Q Good morning, Dr. Kronenberger.

A Good morning.

Q Now, you've discussed the sort of three phases or the two main phases of your research that you conducted on media violence exposure and its effect on brain functioning; is that [75] correct?

A Correct.

Q And you're not relying on any findings from the third phase, the ongoing phase, in rendering your opinion here; is that right?

A Not in rendering my opinion here, that's correct.

Q Okay. And in phase one and two combined, three of those studies involved fMRI; is that correct?

A Yes. Three of the studies, yes, in my declaration.

Q And of those three studies, only one is published in a peer-reviewed journal; is that right?

A That's correct.

Q And the other two are power point slide presentations for a conference; is that right?

A That's correct.

Q And the other two studies you have do not involve fMRI; is that right?

A Other than those three, correct. Yes.

Q And for the fMRI studies, you are not the principal author of any of those fMRI studies; is that right?

A That's correct.

Q And do you also rely on Dr. Murray's research in giving your opinion in this case?

A I rely on Dr. Murray's research in the development – it's one of the things that I used in the development of the theory [76] that – yeah – that media violence exposure affects certain types – or that media violence exposure is related to, associated with certain types of brain functioning.

Q And other than the three fMRI – and Dr. Murray's study involved fMRI; is that correct?

A Yes.

Q And other than your three studies and Dr. Murray's studies, there are no other studies involving media violence exposure and its effect on brain activity using fMRI; is that right?

A I believe that there are studies. As far as published studies, like actually out in the journals, I don't – I can't think of any right now.

Q Now, you talked about the media exposure measure or MEM, as we've talked about, that you used in both phase one and phase two in order to assess each subject's relative level of exposure to media violence; is that right?

A Yes.

Q And this measure relied on self-reporting by both parents and children; is that right?

A On self-report by the adolescent and parent report of the adolescent media violence exposure, yes.

Q And based on those reports, you then assigned each subject a total media exposure measure score; is that right?

A Yes. They were summed.

Q And that score reflects a combined level of exposure to [77] both television violence and to video game violence; is that right?

A That's right.

Q And in the four studies that you did on the – the three fMRI studies and the study in the Journal of Clinical Psychology, which measured executive functioning – is that right?

A Correct.

Q And in all of those studies, you did not analyze the effect of violent video games specifically on the results you found there; is that right?

A That's correct.

Q Okay. Now, it is your opinion, is it not, that there is a correlation between teens with behavior problems and exposure to media violence; is that right?

A Right. That media violence exposure is related to – shows a correlation with aggressive behavior, yes.

Q And that finding is purely correlational, and you can't draw any causal conclusions from that finding; isn't that right?

A Well, there have been studies done that did look at causal models. So, I think in the case of media violence exposure and aggressive behavior, there's a body of literature that, as it's been looked at, supports a causal model.

Q But when you report finding in your own research a [78] correlation between the DBD diagnosis and exposure to media violence, higher exposure to media violence, that is purely a correlational finding, right?

A That's correct. That's a correlation finding.

Q And, in fact, in that study – the study on aggressive behavior; is that right?

A Yes.

Q And in that study you state that the study designed does not allow for causal conclusions to be drawn; is that right?

A Yes. It allows for one to test consistency with a model.

Q But it does not allow for causal conclusions to be drawn from this study; is that right?

A In the sense of a final conclusion, no.

Q And, in fact, it is possible and you've stated in this study that aggressive kids or teens with aggressive behavior might seek out media violence; is that right?

A Yes. And that would not preclude, by the way, that the media violence could affect them, as well.

Q Right. But it doesn't show the relationship either way; is that right?

A Correct.

Q Now, you've talked about the various phases of your research. I'd just like to start off with phase one and talking in particular about the Matthews study.

A Yes.

[79] Q And that's the fMRI study that's attached as Exhibit 2 to your declaration; is that right?

A I don't have it as Exhibit 2. It's attached to my declaration.

Q I'm sorry. It's Exhibit 1.

THE COURT: It's the thing attached to his declaration.

BY THE WITNESS:

A It's the last thing in my declaration, yes.

BY MS. FALLOW:

Q I just wanted – so you know where it is.

And you've said that this study involved the use of a counting Stroop task; is that right?

A Yes.

Q And when you talk about using a counting Stroop task to measure things like control or choice, you're talking about the ability to control whether you give the right answer in the Stroop task; is that right?

A We're talking about the ability to inhibit an easier answer or a faster or more immediate answer in favor of one that takes more thought and mental effort.

Q And you've testified that you can't use a Stroop task to make a diagnosis of ADHD or aggressive behavioral disorder; is that right?

A That's correct.

[80] Q Yes?

A That's correct.

Q And when you used the counting Stroop task in the Matthews study, you were not measuring control over aggressive behavior, were you?

A No.

Q And similarly you've mentioned talking about certain areas of the brain being involved in inhibition, but when you talk about inhibition in the context of a Stroop task, you're talking about the ability to inhibit the wrong answer; is that right?

A Not just the wrong answer, but the more impulsive answer.

Q The more impulsive is to actually read the word rather than state the number of – or sorry – read the number rather than state the number of digits; is that right?

A Yes. The number of numerals.

Q Now, in the Matthews study, this found that media violence exposure had no effect on the subject's performance on the Stroop task; isn't that right?

A There was no difference between the groups on the Stroop task, yes, in the Matthews study.

Q So, those with high media violence performed the same as those with low media violence exposure on the Stroop task; is that right?

A Yeah. I mean, to statistically significant levels, that's [81] correct.

Q And then my understanding of this, and I think you've talked about it, is essentially you put the subjects in the fMRI, and they perform the Stroop counting task while they were in the fMRI; is that right?

A Yes.

Q And then this article, the Matthews article, has some pictures of brain images; is that right?

A Yes.

Q And in describing what you found in terms of what is shown on the fMRI images, you're relying on the statements in Dr. Kalnin's declaration; isn't that right?

A Well, I'm looking at the statements in the Matthews article. Dr. Kalnin is a member of the team, who is a neuroradiologist. So, his statements – he actually looks at parts of the brain for clinical purposes, and so he's a leader on the team for that. And then, of course, I was also present in the team meetings where we discussed those regions. So, I would say that all of those enter into my overall knowledge.

Q You would defer to Dr. Kalnin in terms of looking at these images and pointing out specific patterns of activity; is that right?

A Based on the images, yes.

Q Now, in this study you found that the activation -- you've explained you found that the activation pattern of control [82] adolescents with high media violence exposure resembled that of the DBD group in terms of the fMRI images in several ways; is that right?

A Correct.

Q But the patterns of activation between those two groups were not exactly the same, right?

A No, they were not identical.

Q And, in fact, on Page 289 of the Matthews article, table one, that shows in terms of clusters and location the respective activity for each of the groups; is that correct?

A Yes.

Q And, in fact, for, for instance, the DBD group and the controls with high media violence scores, there are some differences; is that right?

A Yes.

Q Now, on Page 10 of your declaration, you have said that the Matthews study found reduced activity in certain –

THE COURT: Back up a second.

MS. FALLOW: I'm sorry.

THE COURT: What was the page you just cited from the Matthews?

MS. FALLOW: That's Page 289.

THE COURT: Thank you. Go ahead. Sorry for interrupting.

BY MS. FALLOW:

[83] Q If you would look at Page 10 of your declaration, paragraph 30. Sorry. Paragraph 33. You talk about finding reduced activity in certain regions of the frontal lobes for the DBD group and also for the control group of high media violence functioning; is that right?

A Yes.

Q And by that you mean you found a reduction for these two groups in some, but not all of the regions of the dorsolateral prefrontal cortex; is that right?

A Yes.

Q And is it also possible that for the reduced activity you did observe that that could signal expertise, in that people who have, for instance, played a lot of video games may not be as challenged by a task?

A That would be unlikely. Possible in the sense that anything is possible, I guess, but very unlikely.

Q But you wouldn't rule out that your study findings of a reduced activity could actually show expertise in that group?

A For this type of task, for the Stroop task, I would say that would be very unlikely. You'd have to assume that somehow that expertise had generalized to a Stroop task and that the DBD group, which had more similarities with the high media violence exposure group, were more expert, and yet we know that those kids showed very poor control in the environment.

Q Are you aware of literature showing that subjects who play [84] video games actually show reduction in certain areas of the frontal lobes as a result of their expertise playing those video games?

A Reduction in certain – using – reduction in certain areas of the frontal lobes? I'm not sure what –

Q Yes. Are you aware of that literature?

A You mean reduced size or –

Q No. Reduction in activity in the frontal lobes because the task is actually less challenging because they're experts.

A I'm not aware of any neuroimaging studies that have looked at that.

Q And there's nothing in this study that would show that control subjects with high media violence exposure – for instance, they could be worse readers or do worse in school, and nothing in this study shows that that might be the reason for doing more – or for showing a particular pattern of brain activity; is that right?

A Again, you could speculate that, but the data would argue – some data would argue against it. Number one, not only were the control and DBD groups matched on IQ, but also there was no difference between the high and low media violence exposure groups in IQ is my recollection, and you would somehow have to believe that you had smart bad readers, which is theoretically possible, but there's a correlation between reading ability and IQ.

[85] Q Well, you're saying that everybody – but there was no difference in the performance on the actual Stroop task according to groups divided up as according to media violence, high media violence exposure; is that right?

A There was – that's correct. In the Matthews study.

Q Right.

A Not in the Kronenberger study.

Q So, just based on the observations of the brain pattern activity that you observed, because there was actually no difference in performance, you can't conclude, can you, that the control group of high media violence was any worse off. It just showed a different pattern of brain activity; isn't that right?

A I think you also have to take into account the methodology here, which was that they had to perform above a certain level to even be included in the study. So, very poor performers were dropped out. In other words, anyone who performed below a certain level did not enter into the study.

Q But that would apply – you dropped out anyone who performed beneath a certain level across control and DBD; is that right?

A That's correct.

Q And across high media violence and low media violence exposure; is that right?

A That's correct.

[86] Q So, in terms of determining what conclusion you can draw from this observation of brain pattern activity for the control adolescents with the high media violence, it seems to me that your approach was that you took a group that was diagnosed with real behavioral problems or problems with self-control, and you gave them a task of executive functioning – you've testified to this – and

then you compared their fMRI images with those of the control group; is that right?

A It's right, but it's not complete. We also used background research about what those areas of the brain are associated with, others' research, literature review, understanding. So, it wasn't just, you know, we compared the two groups. There was a theory based on that progression from media violence to aggression to brain functioning. We were trying to look at certain brain areas.

Q But in terms of identifying in this study what areas that you found interesting in terms of activation, you looked at what the differences were between the DBD group and the control group; isn't that right?

A No. The candidate areas, the regions of interest we identified a priori. The anterior cingulate cortex and the dorsolateral prefrontal cortex.

Q I understand that, but then when you looked at those regions, you actually found that the DBD group had greater activation in some of the areas of the dorsolateral prefrontal [87] cortex, the middle frontal gyrus, whereas the control group had more activation in the inferior frontal gyrus. So, actually out of two of your three regions of interest, there was a difference between – and there was actually a reduction of activity for the control group in one of the areas of the dorsolateral prefrontal cortex; isn't that right?

A As I stated, in that middle frontal cortex result, because we found increased activation in the DBD group and in the individuals with high media violence exposure, that was different than what we had expected. Sorry. Middle frontal gyrus. And the DLPFC consisted of both regions. A priori we did not expect differences in those regions, and we used the comparison group to address those. However, a priori we did expect that those were regions of importance, and I'd like to point out that the anterior cingulate cortex, the ACC, was a region that was looked at, as well.

Q Now, in your declaration you said that – you concluded that increased media violence exposure was linked with reduced levels of brain functions associated with self-control and concentration, and in terms of determining what areas were associated with self-control and concentration, you used the DBD group as the measure; isn't that right?

A No. A priori we looked at the brain regions that research – as I described earlier in my declaration – that research had tied to aggressive behavior, and those also are [88] regions, namely, the ACC and the DLPFC, that are related to poorer self-control – less activation is related to poorer self-control. The comparison of controls in DBDs is then a layer that is on top of that. It is not the sole –

Q That comparison, though, did play a role in your thinking in this research?

A Yes.

Q And, Dr. Kronenberger, were you deposed in this case?

A Yes.

Q And were you asked in your deposition, "So, for the control subjects, the high versus low, are you saying that the fact that they had their pattern of activation here shows reduced activity in the areas responsible for self-control and concentration?"

A I'm sorry. Can you read that again?

Q Would it be helpful if I show you this?

THE COURT: Show him and then read it slower because I want to absorb it.

MS. FALLOW: Okay.

BY MS. FALLOW:

Q Its starting on Page 239, and I'll give you a line number. Do you have the page?

THE COURT: He's got the page.

BY THE WITNESS:

A Yes. Sorry.

[89] BY MS. FALLOW:

Q It's starting on line 16, and it says, "So, for the control subjects, the high versus low, are you saying that the fact that they had their pattern of activation here shows reduced activity in the areas responsible for self-control and concentration?"

A Yes.

Q And then in your answer, you say, "I'm saying that there are going to be multiple areas that are responsible for self-control and concentration in different ways and with different connections. The best way to understand which ones are responsible for self-control and concentration is to compare a group known to be better at control with a group known to be worse at control. And so, you look at the control compared to DBD as a way of figuring out which regions those are in that paradigm, and then you go and make the comparison of high versus low media violence exposure and see the pattern, whether it fits again the group known to have poorer control or the group known to have better control in that paradigm." Is that right?

A Yes.

Q Now, in this Matthews study the control group with high media violence that you observed a similar pattern of activation, they had actually no real world problems with aggression or self-control by your own assessment; isn't that [90] right?

A That's correct.

Q And with respect to the findings in all of your studies with respect to the high media violence control group, your studies do not predict future risk for aggressive behavior for these teens; is that right?

A That's not something that we studied, that's correct.

Q All right. Now I'd like to turn to Exhibit 2, and this is your article in the Journal of Clinical Psychology, right?

A Yes.

Q And this study is a – the title of it is "Media Violence Exposure and Executive Functioning in Aggressive and Control Adolescents," is that right?

A Yes.

Q And this study did not involve fMRI, correct?

A That's correct.

Q And so, any conclusions that you made about actual brain activity, you're not looking at actual images of brain activity in this study; is that right?

A Not in this study, but by virtue of the test being neurocognitive tests, two of them, they are things that are related – that have been shown to be related to brain activity.

Q Meaning you draw an inference that certain portions of the brain will be activated during these tests?

[91] A Correct. Meaning that – yeah, that there's neuropsychological writing on that.

Q And you said that you used neurocognitive testing in this study; is that right?

A For two of the measures, yes.

Q And by that you're referring to the continuous performance test and the Stroop color-word task?

A Correct.

Q Now, neither of these studies, these tests, measured aggression; is that right?

A That's correct.

Q And you've stated that you found a simple correlation between exposure to media violence and the four measures that you use in this article; is that right?

A Correct.

Q But you've also stated that when you did the regression analysis and controlled for all the other possible variables that there was no relationship between media violence exposure and performance on the Stroop color-word task; is that right?

A That's right, but it's not complete. It was on the fringe of significance, but it was nonsignificant, which raises concern about a statistical artifact.

THE COURT: About a statistical –

THE WITNESS: A statistical artifact.

THE COURT: Isn't that what you were describing [92] before?

THE WITNESS: Yeah, that as you enter more variables, your power is reduced, and as a researcher, you begin to worry that, in fact, there may be a relationship between variables that because of the way statistics work you won't detect because you've put too many variables into your regression.

THE COURT: I thought that's what you were referring to. I just wanted to be sure.

BY MS. FALLOW:

Q And when you did the regression analysis, you controlled for things like IQ, age, race –

A Yeah, race.

Q – media violence exposure; is that right?

A We didn't control for media – total media exposure, yes.

Q Okay. And so, when you talk about the simple correlations you found, for those correlations you couldn't rule out that maybe age or race or gender or IQ would have just as great of a relationship, if not more of a relationship with the performance on the Stroop color-word task; is that right?

A That's really not what the statistic does. It doesn't look at – when you look at the zero order of correlation and you do the regression, you're actually pulling out the unique relationships of those other variables with the two variables that you had been correlating. It's not that you're necessarily testing each of those other variables because your [93] equation might look different if your intent was to test those other variables.

Q Accepting the results of this study, the results that you found were purely correlational, again, right? And – is that right?

A They were cross-sectional in terms of research. Correlational in the sense that nothing was manipulated.

Q And this study, you cannot draw any causal conclusions from the study results; is that correct?

A You can say it's consistent with a model, but you cannot go to a full causal conclusion based on it, yes.

Q And in the article, in fact, you did say that, "First, as this was a cross-sectional correlational study, causal conclusions cannot be drawn from study results." That's on Page 735; is that correct?

A In the sense of a final conclusion, that's correct.

Q And you also say, "Hence, the finding of a relationship between media violence exposure and executive functioning could indicate that adolescents who have poorer executive functioning seek out more media violence, the adolescents who have more media violence exposure have poorer executive functioning, or that some other third" – sorry – "or that some third variable is responsible for the relationship;" is that right?

A Yes, although I go on to explain that it's very unlikely that the final explanation is the case because we were so [94] conservative in our analyses.

Q But the study still leaves open the possibility that those adolescents with poor executive functioning seek out violent media; is that right?

A Yes.

Q Now, I would also like to turn to the other study you talked about in the context of phase one of your research, the study by Wang, et al., and this is the study – I don't think we have it up here for you. I don't think you have it up here.

A Okay. Sorry.

Q And this is the study where you did the media violence exposure measure, and you did the DBD classification, and then you showed the subjects video clips from a video game of two different kinds video games; is that correct?

A That's correct.

Q And you used a James Bond game; is that right?

A Yes. I don't remember which one, but I believe it was a James Bond game. I think that's what it says in the presentation.

Q And you considered that a violent game in the context of this study?

A The way that we define media violence, yes.

Q And then you used some unidentified car driving game; is that right?

A Yes. I don't recall the name of it.

[95] Q And the Wang study is not published, right?

A No, that was a presentation.

Q In the Wang study you didn't measure executive functioning; is that right?

A We measured activation in brain areas that are associated with executive functioning. We did not measure executive functioning in the sense of a neurocognitive test.

Q And you said that – you referred to this is simulated play of the video games, but the subjects were actually told that they were not in control of these clips, the filmed clips of the video game; is that correct?

A Yes. They knew that going in.

Q And you said that you observed similarities again between the DBD group on one hand and the control – I'm sorry – the high media violence exposure group. on the other hand; is that correct?

A Yes.

Q But these patterns again are not exactly the same; is that right?

A Correct. There are similarities.

Q And because you didn't use a test about executive functioning, you can't draw any conclusions about what the pattern of brain activity for those with high media violence exposure shows about executive functioning; is that correct?

A I would agree that we're less confident about what exactly [96] that task shows other than violent versus nonviolent video game playing because there's not the same body of background research that you would find for the Stroop.

Q And your conclusions about this study have to do with the perceived similarities between the DBD group and the high media violence exposure group; is that right?

A Yes, and the fact that we selected the regions of interest based on the criteria that I discussed before.

Q And, in fact, you've said that – you just earlier testified that you couldn't use the task of concentrating on a video game to get a diagnosis on impaired executive functioning; isn't that right?

A That's correct.

Q And, again, in this study the control subjects with high media violence exposure did not exhibit any real world problems with behavior; is that right?

A That's correct.

Q And they hadn't seen a mental health professional in the past three years; is that right?

A That's correct.

Q Now, in phase two of your study, it seems to me that this primarily consists of, at least for purposes of your testimony, the Kalnin study; is that right?

A Yes. To my knowledge, that's the only thing that we've presented on it.

[97] Q And that's another fMRI study; is that right?

A Yes.

Q And this study has not been published; is that correct?

A Correct. But I should clarify, most people would consider it not published. I believe an abstract of it has been published, but this is done – I just want to be technically precise. This is done for presentations, and it's not considered a publication.

Q It was an abstract published in a peer-reviewed journal as a peer-reviewed piece?

A I don't know – in all honesty, you're talking about a neuroradiology journal. As a matter of fact, I can't even remember the journal. But when – I just want to be technically correct. When they do these presentations, they publish an abstract in the journal so that people can see what presentations have been done. I don't know.

Now, I can tell you psychology presentations are peer-reviewed very frequently. But I apologize. That's just what I – I just want to be technically correct.

Q You don't know whether it's been published in a peer-reviewed journal; is that correct?

THE COURT: I think what he's saying

THE WITNESS: I think that that's accurate. I just don't want to get this wrong.

THE COURT: I think what he's saying is that the study [98] itself hasn't been published. An abstract has been published, and he's not sure whether that one was peer-reviewed because it's not a journal that he normally picks up and reads.

THE WITNESS: That's exactly.

BY MS. FALLOW:

Q And you described using in this study an emotional Stroop task; is that correct?

A Yes.

Q And what you did here is you had the words of different colors, but you actually had them – you assigned some that you said were violent words; is that correct?

A Violent aggressive, yes.

Q And then some words were nonviolent; is that right?

A Correct.

Q And examples of violent words are words like hit or kill; is that correct?

A Correct.

Q And you say on Page 11 of your declaration – it's paragraph 38, first bullet point, "Within the DBD group adolescents with high media violence exposure were slower to respond to violent words, compared to nonviolent words, when asked to ignore the word meaning and respond only to the color of the ink in which the word was printed. Therefore, they were more affected by the violent words than the nonviolent words, despite being told to ignore word meaning;" is that right?

[99] A Yes.

Q But isn't it true that this study actually shows that the DBD subjects with low media violence were, in fact, slower or had a greater Stroop interference effect than the DBD group with high media violence; isn't that right?

A Well, and I should probably clarify that because this is something that we discussed in my deposition. First of all, you can't just look at the difference between two mean values to tell if there's a difference between groups. The variability is also involved in that test. We don't have the variability there.

My understanding of the analyis [sic] that Dr. Kalnin did was based on a relatively – a discussion with him and also based on what was stated there in that presentation. That's what I understand. I do not remember being present at the data analyses. So, it's hard for me to say exactly what was happening there. What I can tell you is it is true that you cannot tell from that presentation about the variability, which you would need to show if there was a difference or not. So, you're left with his statement.

Q But you state that the DBD group with high media violence exposure was actually slower to respond to the violent words and the nonviolent words and thus showing that they were more affected by the violent words. If you look at Page 13 of the Kalnin presentation, which shows various charts with behavior [100] results, on the left – if you could just turn to that. On the left, the two graphs on the left talk about reaction time; is that correct?

A That's correct.

Q And the top one refers to the reaction time to violent words, and the bottom one refers to reaction time to nonviolent words; is that right?

A That's right.

Q And at the bottom it lists the groups. The farthest to the right is the DBD M1. That refers to the high media violence; is that right?

A Correct.

Q And the DBD M0 was the low media violence group within the DBD group; is that right?

A Correct.

Q And just estimating, it looks like the DBD high media violence essentially was slower to respond to violent words, as opposed to nonviolent words, by about ten milliseconds; is that right?

A Again, that's how it looks. I should clarify that these are not analyses that I laid my eyes on from the standpoint of the data. I may have my interpretation of this wrong. As I look at it, I see what you're saying. I may have my interpretation of it wrong.

What I am saying, also, though, is that you can't say [101] that the differenc [sic] between – if you look at the top left, you can't say that the difference between DBD M1 in the top left and DBD M0, still in the top left, is, you know, more or less than the difference between DBD M1 and DBD M0 in the lower left because you don't have the variability.

And my understanding, again, from discussions with Dr. Kalnin, was that he had found a difference in that upper left. That's what I was trying to characterize there. I understand there may be an error, but I can only tell you how I see it now.

Q It's my understanding that the Stroop interference effect is you actually look at the person, and you say how long did they take to respond to the violent words, and then you subtracted from that how long they took to respond to the nonviolent words; is that correct?

A Well, you do it on a group basis.

Q Okay. Fine. Within a group. So, the real comparison should be the reaction time of the DBD with high media violence to the violent words with the reaction time for the same group to the nonviolent words. That's the Stroop interference effect as you describe it in paragraph 38 of your declaration; is that right?

A Well, and that's where I'm saying. That had been my understanding and, again, from discussions with Dr. Kalnin, but as I look back at the information, what I'm saying is you can [102] compare the DBD with high media violence and the DBD with low media violence on the violent words, and if you find a significant difference between those two groups on the violent words, but not on the nonviolent words, that is an interference effect. But it is true that you don't have the data to say that. I'm just trying to explain what my understanding was. I think, unfortunately, that is something that I cannot give you a firm answer to here because I –

Q Based on just what we have here, it is possible that the DBD group with low media violence actually were slower to respond to the violent words, meaning they were more affected by the violent words than the high media violence DBD group; is that right?

A That's possible, but I would say that's very unlikely, but that's possible.

THE COURT: Find a convenient place to pause. We're at 12:30. Is this a good place?

MS. FALLOW: Yes.

THE COURT: Okay. I have a status hearing that should take no more than a couple minutes at 1:30, so we'll resume right after that. And then tomorrow rather than 10:00, I think we'll be able to start at 9:45.

MS. FALLOW: Thank you, your Honor.

(Whereupon, the within trial was recessed to 1:30 o'clock p.m. of the same day.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ENTERTAINMENT SOFTWARE ASSOCIATION, et al.,	)	No. 05 C 4265
Plaintiffs,	)	Chicago, Illinois
	)	November 14, 2005
v.	)	1:45 p.m.
	)	
ROD BLAGOJEVICH, et al.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE MATTHEW F. KENNELLY

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[105] (The following proceedings were had in open court:)

THE COURT: All right, Dr. Kronenberger, do you understand you are still under oath?

THE WITNESS: Yes.

THE COURT: You can proceed.

MS. FALLOW: Thank you, your Honor.

WILLIAM G. KRONENBERGER, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

CONTINUED CROSS EXAMINATION

BY MS. FALLOW:

Q Dr. Kronenberger, before the lunch break, we were talking about the Kalnin study that used the emotional Stroop test, is that correct?

A Yes.

Q In that study you again found similarities between the brain pattern activity of the DBD group and the control group with high media violence, is that correct?

A That is correct.

Q But, again, you didn't find that these patterns were exactly the same, is that correct?

A That is correct.

Q In fact, in this study the control group with high media violence showed activation only in the amygdala, not in the parahippocampal gyrus, is that correct?

A That is correct.

[106] Q But the DBD showed activation in both areas, is that right?

A In the parahippocampal gyrus as well as the amygdala.

Q Thank you.

The similarities you observed could have quite different causes in those two populations, isn't that correct?

A That is possible. I think that that is more of a stretch given that we knew what our – we hypothesized that our task was a certain type of emotion and we were basing it on prior research about what the function of the amygdala is.

Q On page 13 of your declaration, or you had mentioned in your testimony that the phase – that phase two of the Kalnin study replicated the findings in phase one, is that correct?

A That is correct.

Q And you believe that that replication is shown in the slide presentation, Dr. Kalnin's slide presentation, is that right?

A I believe it was shown in his description of his results. Subsequent to – I believe it was subsequent to my –

At any rate, at some point he and I had a communication where he corrected his reading of one of the slides, and I –

My understanding was that he still found that effect, but he didn't see it on the slide that he had. I forget which region of the brain that involved.

Q And you testified earlier that you weren't sure what parts of the DLPFC or other parts of the brain were activated for the [107] low media violence group and the control group, is that right?

A I am not quite sure what you are asking.

Q You were talking about replicating the findings in phase one.

In phase one you found activation in certain areas of the frontal lobes, is that right?

A That is correct, yes.

The dorsolateral prefrontal cortex was involved in both studies, but in the Kalnin study it has not been separated out in the presentation.

Q You also mentioned earlier that you reviewed Dr. Murray's fMRI study, is that right?

A Yes, in the course of my research.

Q Is your opinion that the research is consistent with the legislative findings in this case based on Dr. Murray's research?

A That Dr. Murray's research is consistent with the findings?

Q Yes. Does that form a part or basis for your opinion?

A Well, I don't know if you define it that way. It was part of the body of research that I looked at early on in identifying candidate brain regions to be regions of interest for my later research.

So, I mean, in a way, I guess there is a connection but, again, really my opinions are predominantly based on my research.

[108] Q Would it be your assertion that Dr. Murray's study supports the conclusion that there is a reduced activity in the frontal lobes of the brain of minors that view violent media?

A Oh, I don't know that you could say that.

His research, as far as I know, is based on brain activity during the actual viewing of violent media. My understanding and my research has been based on what happens to individuals who are exposed to violent media after the violent media exposure.

Q Dr. Murray's study didn't involve video games at all, is that correct?

A I can't speak to him on that, but the things that I reviewed were videotaped scenes is my understanding.

Q These were films like Rocky 4, is that right?

A That is what I understand, yes.

Q Then a nature film and an educational film?

THE COURT: Which one is Rocky 4? Is that the one with the Russian guy?

MS. FALLOW: I can't remember. I was thinking about that.

THE WITNESS: Can I answer?

THE COURT: Do you remember?

THE WITNESS: I was at a presentation where it was the Russian guy.

THE COURT: That's okay.

[109] THE WITNESS: I am sorry.

THE COURT: – Lundgren playing a Russian?

THE WITNESS: Yes, exactly.

THE COURT: Then there is an ersatz Gorbachev right down to the birthmark, I think, that stomps out of the stands at the end when the Russian loses.

THE WITNESS: I didn't see that.

THE COURT: I watch a lot of cable.

Go ahead. Sorry.

BY MS. FALLOW:

Q Dr. Kronenberger, all three phases of your research that you have described were funded entirely by an organization known as the Center for Successful Parenting, is that right?

A For all intents and purposes, yes.

Q Your understanding of the Center for Successful Parenting's mission is that it's designed to protect children from media violence in all formats, is that correct?

A That may be correct. I think you showed me some things at my deposition that I, frankly, had not researched or seen before, and my recollection is it was something like that.

Q And you and your colleagues have received over $1.3 million in funding from the Center for Successful Parenting for the three phases of your research, is that correct?

A I would have to add it up. Can I look at my CV?

Q Sure.

[110] A You are probably in the ball park. I don't know.

Q I don't have it up here with me.

A Is it okay to say you're in the ball park?

Q If you think that is –

A You're in the ball park.

Q – roughly in the ball park?

A Yes.

Q The funding is reflected in your CV that you have submitted to this Court, is that right?

A That's correct.

MS. FALLOW: No further questions.

THE COURT: Redirect?

MS. LIU: No, your Honor.

THE COURT: You are excused. Actually, no. I had a question.

When you were talking about the control subjects with high media violence exposure and those with low media violence exposure, my recollection of your description of how you made the dividing line, it was basically you took the whole group and you kind of – everybody who was above 50 percent and everybody who was below 50 percent, is that right?

THE WITNESS: Roughly speaking, yes.

What we did was we took the entire sample, which included controls and DBDs together, and then we made the dividing. So within any group – because on average, it will [111] tend to be the case that controls have a little lower media violence exposure. You might end up, I think in the study, for example, with eight controls with high media violence exposure and 11 controls with low media violence exposure, and those numbers are flipped for the DBDs.

THE COURT: My question was this: What does high mean? In other words, can you put some numbers on it in terms of – I don't know.

I know this is details on the terms of your study, but can you put some numbers on it in terms of how much exposure was high for the people in that category?

THE WITNESS: You know, I may be able to provide some information out of one of my articles. Is it okay to refer to that?

THE COURT: Yes.

THE WITNESS: So this is the Defendants' Exhibit 3 aggressive behavior article where we actually provided values.

THE COURT: It looks like –

THE WITNESS: In Table 1.

THE COURT: Table 1.

THE WITNESS: In Table 1 you can see –

Probably the easiest things to evaluate is the past week because that is actual minutes of violent television or video that they had exposure to.

THE COURT: So it's by minutes.

[112] THE WITNESS: Yes. There is a little more that goes into the calculation. So you can't actually say – for example, in the upper left, you can't actually say that kids with disruptive behavior disorder were exposed to 612 minutes in the past week on violent television.

Do you see where I am up there?

THE COURT: I am looking at exactly at it.

THE WITNESS: What happens is there are two measures of violence. This is where I talked about it's a pretty involved measure. You get a measure of injury, which is a depiction of someone actually being harmed. It is double-weighted in terms of minutes if the injury is considered graphic, which is defined as blood showing or loss of a body part.

And we do this in an interview. So if they say, yes, there was graphic injury, you say, "what happened?" so that we make sure that it really happened. So it's a little hard to turn it exactly into minutes.

THE COURT: I get it.

THE WITNESS: But roughly speaking, you are talking on the order of hours in the past week, roughly speaking. There may be –

THE COURT: Let me –

THE WITNESS: Actually in the text, actually there is going to be some stuff –

[113] THE COURT: Some discussion.

THE WITNESS: Actually on page 208, without reading it all to you, but under media violence exposure in diagnostic group, that actually goes through the number of hours in the past year as well.

THE COURT: Here is my question about that. When you are talking about the number of minutes of violent media exposure, let's say you have an hour long show which was, as we all know, isn't an hour long show; its probably 40-some-odd minutes.

And let's say during that entire show one person gets – is the object of violence in one of the manners that you described, in other words, blood or loss of a body part or something like that.

Do you count the whole hour or do you just count the part, or how does it work?

THE WITNESS: We actually handle that in the interview. It's relatively rare that a teen-ager will tell us, "well, I watched a show for an hour and it was fine, and then at the end, you know, this person, you know, whatever, he lost a limb."

More often than not what will happen is they will say, "well, there was this, that and the other thing," and then we will say, "well, here's our definition of injury, you know, people being injured. When you watched this show, you know, for this hour, so to speak, was that something that you feel [114] was regularly present in the theme of the show?" And then they answer that.

Then we actually probe it. We have a t.v. guide here. Actually when we train our technicians, we actually have a video of a person that we show them going through this. It's actually a fake, it's a confederate, and then we sit there with them and say, "okay, what would you say here?"

So we try to standardize how they would ask the questions.

The past week with the minutes, you know, to some extent there are times, frankly, that you are making estimates, obviously.

THE COURT: Of course, right.

THE WITNESS: Now, the past year what we do is – and I apologize. I don't know if you want the gory details, but we essentially say, "How many hours of television do you watch a week?" We don't want to bias them. We don't want to say, "How many hours of violent television do you watch a week?"

So we just start with, "How many hours of television do you watch a week?" We have, like, graphs to see how much of a day this would be and things like that. They tell us the number.

Then we say, "we are going to go on a four-point scale. 1 is it's not present at all. 2 is it's sometimes present but you really don't notice it. 3 is it's regularly [115] present, and you know it's present as a theme. Then 4 is you feel like it's almost constant or you couldn't do it without it.

Then we go through injury, which is defined, as I said before, and then graphic injury, which is defined. So they do it on a 1 to 4 scale, and then we have a formula where we multiply.

Does that make sense?

THE COURT: I get it.

THE WITNESS: We feel like that's more valid.

THE COURT: I get it. In other words, a situation where a person says they saw a show which may have included, you know, intermittent violence or one act of violence, it doesn't get the same – it doesn't translate into the same number of minutes for purposes of your thing as one where it's regularly involved as a matter of routine, or am I missing something?

THE WITNESS: It could.

THE COURT: It could.

THE WITNESS: There really is a certain judgment in the past week.

THE COURT: Sure.

THE WITNESS: I mean, our technicians are fairly sophisticated. They have a t.v. guide. They have the themes of the show and things like that. They are told not to [116] influence the rating, but they actually do –

I mean, there is a judgment. Ultimately they have to say it was violent media or it was not in the past week, and that is a weakness of the past week, or it's – not a week, but something you have to consider.

The past year, because they can make those kinds of gradation estimates, you get a little bit better. Each has its strength and weakness, which is why we like the fact that they were correlated with each other, so we could add them together, the idea being that what you end up with at the end, while there is a, like many measures in psychology, a certain amount of error variance, that you have essentially strengthened your core measure.

THE COURT: You just segued into the one other question I had. When you said that the five – I think it was, you said, five out of the six correlated with each other, what I take it you meant by that is that the answers on those five were more or less consistent with each other and then there was this one that wasn't.

THE WITNESS: That is exactly right, and it was the parent television that did not go with the rest, and that was in phase one. We really developed a measure in phase one. I don't know what the results look like in phase two, if we had done the same thing.

THE COURT: Thanks.

[117] Does anyone have any follow-up questions based on the questions that I asked?

MS. FALLOW: No, your Honor.

THE COURT: Thanks. You are excused. Thank you very much.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: The next witness is?

MR. SMITH: Dmitri Williams.

(Witness sworn.)

THE COURT: You can proceed.

DMITRI WILLIAMS, PLAINTIFFS' WITNESS, DULY SWORN
DIRECT EXAMINATION

BY MR. SMITH

Q Would you state your full name for the record?

A It's Dmitri Caspian Scott Williams.

THE REPORTER: Please spell your name.

THE COURT: Spell Dmitri.

THE WITNESS: D-m-i-t-r-i. Caspian, C-a-s-p-i-a-n; Scott with two "t's." Williams the standard way.

BY MR. SMITH:

Q Where are you presently employed?

A At the University of Illinois, at Urbana Champaign.

Q What position do you hold?

A Assistant professor.

[118] Q And what department?

A Speech communication.

Q Can you tell me what is your focus of work in the area of speech communications?

A My specific areas of focus are in media and new technologies.

Q Media and new technologies?

A Correct.

Q Now, let me show you what has been marked as Plaintiffs' Exhibit 1.

THE COURT: This is the CV?

MR. SMITH: Yes.

THE COURT: Unless it's changed, I will just go with the one I have got.

BY MR. SMITH:

Q Is that your CV, professor?

A It is. I have one paper since I submitted it, but otherwise it's right on.

Q What courses do you teach at the University of Illinois?

A I teach two primary courses. One is titled Virtual Communities, and the second is titled Video Games: Content, Industry and Policy.

Q Can you tell me briefly what your educational background is?

A I have a bachelor's from the University of Southern [119] California, major in English literature and creative writing; a minor in business administration; a master's from the same university in communication management; and my PhD in communication studies from the University of Michigan.

Q Your PhD was in communication studies. Can you tell us what that is?

A Communication studies is a relatively broad term, but we are interested in messages between individuals and among groups often, but not always, through the mass media.

Q And in your training in communication studies, did you study both quantitative and qualitative methods?

A I did. I had advisors who specialized in both.

Q How does your field of study, communication studies, relate to the field of study called social psychology?

A There is certainly an overlap. I would consider myself a social psychologist. To the extent that I specialize in media, I view social psychology, both theories and methods. Not everyone in the communication field would identify themself that way, but I would.

Q Do you have training in the area of social psychology?

A I do.

Q Was any of that training specific to the media and how social psychologists would look at the media?

A Yes. Nearly all of at Michigan, yes.

Q Tell us the title of your PhD dissertation.

[120] A Its called "Trouble in River City, The social Life of Video Games."

Q Can you just briefly describe the subject matter that you dealt with in your dissertation?

A It's difficult to do entirely briefly because it has many different component parts, but it's –

Q Take as much time as you need then.

THE COURT: Well, wait a second.

MR. SMITH: All right, I should never say that to a witness. I'm sorry, your Honor.

BY THE WITNESS:

A You don't want to say that to an academic.

In brief, it involves the history of the game industry, the history of how people have played games, where, with whom, and why they have played; a little bit of the history of the reception of games; our cultural values; game's representation in the mainstream press.

And then the centerpiece of the study is – the centerpiece of the dissertation is an experimental study which involves several variables including variables that involve the social capital, cultivation and aggression.

BY MR. SMITH:

Q Can you just tell us what kind of experiment that was?

A It was a one-month controlled panel study of a single video game of a particular type called a massive multiplayer online [121] game.

Q Have some of the results from your field experiment that made up your dissertation, or part of your dissertation, have they been published in peer review journals since then?

A One was published this summer. Another is accepted and in press and will be published in January of next year. Another is under review. A tangential one was also just accepted last week.

Q Now, putting aside your work on the dissertation in the field experiment which we will come back to, are you generally familiar with the literature concerning video games, in particular, violent video games and their effects?

A I am.

Q How did you become familiar with that research?

A When I was considering what dissertation topic to investigate, I was in an archival research class. So I made it my task for semester to acquire every piece of literature on video games in any range or any topic I could possibly find and to put everything aside, so every newspaper article, every economic analysis, every – research report, every journal article I could possibly find.

Then when it came time later to be more specific, after I had read through everything generally, I went back and reread something more specifically. So I have a set of literature set aside under the title in a file drawer called [122] Aggression.

Q Called?

A Aggression.

Q Aggression.

And in addition to that, you have essentially a complete set of literature relating to video games in the academic literature?

A That is correct.

Q Now, do you have experience relating to video games other than this kind of research that you have been describing that is relevant to your opinion here today?

A Yes. As a player, as an interviewer of other players, as someone that talks to people in the industry, my background involving video games is relatively broad although, for my own personal sake, I consider them part of my media diet. I am not sure that is the angle you are interested in.

But I spent a fair amount of time talking to game players and game makers to understand what they make of the games that they play and understand the nuances of the content themselves and how they perceive it.

Q Now, turning to the substance of your testimony then, Professor, what were you asked to do in your capacity as an expert for the plaintiffs in this case?

A I was asked to review and rebut Professor Anderson's declaration.

[123] Q Were you also asked to review some of the findings that the Illinois general assembly – that the legislature made in the law at issue here?

A Yes.

Q Let me put in front of you, if I might, Plaintiffs' Exhibit 2, which is, in fact, House Bill 4023, or law that is at issue.

THE COURT: Just give him two, and he can give me one of them.

MR. SMITH: That is a good system.

BY MR. SMITH:

Q I am asking you, Professor, if you could refer to page 7. The numbers are at the top where the violent video games portion begins in Plaintiffs' Exhibit 2.

THE COURT: You don't per chance have one other spare of this, do you?

MR. SMITH: Sure.

THE COURT: Thanks.

(Brief interruption.)

THE WITNESS: I see that section.

BY MR. SMITH:

Q Now, do you see the section on findings there?

A Yes.

Q Can you tell us which of the findings by the general assembly you were asked to address?

A A-1 and A-2.

[124] Q So what were those findings then?

A That minors who play video games are more likely to exhibit violently social or aggressive behavior and that the same are more likely to experience feelings of aggression.

Q Okay. What conclusion did you reach about those findings?

A I disagree with those findings.

Q And in what way do you disagree with them?

A Based on the evidence at hand and the literature and my reading of the literature, it's my contention and belief that it doesn't support those findings.

Q Now, you mentioned the literature. What else, if anything, did you consult in forming your opinion that the findings are not supported by the literature?

A My own research as well.

Q Now, if you could turn over to the next page of Exhibit 2, do you see there under the definitions, a definition of the word "violent" toward the bottom of the page?

A Yes.

Q Okay. Could you just read that definition out loud?

A It says: "Violent video games include depictions of or simulations of human on human violence in which the player kills or otherwise causes serious physical harm to another human. Serious physical harm includes depictions of death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of both parts or rape."

[125] Q I want to ask you first, Professor, if you could relate that definition to the categories that are typically used and have been used by researchers in the field when they study violent video games and their effects.

How does this definition relate to those categories that are used in the literature?

A We have a difficult time in the literature trying to identify which games mean what, and what we are basically lacking is a typology-passed basic genre categories. Everybody can agree that there are certain genre categories. We know that there are shooters, role-playing games, sports games. But when we get into the nuances of what makes games different from one another and the different settings and the things that relate to them, it becomes very difficult to make generalizable statements based on not having a clear typology across all of the different games that are out there. So it's very difficult to relate this statement to it.

Q Would you say there are any studies out there that have looked at violent video games confined to this particular definition or anything remotely like it?

A There is one study, one of Professor Anderson's studies, that specifically controls for human versus human compared to human versus alien in a test.

Q Are you familiar with any other study that draws that distinction?

[126] A Human on human versus something else?

Q Yes.

A No, I am not.

Q Are you familiar with studies that study violent video games in which they include games which would ordinarily be viewed as more cartoon-like violence?

A I can't recall the distinction between them in any of the research.

Q Now, the law at issue here applies only to distribution of games to individuals under the age of 18. What does the social science literature say about that group in particular in terms of their vulnerability or invulnerability to potential effects from violent video games?

A If I were to refer to the television literature, the picture would be relatively clear. Compared to that, the picture for violent game video effects, of video game effects, is very unclear.

It's difficult to know at which point minors might be more or less subject to risk, and one of the confusing parts is that we generally would expect younger players to be more susceptible or more at risk, but some of the more recent findings have suggested that, in fact, it's the opposite, that findings tend to correlate with age; that is, people are more likely to experience them as they are older.

That's something that has been shown in a [127] meta-analyiss [sic] and also a finding that I was surprised to find in my own work. So the picture around age right now is very unclear.

Q Now, just to slow down here and make sure we have a clear picture, you said there was a meta-analysis out there that included the conclusion that older people are more vulnerable than younger people?

A That's correct.

THE COURT: That's m-e-t-a-a-n-a-l-y-s-i-s, right?

THE WITNESS: Correct.

BY MR. SMITH:

Q Can you tell us what you are referring to there?

A I am referring to a paper by John Sherry, professor at Michigan State University, which is a meta-analysis from Human Communication Research published in either 2000 or 2001.

Q What did he find?

A He found a positive correlation between age and effects, and that it suggests the older the person is, the more likely they were to experience effects.

Q What were you referring to in your own work as being similar to that?

A In my study, I had an age range of ages 14 to 68, and I found that there was an approaching significant finding on age that would suggest that the strength of the effect would rise as people got older.

[128] Q Now, turning to your work in terms of responding to defendants' experts here, you said you were asked to respond to the opinion of Dr. Anderson.

Did you also focus on any of the other expert opinions here such as Professor Rich?

A I also –

Q Dr. Rich, I guess.

A Dr. Rich's work as well, yes.

Q Now, what is your overall opinion about the conclusions reached by Professor Anderson and Dr. Rich about the violent video games?

A That while I agree with some of their premises, I don't agree with the general strength of the conclusions because of some significant base problems.

Q Can you tell us more specifically what conclusions you disagree with?

A The finding that or the concept that violent video games cause aggressive behavior in the players.

Q Now, I want to also make sure we have in the record your declaration itself.

Do you have that up there, your Honor?

THE COURT: Yes, I do.

BY MR. SMITH:

Q Plaintiffs' Exhibit 3, which I placed in front of you, is 3 your declaration in this case, is that right?

[129] A Yes.

Q Now, I want to start then with this concept of causality and how the social science literature proves it and why you disagree with the other experts that you studied.

How does a social science researcher go about attempting to test whether violent video games cause or don't cause certain effects?

A Well, we have a variety of different research methods which we would use that we would be essentially trying to satisfy three main conditions when we were using those methods.

Q Are those the conditions up on the board here?

A They are.

MR. SMITH: I hope that is helpful, your Honor. I don't know how visible it is.

THE COURT: I can see it.

BY MR. SMITH:

Q What are the three conditions before you determine that one thing is causing another?

A Covariation: As the two things move at the same time, not always the same direction, but that they are related. When one moves, the other moves.

Time order, that you have controlled for the effect by placing usually, in an experimental setting, one thing before another, so you know one thing precedes it, ruling out a bidirectional problem.

[130] And number three is sort of a general catch-all, that you have eliminated other possible explanations. Our lingo is plausible alternative hypotheses.

Q Using those three categories, those three prerequisites to a finding of causation or causality, what in your opinion does the existing literature tell about the relationship between violent video games and aggression?

A I think that point one is relatively well-covered. I think that most experts would agree that we have established covariation.

Q Which is to say that people who play more violent games, some tend to exhibit greater aggression?

A Correct.

And point two, that time order, at least for the short-term, experimental work has been well-taken care of and that people have done carefully-timed experiments where they have controlled when the stimulus was applied.

Point three, the broader one, unfortunately, leaves the research open to some criticism because there are other possible explanations for the data.

Q Okay. Now, I also want to just break down, if we could, for the advantage of the – to help clarify here the categories of studies that exist out there and that you have looked at really in the field of social psychology and studying video games.

[131] Can you tell us what four categories there are?

A Social psychological research methods are cross-sectional; that is, at one point in time correlational analyses, experiments, longitudinal designs, which may or may not include controls, and meta-analyses.

Q Let's start with the cross-section correlational studies and tell me what is that.

A It's usually in the form of a survey, but it doesn't have to be. What it is is a snapshot measure. It's at one point in time, we take a measure of several different things and see to what extent they are or aren't correlated together with one another.

Q What would be the typical variables you would find in a cross-sectional correlational study relating to violent video games?

A You would take a measure of violent video game consumption in some way and also a measure of aggressive behavior in some way and see if those two things covaried.

Q Have there been studies that attempted to do that?

A Several.

Q And when you say aggression in this kind of context, what is it that social scientists mean by the term "aggression"?

A Aggression could manifest in one of several ways, most of which are described under Professor Anderson's sort of umbrella model of the GAM, which I am sure we will get to.

[132] But you could measure them in any number of ways because there are several component parts: For example, aggressive behaviors, aggressive thoughts, aggressive cognitions and beliefs, and some other things which may or may not be debatable.

[133] Q Well, what is it that makes a particular form of behavior aggression, as opposed to something else?

A Well, the formal definition is that it's the intent to cause harm to a person who would seek to avoid that harm.

Q Okay. Now, you mentioned that there are a number of studies that have attempted to correlate some kind of measure of aggression with exposure to violent video games, and what have those studies tended to show?

A They tended to show a positive correlation, in that as one rises, the other rises.

Q Now, what, if anything, do those correlational studies tell us about the effects of playing violent video games?

A On their own they don't tell us anything about the effects because they can't control for time order. This always leaves open the possibility the causal arrow, which is we have two variables, and we call one for shorthand X and another Y. We don't know if X causes Y or Y causes X or if there is some simultaneous bidirectional causality going on. So, there are other possible explanations.

Q So, to be more concrete here, using the variables that are at issue, which is exposure to violent video games and aggressive behavior, can you explain why it is that you can't tell one causes the other?

A Simply by seeing the correlation, all we can determine is that they're related, and it could be that people with [134] aggressive behaviors are more likely to play violent video games rather than the other causing in reverse.

Q Now, if correlational studies can't prove causation in this context, why do researchers go ahead and perform them?

A There are a number of reasons, both theoretical and practical, why they're good to start with. The first is from the point of view of a researcher, which is usually marshaling some sort of scarce set of resources, correlation studies are often less expensive than a more time-intensive experimental or even long term design. So, it's simply better to do them first for that reason. But from sort of a theory-building perspective, they're very useful in that they can establish –

Q Do you want to slow down? The court reporters are going to lose their ability to get everything down if you don't slow down.

A I respond to dirty looks.

Q I'm sorry to interrupt you. You were talking about –

THE COURT: You lost your train of thought.

THE WITNESS: I did.

BY MR. SMITH:

Q I'm sorry to interrupt right in the middle of talking. You were talking about the theoretical reasons why one would do a correlational study.

A For the theory building point of view, we want to establish that first condition. We want to establish the correlational [135] relationship.

Q Okay. And is it fair to say then that correlation being a prerequisite is one of the things you would want to check first because it's the easiest thing to check?

A That's right. We would call that a necessary, if not a sufficient condition.

Q Okay.

A And the other thing that correlational studies can also do is they can often include other possible explanations, just not the time one, usually, at the same time.

Q Say that again. Or maybe explain that so I'll understand.

A A correlational analysis wouldn't limit the researcher to only looking at the bivariate case between those two things. They could include other possible measures to rule out some possible explanations, just not all of them, and chiefly the one with time.

Q Is that typically done through a regression analysis?

A It can be, so long as the researcher is careful not to imply causality, which is tempting when you have an independent variable dependent variable equation.

Q Right. Now, let's move on to the experimental studies that have been conducted as to violent video games. First of all, what does an experimental study in this context mean?

A It means that the subjects in question are being given some sort of stimulus. Usually, there is a pretest, an [136] administration of a stimulus, followed by a post-test, and that the results that we're interested in would be the post-test numbers with the pretest numbers subtracted out of them. We would then compare that result with a control group which had the similar pretest/post-test, but the group that had the stimulus which was different on some important theoretical dimension.

In this case the ideal situation would be a game in the treatment group would feature violent content, and then the game in the control condition would feature everything except the violence. You would want those things to be as equivalent as possible on every other dimension so that you weren't introducing any other possible explanation for an outcome.

Q Now, in the literature that exists out there, what is the amount of time elapsed in a typical experimental design?

A The typical experimental design lasts somewhere between ten and 30 minutes for the duration of the stimulus itself. I've seen studies as short as ten minutes. The longest one that I'm aware of is 75 minutes.

Q And how long after the administration of the stimulus do they typically take their measure of aggression?

A It varies, depending on the measure of aggression. They're usually directly following. It's going to vary between a few moments after and 15 or 20 minutes after. And some of the measures afterwards have another intervention phase in front of [137] them, such as irritating the subjects. So, that would prolong the actual time to measurement, but it's usually not the sort of thing we would hold against the research.

Q What kind of measures of aggression does one see in these experimental studies?

A There are several. Since I mentioned there were those different component parts in the general aggression model, there is a scale – basically a line for each sort of part. If you wanted to measure beliefs in aggression, you would ask some questions. There are also – I'm sorry. Most of these are scaled questions, which is we ask, say, ten questions which are all related to one underlying construct, and the idea is that by asking all ten, it's a more valid and reliable way of trying to get at that underlying construct than asking one question. So, there are actually a series. There are also observational methods of seeing what people do and then task methods, asking people to complete word tasks or perform some kind of action.

Q Okay. Now, when you say observational, what kind of observations are made?

A Some of the ones that have been used in the video game literature have been observing the free play of young children out on a playground, but one could also categorize many of the action tasks as something that you measure through observation, as well.

Q Okay. Now, what have been the results of these studies [138] generally speaking?

A Generally speaking, with a couple exceptions, they point to short term increases in aggression following the experiment.

Q Now, do you have any concerns about relying on the results of those studies as proof that violent video games cause an increase in aggression?

A I do. And it depends in part on how one defines an increase in aggression, but I have several basic issues with the designs.

Q Okay. Can you tell us sort of just generally what your list of concerns is about experimental research in this area, and then we can maybe take them in more detail?

A Sure. One minor issue is setting. Another is the measurements that are taken. Some more important ones to me would be the context of the play, that is, the social context of how the game is played in the laboratory. Probably the largest complaint I have or problem I have with literature relates to the duration of the effects, that is, the length of the stimulus and the claims that are then made after the testing phase.

Q Let's start with those. You said you had concerns about the setting in which the experiments occur.

A Correct. Generally speaking, researchers are concerned that by bringing someone into a laboratory, we are bringing them into a relatively alien environment, and they might behave [139] or react in a way which isn't reflective of how they would feel comfortable out in the quote, unquote real world, and if you get results in a situation like that, they could be explained by the fact that the person was in an artificial setting rather than the stimulus itself.

This is in some cases known as the Hawthorne effect, which is the idea that people are being tested with the intensity of light in a room, and they turn the lights up, they turn the lights down, and they found the effects got stronger and stronger, and it wasn't that the lights were up or down causing anything, it was the fact that the people were being messed with. It made them paranoid.

So, as experimenters, we're constantly concerned that we are having some kind of Hawthorne effect. So, if we're going to have people play violent video games, we want to make sure that they're playing them in the kind of setting in which they would play them outside the laboratory. So, a conservative researcher would set up some kind of naturalistic looking space, something that looks like a living room with a couch. Again, this would depend on the audience — I mean, sorry, the sample age and background.

Q And you say you have concerns that that's not always done?

A It's not always done. I've toured several facilities that test for violent video game effects. The typical lab as represented by facilities in my own university. I've toured [140] the facilities at the University of Southern California and at the Ohio State University. And they all appear to be the sort of generic office park Dilbert like cube farm, for lack of a better term, that is not typical of the settings in which the subjects would normally play the game. This isn't a criticism of all of the work, and researchers vary. Some set up very naturalistic settings and aren't subject to this problem at all.

Q Now, you also mentioned you have concerns about the social context in which these experiments occur. Can you explain to us what you mean by that?

A By social context, I don't just mean what games are played, but I mean with whom they're played. Something that we've learned in the history of communication research is that other people wind up being immensely important variables in trying to figure out what the actual effects of media are.

And early on in the persuasion literature, which is the sort of granddaddy of them all that birthed our discipline, we found that there were relatively direct effects and that people were very persuaded. This all came out of propaganda research around World War I, and people probably most famously think of The War of the Worlds as a case where people were directly affected by a media stimulus. But in ensuing decades we found that most of the effects were moderated by other people in addition to demographic variables that we now take [141] for granted.

So, my concern is that if we want to study how people are using video games, we ought to be doing research in which they use them in the way they would use them outside of the laboratory, and my research into the social history of play suggests that most people tend to play together; although, these patterns have fluctuated over time for technical and historical and political reasons, but that at least now, especially, the trend towards playing with other people is paramount. So, if you get people in a lab, and they're playing by themself, it's not entirely clear what use the results would be.

Q Is there particular research you would point to that shows the effects of changing the social context in which you conduct such an experiment?

A There are two papers I reviewed recently, that is, in the last couple weeks, which talk more about the social context of the play which relates as much to the in-person settings as it does to the way the game is played. Studying video games is a little bit more complex than studying television because, first of all, people are playing rather than watching, and when they're playing together, they could be doing it in a variety of ways.

So, I've reviewed an unpublished manuscript. I was the peer reviewer for a paper about a week and a half ago in [142] which the experimenters were varying whether people were playing – everyone was playing on teams, but the experimenters were varying whether they were playing against other teams or against the computer.

And then there's another study where similarly, but slightly different, people were varying whether they were playing in collaborative versus competitive settings. And in both studies it was the more antagonistic set of play that wound up explaining all of the hostility that came out of the studies. To me this is an example of where the research should be moving, and it also explained that the social context was a thing that explained the finding and how it interacted with the actual game itself. So, when you change the social settings, the effects change completely.

Q You mentioned also a concern about a measurement problem in the context of these experiments. What was that about?

A This is a relatively minor point and not mine originally. I, generally speaking, don't have a problem with most of the after-the-fact measures, most of the post-test measures.

Q Measures of aggression.

A Measures of aggression. I don't have a problem with sound blasts or with scales or with anything of those things and would be likely to use many of them myself.

One that seems worth exploring to me is something that I read through Dr. Goldstein's work, which is trying to make [143] sense of the observation of free play among adolescents and whether or not it represented aggression because the experimenters would observe people out on the playground, children, playing, and conclude they were being violent. Dr. Goldstein's hypothesis is that it's only aggression if it's [sic] intent to cause harm, and were the experimenters seeing people actually trying to cause harm or were they merely imitating what they had seen in the game and not intending to cause harm, or was it some kind of roughhouse play, which is fairly common, and it usually doesn't wind up with harm.

This is not to say that those measures are entirely invalid. It's just an alternative explanation that would need to be accounted for before I would feel comfortable accepting those particular results.

Q Now, in your declaration – I'm not sure if you mentioned it before this when I asked you to do the list, but there was some discussion of arousal and whether or not that's sufficiently accounted for. Can you tell us about your concerns in that area?

A The arousal confound is essentially the idea that perhaps the effects could be explained by the fact that the person playing the game was excited or stirred up rather than it had violent content in it. In order to control for that, in order to eliminate that hypothesis, the experimenter would have to have a game which was as equivalent as possible to the [144] stimulus, the treatment game, on every dimension but violence. In other words, it would have to be equally exciting, equally arousing. And it's my opinion that most of the research to date doesn't address that confound particularly well, and it isn't until about 2000 that researchers start to include that kind of thinking in their experimental designs.

Q Are there other dimensions on which it's important to equate the control game versus the violent game, such as frustration and how much fun it is and other matters?

A It should be on every dimension that could possibly interact with the dependent variable of interest. So, if we're thinking of some specific measure of aggression, it should be any dimension of the video game which might affect that. So, one might assume that frustration with playing a game could definitely increase some kind of aggressive behavior.

If the person was new to a game – this is one potential problem with some of the experimental designs is that you're getting people who are frustrated by the newness of the game, and if they are playing ten or 20 minutes that, in fact, what you're seeing is their difficulty on the learning curve, not any kind of aggressive result. So, that is one of many, and you just want to make sure that things are as equivalent as possible on all of those dimensions so that no one gets up on the witness stand and says, "Aha."

Q Can you give us an example of a –

[145] THE COURT: Before you go on, I need to take about a ten-minute break. We're going to break for about ten minutes at this point.

MR. SMITH: Sure.

(Brief recess.)

THE COURT: Okay. You can resume.

BY MR. SMITH:

Q Professor Williams, can you give me an example of a study in which you see this arousal confound occurring?

A Most of the work prior to 2000 is subject to this. The study that came out in 2000 by Anderson and Dill, which studies two games, one called Wolfenstein 3D and one called Myst, is the first to try to get at this issue by directly pairing games and trying to match them and by doing a pretest. It's the first step in that direction. But it's still probably suspect to this problem.

Q And why do you say that?

THE COURT: This problem being?

THE WITNESS: The arousal confound problem.

THE COURT: Okay.

THE WITNESS: The control game possibly not matching on the equivalent characteristics.

BY THE WITNESS:

A I say that because the game that was used in the control case to me is radically different than the game used in the [146] treatment condition on a number of variables.

BY MR. SMITH:

Q What were the two games involved?

A Wolfenstein 3D and Myst. They happen to be two games I'm familiar with from having played and watched others play. So, it gives me a little bit more depth and background to be able to talk about them, compared to other games.

THE COURT: M-y-s-t, right?

THE WITNESS: M-y-s-t. That's right.

BY THE WITNESS:

A Myst was the top selling PC game of all time until just a few years ago. It was a very popular, widely played game.

BY MR. SMITH:

Q That was the control game in this instance?

A It was.

Q And what are the characteristics of that game?

A It's a very slow moving, very ethereal kind of game. It's basically a puzzle-solving game, but in a very aesthetically beautiful and pleasing lush environment. It's sort of the Wyndham Hill of video games in the way one moves through the environment. When one reaches the end of a screen, the next screen loads up, and there's another beautiful scene. There's no threat. There isn't really pace. It might come from the first person point of view, but it looks more like a slide show than a walk-through.

[147] Q And what are the characteristics of Wolfenstein 3D?

A Loud, fast, scary, hostile, action-packed, and fast paced. To me, the opposite on many of those dimensions. Its the heavy metal.

Q What kind of game is that?

A Its a first person shooter title.

Q And can you tell me how those two games were treated in this Anderson and Dill study in 2000?

A Well, the first thing the experimenters did, which is definitely the right step, is to pretest them to see if rather than someone's subjective interpretation, like my own or their own, someone would try to do an objective test to make sure that the two games were matching on all of the stimuli of interest, of the variables of interest, and they did and concluded that they were matching on all but I believe action. No, I'm sorry They found them equivalent on action. They found it not matching on excitement.

And so, if you do a pretest and then you find out in your pretest that they aren't perfect, what you could do is use a statistical control later on to control for the way that they were slightly different. You could adjust for that later on.

My concern was that those two games were rated equivalent on action. I'm not entirely sure what their definitions of action versus excitement were, but they're the kind of things where I would have expected radically different [148] scores based on just a basic on the surface of it review of these games, and a pretest that would not find that to me would be problematic.

Q Now, I believe that the fifth category of concerns you have about experimental studies related to – and I think you said this is the most important – related to duration. Can you tell me what you meant by that?

A This is probably my main objection with the conclusions from the literature to date. This is kind of the big picture idea. It's that we have short term studies of video games, and yet long term claims are being made. To me the claims should match the stimulus length, and even though that's a tough charge to give to researchers, it's nevertheless the appropriately conservative thing to do through social science.

Q Can you tell me what you mean by the claims should match the stimulus length?

A I think if you want to say that video games cause X over a week, then you have to watch someone play video games over a week. I think if you want to talk about months or years, then you need to do tests of months or years.

I don't think it's appropriate to take measures that are ten minutes long or 20 minutes long or 30 minutes long and talk about effects over the lifespan. I understand the theoretical reasons behind this because of the potential parallels with the television research, but to me that's very [149] different than saying that this has been established, especially when there may be fundamental differences between the media.

Q Why do you think there might be fundamental differences between video games and television in terms of whether short term experiments can be extrapolated to longer term effects?

A I'll start with the first part of the question, which is how are they fundamentally different. Well, first of all, the content is different. There's a different range of characters, a different range of genres, a different range of – the source content is fundamentally different. You can't change the settings on a television show from fast to slow. You can't change the scenarios within the television show.

But I think the more fundamental difference is that you watch television, and you play games. They're used differently and that that might lead to different cognitive processes and how that information is taken and used by the player versus the viewer. I can think of some potential differences, which may or may not offer a confound of some of the hypotheses people are interested in.

Q Now, what, if anything, does the social science literature tell us about the effect of playing a game a longer time, over a period of hours or days or whatever, in terms of how that affects the correlational result or the experimental results in terms of aggression? If that question makes any sense.

[150] A It does, and, unfortunately, the answer is that we don't have those data. We only have two studies that go longer than 75 minutes, and they are my study that was published just this past summer and the unpublished study that I was given to review when I was writing my declaration that's done by Professor Anderson and his colleagues. As far as I know, these are the only two studies which have measured any kind of game play longer than 75 minutes.

Q Okay. Well, let's focus first on the delta between ten minutes and 75 minutes. What does the research tell us about the effects of playing a game longer in that range?

A In Professor Sherry's meta-analysis, he noted that when he looked back through all the different studies that had been done, he noticed that there were two studies of the same game, but for different durations, which is a happy coincidence for the meta-analyst to go back and make some kind of conclusion about duration.

So, there were two studies of the game Mortal Kombat. One lasted for ten minutes; one lasted for 75 minutes. The ten-minute study found a very large effect size, and then the 75 minutes one, according to Professor Sherry's extrapolation of the results, came up with a relatively small, almost zero, effect size. His conclusion was that we wish we had more literature on which to base these kinds of decisions, but it seems like a safe assumption to show that the effects fade out [151] over time, which in turn offers some support to the arousal hypothesis that as arousal fades off, it's replaced by fatigue or boredom, and you're not looking at aggression at all. You're just looking at people becoming accustomed. And it might even be a way of explaining again that frustration finding as people become more familiar with it. It's another possible explanation not mutually exclusive.

Q Okay. Now, you mentioned that your study goes beyond 75 minutes. The timeline there was a month of exposure?

A That's correct. I asked the subjects to play for a minimum of five hours a week. Most met that condition, and the average time of exposure across the month was 56 hours of exposure.

Q Let me just put your article in the record here. Exhibit 4, Professor, is that your article writing up the particular portion of your dissertation work that was a field experiment and its relation to aggression?

A It is.

Q And where was that published?

A Communication Monographs this past June.

Q Is that a peer-reviewed journal?

A It is. It's a journal of the National Communication Association.

Q Okay. Now, let's just talk a little bit about how you went about this study and why you went about this study. First of all, what kind of a group of people did you use in this study?

[152] A For the results reported here, I used first time players of this type of game. I wanted to get – rather than some kind of interval in the middle of an experiential curve, I wanted to get what happens to people when they play from scratch, but I didn't want to worry about that kind of short term problem. I wanted to have a long, relatively long, exposure time so that I could not worry about those initial arousal possible confounds. I also picked one game, notably, rather than several games so that I could have more control over exactly what they were playing and watching.

Q So, how large a group of people did you put together?

A Well, the initial panel is 400 people in the treatment group and 400 people in the control group, but as part of the first wave of the research, I asked people about their prior experience without telling them why or how it would affect how they would be assigned or used, and I found that significant chunks of them had played this type of game before. So, they were taken out of these analyses altogether. So, we were looking at more like about a hundred in the treatment versus a hundred matching in the control that's higher for the control because – it's higher for the control.

Q Okay. Now, what was the age range of this group of 200 people or so?

A The average age was 27, and the lowest was 14, and the oldest was 68.

[153] Q And the game you asked them to play was?

A It was called Asheron's Call 2.

Q And tell us again what kind of a game that is.

A By genre, it is a role playing game, which means that the person starts a character and then advances that character through some kind of usually fantasy like environment by platform, that is to say, the way it's played or what machine type it's played on. It's a massive multiplayer online game, which makes it very different than other sorts of games, but probably indicative of the way games are going to be played in the future. It's a game where instead of people playing for a short amount of time, they tend to play for a long period of time because this character stays consistent, and they keep revisiting that player. And they also instead of playing with a small number of people play with very large numbers of people. There could be several thousand people on any one game server at a time.

Q To what extent is the action in that game characterized by violence by the character?

A I wouldn't put it at the high graphic end of violence. It wouldn't compare to Doom 3, the latest first person shooter, which has extremely realistic physics where the individual droplets of blood are tracked by parabolas and such. It is, hpwever, [sic] certainly a very violent game. It features consistent combat between the players and monsters, usually. Sometimes [154] other players, but typically it's the monsters, and when the monsters or the player die, they usually collapse, make some kind of fairly awful dying sound or scream or wail, and then smoke comes up off of their bodies. So, it's not exactly cartoon violence, either. I'd put middle to high on sort of the violent content spectrum.

Q Now, you mentioned there was a control group in this study. Can you tell us why you decided to have that?

A I wanted to make sure that any results I had were the result of playing this game rather than the results of being in the study. There was something possibly that I couldn't have control about how the question order occurred or demand characteristics about the right kind of answers, the equivalent of the Hawthorne effect of the lights going up and down. If you have a control group, that gets you out of those kinds of problems.

Q And how much on average did each person in the noncontrol group play the game during the month that you studied?

A The treatment condition?

Q Yes.

A They played an average of 56 hours.

Q And what measures of aggression did you use to assess the effect of that 56 hours of exposure on them?

A I used several, not all of which are reported in this article. I used the normative beliefs in aggression scale.

[155] This would be aggressive beliefs, one of the components of the GAM. I also used the Buss and Perry more traitlike measures, which are verbal and physical aggressions, but that's not meant to reflect short term changes. It would be arguable whether or not one would find something in a period even as long as a month. And also some behavioral measures, notably whether or not someone received a speeding ticket or was in an argument or a fight with a spouse or with a boyfriend or girlfriend.

Q And you tested these people before they had the exposure and afterwards; is that correct?

A That's correct.

Q And can you tell us what results you found in terms of impact on these measures from the exposure to the game?

A For the first-time players that I'm reporting on in this paper, there were no changes. The only thing that came up which was of interest was this finding on age that I mentioned, where it looked like people as they got older might have had a higher score on some of the aggression measures.

Q But if you average all of them together, there's no effect; is that right?

A That's correct.

Q Now –

A Well –

Q Do you need to explain?

A You're not really averaging them together, and there's no [156] need for controls, either, because there's random assignment between treatment and control condition. I just wanted to make sure that it was clear that there is some experimental control there.

THE COURT: When you said on the age difference, I think you said before that it was not statistically significant, but it was close to it.

THE WITNESS: Between the treatment and the control groups?

THE COURT: Yes. I'm talking about the thing you said about as people were older, there seemed to be more of an effect.

THE WITNESS: That's correct. It was what we describe as marginally significant. I think you heard earlier in Professor Kronenberger's testimony that we have a P level, getting close, but not quite there.

THE COURT: Right.

THE WITNESS: The theory would have suggested that it would have been the opposite, which was why it was notable and we reported it.

BY MR. SMITH:

Q Okay. Can you tell us what conclusion you draw from your study about whether violent video games cause significant aggression?

A I wouldn't draw any conclusion about that statement based [157] only on my study. From my study, I would draw conclusions based on these particular kinds of measures, which are a subset of the many measures in the GAM. For this one game, one might make the case that games similar to it would be worth talking about, as well, other MMOs, in a fantasy setting and for a month, no more, no less.

Q Now, the third category of methods for studying the questions we're talking about here we have up on the chart is longitudinal studies. Can you tell me what a longitudinal study is?

A A longitudinal study seeks to fix this duration problem altogether by looking at somewhat of a relatively long period of time. It is as simple as it sounds. The typical longitudinal studies, at least the ones that we pattern ourselves after in the television violence literature, last for an extremely long period of time. They are more lifespan type studies.

The most notable ones done by Professor Huesmann, who was at Michigan when I was there, can last for decades, and the researchers would issue reports at regular intervals to see as the effects go longer. They're very hard to do because researchers themselves only live so long, and they require a lot of money and a lot of setup time, and they typically don't feature a control group because this wouldn't be feasible in a truly long term setting.

[158] Q And why is it important to study these kinds of effects over the long term?

A To have some leverage to talk about effects that matter. It's not clear that knowing what happens in ten minutes, when there are these other possible confounds and there could be a fadeout, tell us a lot, but if you found an effect after a week, that would be more interesting, I think, than after a half an hour, and you're talking about diminishing rates of return here, but you have more leverage and power to talk about long term effects as you have long term studies. A year long study would be an amazing advance in our field right now.

Q Well, have there been longitudinal studies in violent games and aggression?

A No.

Q You mentioned I think earlier that there was one study by Dr. Anderson that's not yet published that at least characterizes itself as a longitudinal study. Can you tell us what that -- can you just describe that for us?

A His team study – I'm not sure in what phase of preparation it is. It didn't look like it had been through the peer review process yet. It looked like it's sort of that tentative. So, it's awkward for me to criticize something that the authors haven't had a chance to do. It's not my normal venue to do such a thing.

But to be simple, if I can describe it, I will. They [159] took third, fourth, and fifth graders and asked them pre and post-test questions, and the pre and post-test window ranged from two months to six months. So, for some people it was a two-month study and for other people a six-month study. It's very different than my own in a couple of ways, if we're trying to draw comparisons.

Q Well, what are the key differences in your mind?

A Length is longer. Lack of control limits some of the conclusions. I had a control group, and they did not. I think the key differences otherwise would be the age of the respondents, which is something I'd like to learn more about personally from the results of that study, and also the fact that it's a test of violent games at large, all of them, versus one specific defined tangible game.

Q Now, what was the age group studied there?

A Third, fourth, and fifth graders.

Q Okay. And you say it was violent games at large. How did that study go about identifying people who had – and measuring people's exposure to violent games?

A As best I can re-report their findings from the data they give us, it's not perfectly well laid out. So, I'm not completely sure here. But it seems like these are self-report measures from the third, fourth, and fifth graders where they ask the students to list a handful of their favorite games and then to indicate the level of violence within each of those [160] games. So, it's essentially self-reports of their favorites, including an assessment of the content.

Q So, the games at issue wouldn't necessarily include games for most of these kids that would be very violent by standards of adults?

A It's hard to know what games they played. Probably they skewed younger, if we believe the statistics on who plays what sorts of games, but without that information supplied by the research team, it's just games, and I can't say more.

Q Are there statistics out there about who plays what kinds of games?

A There are statistics on purchasing patterns. I don't know great statistics on play patterns. It's hard for me to make that statement.

Q Okay. Can you tell us do you have some concerns about the structure of this study and how it was done?

A A few things in the way that conclusions are drawn. I have a problem with that self-report measure of media. It's suspect to me for a couple reasons. One is that I have a hard time defining violent content in video games, and this is all I do. I play them for leisure. I study them at work. I know them pretty well. But I wouldn't use my own assessment. I would use some kind of content analysis with multiple coders to establish reliability. So, essentially, we're establishing a lot of noise there.

[161] Q Who is it that established the violence? Which games are violent here?

A The students themselves.

Q The students themselves in third or fourth or fifth grade?

A And one can make an argument in two directions, that they could have been underrepresenting the level of violence in the games that they listed or overrepresenting. I could think of strong arguments to go each way. People who consume a lot of violent television and movies tend to underreport, the argument being that they're desensitized to it. So, in that sense they might have underreported the level of their violence. On the other hand, they're third, fourth, and fifth graders who, as far as I can tell, want to act like fourth, fifth, and sixth graders and want to probably show that they consume more violent content than they do to show that they're more grown up than they are. So, it's just the unknown.

We report a reliability number so that we can trust our measures, and depending on – this is a number that goes from zero to one, and when that number goes under eight, some people will say that you cannot publish it. In some fields and some journals, that number is lowered to point seven, and very occasionally will numbers under that be accepted. The number on this particular measure, which is the central measure of that study, is point six eight. So, by most standards it's under the acceptable number.

[162] This is the kind of case where we would ask the researchers to explain why it should be accepted rather than tossing it out. Again, this is not being entirely fair to the research team. We would give a chance to explain why should we trust such a low number.

Q Can you tell me what kinds of measures of aggression were used in this study?

A They used several. One of the ones that springs to mind is a series of vignettes where they ask people to react to hypothetical situations. For example, you're passing by some other children in the hallway, and they make snickering sounds. Are they laughing at you, or are they laughing at something else? It's the kind of thing that would get at what we're talking about. We'll be talking about hostile attribution bias, in laymen's terms kind of paranoia.

In addition to that, I think they had several other standard measures. I think the more powerful ones were the teacher and peer assessment scores for aggression and violence, which I think are good measures.

Q Well, what were the results that were reported here with respect to the effects over this two to six-month period of the greater exposure to more violent games?

A There are several outlined on a table at the end of that study, and I think they're best explained through a series of tests they describe as destructive analysis, which is that they [163] start with the correlation between violent game play, problematic or not, a time one, and some kind of aggressive outcome at time two. To the extent that those things are correlated, they've controlled for time, and they can say something interesting.

So, what they've done is they get an initial correlation, and then they start partialing out these other potential explaining variables, these other plausible alternative hypotheses. Well, okay. You have the correlation now. Let's add in gender. Let's add in age. Let's add in these things and see if anything is left. Let's add in parental involvement. Once those things are partialed out, there is a small number – there are numerically small effect sizes on these dimensions. These effect sizes basically explain how much of the change is explained by playing violent video games.

What's difficult to assess about the measure is that we don't have the raw numbers themselves. In other words, we can't say that aggression in some measure went from a seven to an eight and that we can explain 2 percent of that change. We don't have those round numbers. So, we have these small percentages. We don't know small percentages of what. So, is it a small percentage of a big thing or a small percentage of a little thing. Is it substantial or negligible.

Q And the percentages we do get are in the range of 2 percent [164] or a little more?

A I think the key percentages on the main variables that showed up after – some things like prosocial behavior, a decline of prosocial behavior, if I recall correctly, once partialed out, there was no finding. But the three that are remaining, I believe, were 1 percent, 2 percent, and 3.6 percent.

THE COURT: One percent change you mean?

THE WITNESS: One percent of the change could be explained by play. We don't know what the absolute –

THE COURT: Okay. One percent of the – in other words, you had whatever the amount of the change was, and once you controlled for the other variables, you were down to 1 percent of the change that could be explained by playing the game in that one instance.

THE WITNESS: Correct.

THE COURT: And the others were how many?

THE WITNESS: Two percent and 3.6 percent on the key three variables.

BY MR. SMITH:

Q Now, can you tell me why it is that this study, this one longitudinal study, doesn't lead you to believe that the legislature's findings that we talked about at the beginning are correct?

A It's mostly the lack of information. I don't know what to [165] make of them because I don't have the absolute numbers. If I had the absolute numbers, that would be the sort of thing where a policymaker would say this is or isn't a big or a small problem. That's more of a normative assessment.

With the issues about the self-assessment of violent video game play at time one and this question mark about the size of the findings, I just don't want to interpret the study. I just don't think it's ready in its current form. It might be later. This is something I – it's an odd thing to comment on. This is not how we usually do this. It's a potentially exciting interesting study.

Q Now, would it be possible – assuming this study were to get cleaned up and some of these issues were taken care of, would it be possible to extrapolate from a study two to five months in elementary school to conclusions that people are going to grow up and be violent?

A No. I think it would give us power to talk about two to six months in elementary school at these particular ages. I think also, notably for policy-makers, it might actually be able to help us with this age issue if we knew what happened in grade three versus grade four versus grade five. In other words, if the effects were to go up or down, that's very interesting and could help fashion policy. My understanding now – and I'm not supposed to get into policy – is – sorry, I can't help myself – is that it's 18 and under. Well, here's [166] an actual range. You could actually get an answer.

Q Now, you mentioned there were these much longer longitudinal studies in the area of television research. How do you see that as relating to the assessment of whether violent video games might have or might not have effects over the long term of making people more aggressive and violent?

A If one can make the assumption that video game play is just like television effects or more so, then that research would be extremely helpful and useful. I happen to buy the television violence literature. It works for me. What I have a problem with is using it and applying it automatically to the video game effects literature because I think there may be fundamental differences between the media. So, to me, until someone definitively proves otherwise, they're apples and oranges, and they should be treated independently.

Q Now, you mentioned before, and we have up on our list here, a kind of fourth category of method, which is a meta-analysis. And can you just briefly tell us what that is?

A A meta-analysis is when a researcher doesn't collect new data, but instead looks at what's gone before. Basically, pools all of the different findings. The advantage of meta-analysis is you suddenly get a very large sample size, and you get a test, hopefully across a similar range of tests, of slightly different settings because any one study is going to be subject to some kind of flaws and limits, and if you can get [167] a bunch of them in one study and they all look the same way or they all suggest something, it makes us more comfortable with the results. It also can allow for the analysis of some of these bigger picture patterns. For example, Professor Sherry's finding on age and the comparison of the two Mortal Kombat studies. Those are the kinds of things that can come out in a meta-analysis.

Q Now, the meta-analyses that exist in the area of studying violent video games, those are analyses which consolidate or combine either the short term experimental studies or the cross-sectional correlation studies or both; is that right?

A That's correct.

Q And so, does the fact that they're put into a meta-analysis in any way effect the limitations of what you can conclude from a correlational study or experimental study about long term effects?

A No. The study is as good as the source studies that go into it, and, in addition, responsible meta-analysts would separate the cross-sectional studies from the experimental studies and show them differently, which is something that Professor Anderson has done in his, but it doesn't help you if the source studies aren't trustworthy in the first place, which is my opinion of the experimental work before about 2000.

Q And is it also true that whatever reliability the studies may have, if you look at a bunch of experiments together and [168] they're all about the short term, that doesn't make it any more valid to extrapolate from experiments to long term effects?

A No. If you look at the length of exposure in all the source studies in the meta-analysis, it might let you say something about effects over relatively short periods of time. If all the studies are ten minutes, 20 minutes, and 30 minutes, you could compare those, but you still can't go past the 30 minutes. And so, they all go to 30, a couple go to 40, and one goes to 75, but, generally speaking, they're all these very short term studies.

Q Now, in your field I think you mentioned before there are times when people kind of construct theoretical models, how they think a particular kind of medium is affecting people?

A Yes.

Q And is the GAM that Dr. Anderson has developed an example of that?

A It is in a sense. It's sort of an umbrella for some existing models because we have a little bit of an alphabet soup of potential models. The GAM seeks to take some order out of chaos by combining some of these different approaches. There are several different potential routes to aggression. And so, it identifies them and says here otherwise they go and let's just call it one thing.

Q Has that model or any other model at this point been sort of proved correct in the area of violent video games and their [169] effects?

A Not in my opinion.

Q Okay. And do you have an opinion about the validity of Professor Anderson's particular theoretical model, the GAM?

A I think it's the right start. I think it's missing some pieces. It's not the kind of thing I would throw out and start from scratch because I think the questions are worth studying. I think the basic premise of the thing is just fine, but I think it's, number one, not allowing for the difference between the two media, and it's assuming that the second one is simply the first one but worse.

Q The two media being television and video games?

A That's correct. Number two, it doesn't allow for social textural moderators, which by my view of these last two very recent studies and my own work and thinking about games seems to be very, very important.

And number three, there is a potential problem with the hostile attribution bias portion of the model. I say potential because I have a result which contradicts the way that the GAM suggests that this part of the model would work. But it's just, again, one game or one test, whereas it works differently in the longitudinal study of Professor Anderson's that I've reviewed. It just puts a question mark in my head about how that part of the model should work. It's this box in the middle, and it's not clear to me that it should be there or [170] should function the way that it does.

Q What is it that your study shows about hostile attribution bias and how it functions?

A This is -- you're going to have to bear me with me a little bit here. This is a theory called cultivation, and it basically means that if you consume a lot of media, you start to think that the world looks like that media. And the classic case is of someone who watches a lot of television news will think that their neighborhood is more violent and scary than it really is. It's a very, very intuitive appealing mechanism to think about.

The problem is that it's almost entirely debunked in the research in the way that it was originally constructed. It's one of our field's, communications, more famous back and forth debates as to whether or not this data was valid or was junk, and the exchange that went back between the research team is the sort of equivalent of the Far Side comic with the guys in the white coats throwing things at each other. It's the kind of thing we teach in all our intro classes.

One of the problems was that someone found the astrological signs of all the people in the original source study and found that they were a better explainer of the effects than the television they consumed, which is a fairly devastating attack on any level, in addition to being somewhat mean.

[171] THE COURT: I guess it could be proof of astrology, I think.

THE WITNESS: Could be. What it told most of us, and there have been quibbles back and forth since, is that cultivation as originally composed doesn't work. When I say as originally composed, it's the idea that you might see some specific thing on television, but it will then spread to related things.

In other words, you might see something which is part of the overall concept of crime, and it would then spread to other kinds of crime. We call this spreading activation.

I tested for this very, very specifically in my game study over the month by testing for cultivation measures, and I had a test that would have shown, number one, is there any cultivation at all, and; number two, does it work by this kind of spreading, or does it stay constrained to the very specific particular incidents.

And I found that it stayed constrained to the very specific instance. It didn't spread to semantically related similar other things.

BY MR. SMITH:

Q To be more concrete about it, what is it that people's attitudes –

What kinds of attitudes changed and what kinds of attitudes didn't change during that month that they were [172] playing the game?

A Well, I asked them to give me the likelihood of four types of violent crime in the real world, in other words, their perception of how often these things occurred; and the four things were rape, murder, robbery, and assault with a weapon.

The test of the spreading versus specific can be found in that in the game world, only one of those things exists, assault with a weapon. It's basically the entire content of the game.

It's nothing but the player and the monster doing this to each other, 56 hours of it, hundreds of times, over and over every hour, just a constant steady stream.

Players who played the game wind up thinking that they were more likely to be assaulted with weapons on the street than people in the control group who experienced no change. But they weren't anymore likely to think the other three things happened.

In other words, there was a cultivation effect, but there was no spreading.

Q I want to conclude, Professor, by just asking a couple of questions about the existence of consensus in your profession about the effects of violent video game exposure.

Are you familiar with Professor Anderson's assertions that there is such a consensus?

A I am.

[173] Q Can you tell me what your professional judgment is about whether such a consensus exists?

A Well, when one looks across disciplinary boundaries, there is much less consensus. I would assume that some portion of the bodies which have issued the statements about violent video games' effects, notably the American Psychological Association most recently, there's probably some consistency within that body.

In communication and in the game specific research circles which I occasionally move in, there is no consensus. If there is any consensus in those groups, it's the opposite of the findings.

Q Now, you talk about game specific circles. Are there particular organizations you are talking about there?

A I am highlighting two organizations. In communication research its the International Communication Association. But in game specific research, it is an organization called the Digital Games Research Association, or DGRA for short.

Q What kinds of professions are reflected in the members of those organizations?

A The membership of DGRA is more qualitative than quantitative. It has some social scientists, but for the most part it tends to be people using anthropological or ethnic graphic research methods, people who would, rather than collect statistical data, would sit in with game players and talk to [174] them about their experience. They tend to get depth rather than the breadth that the social scientists get.

Q What can you tell us about the perspective of members of those two organizations on the question of whether violent video games are harmful because they cause aggression and long-term?

A The membership of DGRA, if one can sustain the irony, would be outright hostile towards it. They think that it's the wrong question to ask. They don't believe the findings and they consider it a witch hunt.

The membership of ICA is relatively agnostic about the effects, basically reflecting my own position, in that most of the junior and senior researchers talking over this issue, it's not that we have come down saying, "yes, there are, yes, there aren't," but that we need some more data to make good, sound conclusions, and we are openminded about it.

MR. SMITH: I have no further questions, your Honor.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. KASPER:

Q Professor Williams, my name is Michael Kasper. We met out in the hallway a while ago.

First of all, Professor, you do not have an opinion about whether or not exposure to violent video games lead to aggression, do you?

|175| A No.

Q Similarly, you don't have an opinion about whether exposure to violent video games leads to an increase in feelings of aggression, is that correct?

A That is correct. I assume by violent video games, you mean all?

Q Correct.

A Then no.

Q And you, in fact, have in the past used the word "agnostic" to describe your feelings on this position?

A That is fair.

Q And do you recall being quoted in the New York Times as saying, quote – I am sorry – the Washington Post, as saying, quote, "I am not saying some games don't lead to aggression, but I am saying the data are not there yet"?

Do you recall that?

A Yes.

Q That is a reflection of your agnostic position?

A Yes.

Q When you're talking about your disagreement with the findings of the Illinois general assembly in enacting this legislation, what you are saying is not – your position is not that these games do not lead to those results, only that you have not professionally been convinced of that yet?

A That is correct.

[176] Q You received your PhD in communications, not psychology, isn't that right?

A That is correct.

Q You received that PhD last year?

A I was awarded it the beginning of 2004, but my defense was actually in 2003. I was a visiting assistant professor for that term.

Q And in your dissertation, you conducted an experiment regarding video games that you talked about, is that correct?

A Yes.

Q That is the only experiment in the area of video games that you conducted personally?

A No, no. I am currently engaged and basically finished with a second experiment which doesn't involve aggression but which is another month-long online test. It's much more complex than the original one, and I have been involved in a series of experiments in political psychology over a couple of summers, probably about eight different experiments.

Q But is it fair to say that you have done one experiment involving video games and aggression?

A Yes, it is.

Q As I think you were describing earlier, the game that was played was called Asheron's Call 2, isn't that correct?

A That is correct.

Q You described that as a massively multiplayer online [177] role-playing game?

A That is correct.

Q What does that mean?

A Well, there are two parts to that very long acronym. There is the massive multiplayer part and then there is the role-playing part.

The role-playing game part would indicate what genre it is, the creation of a character, advancing that character steadily to some usually never-attained goal. The massive multiplayer would refer to the medium and the means in which it's played, that is, over the Internet, usually from a PC, but for some games also through consoles.

Q And that data that you collected playing Asheron's Call was used in your dissertation?

A Yes.

Q That was the basis for your publication in the journal called Communication Monograph?

A Correct.

Q You published that article after your submission was rejected by the Journal of Communications, isn't that right?

A That is correct.

Q And I think that you used the phrase in talking about your analysis of one Dr. Anderson's reports about this question of revising and submitting versus being tossed out. Do you recall that?

|178| A Yes.

Q So was the "tossed out," was that, to use your term, what happened with yours regarding the Journal of Communications?

A When I initially submitted it to the Journal of Communications in an earlier form, it was outright tossed out. So we have accepted, revise it and give it back to us, or simply reject it.

On the first pass, our paper was rejected.

Q That is how you ended up with the Communication Monograph, is that right?

A Yes.

Q Then after that happened with the Journal of Communications, you, I think in your deposition, talked about how you consulted with Dr. Bushman?

A Yes.

Q Is that right?

Is that the same Dr. Bushman who is a coauthor of the meta-analysis with Dr. Anderson?

A Yes, it is.

Q And going back to your study, I just want to get a couple of things clarified.

Where did you get the players to play in your study?

A It's a challenge to find people who would be likely to play a game or would fit the demographics for people for a game but who haven't played it yet.

[179] So I took two tacks. One was to ask current players for referrals, in other words, select the – people that they would want to get their friends to play who had never tried it, and this would be incentive to do it. But there is a danger there of oversampling a certain type of person.

So I also made sure to recruit across a wide range of other types of demographic groups. For example, I knew that it would be very difficult to recruit women. So I tried very heavily on women's sites, several posting boards on I-Village, for example, to try to get female subjects potentially interested.

Q When you say sites, you mean the Internet. You recruited through the Internet, didn't you?

A Oh, yes. That's an online game. That is pretty standard.

Q Did you also recruit through gaming web sites?

A Yes.

Q Things of that nature?

A Yes. That is the snowball –

Q Is it fair to say that the people –

THE COURT: Hang on a second. He hadn't finished his answer, and I didn't hear the last part.

THE WITNESS: I did, in fact, recruit through gaming sites. That is the side of it where I am hoping for referrals because I can always, when I ask people if they have played the thing before, drop them from the study at that point.

[180] But I could certainly maximize my resources by asking people to refer their friends. It turns out that when I did a test at this point that less than half of the people actually were friend referrals and the majority were on their own from other sites. I asked that specific question.

Q From other web sites?

A Correct.

Q When you use the word "site" –

A When I say "web site," I am usually talking about some kind of message posting board from some community of interest.

This lets me go and target specific kinds of groups, if I am thinking I want to balance out my sample to make it appropriate and match the actual people who had played this game, so that I have that kind of generalizability about the population because the characteristics of the population of the MMOs are known so I can try and match them. It turns out I matched them pretty well.

Q So is it fair to say that the people who you recruited had experience in playing video games?

A Some of them did, some of them didn't.

Q The ones that did likely are the ones that you found through these game playing web sites, things of that nature?

A I never did a test of that, but it is a fair hypothesis. It's only an issue if they were imbalanced in their assignments to the treatment of the control conditions, but since I use [181] random assignment, it's pretty safe insulation from that kind of –

Q You said that the age range was 14 to 68, is that right?

A That's correct.

Q Did you in any way segregate them during the course of the month of study, the younger players from the older players? Did you keep track of them?

A Well, they weren't playing with each other specifically at all. So I am not sure what you mean by segregate.

Q I mean, they kept a journal of how long they played, right?

A That's correct.

Q The average was 56 hours?

A That's correct.

Q Do you know if the older players were playing more or playing less, or was everybody in one?

A I haven't done the analysis –

Q So the answer is no?

THE REPORTER: Please, one at a time.

MR. KASPER: I apologize.

THE COURT: Let him finish.

THE WITNESS: No. I couldn't tell you if ours played skews younger or older or sits in the middle. I have no idea. I have not done that analysis even though I do have those data.

BY MR. KASPER:

Q And do you know what portion of the population of the study [182] was, say, under 18?

A I was asked this question in the deposition, and so I am going to give my best-guess answer now, like I did then, without having looked at the data.

If the real world average is 27 and the actual average in my study is 27, it is not a perfect normative balance. In other words, the Bell curve doesn't go from 14 up to 27, which would be 13 to another 13 to 40. It goes to 68. So that means it is going to skew kind of funny.

It means there's probably a clump of people who are under 27, and they are probably going to be centered around the college age, which means that some are going to be under 18 and some of them aren't.

My guess is probably a quarter are under 18 in the study, and it's just a guess.

Q And getting to the nature of the game play, you say people are playing – it is a multiplayer game, but people are not playing together.

By that you mean that people are on the Internet playing while other people are playing the same game in the same sort of space, so to speak, is that right?

A I am not sure what you mean by not playing together, but I agree –

THE COURT: They are not in the same room, in other words.

[183] THE WITNESS: Some are, some aren't.

THE COURT: Doesn't need to be.

THE WITNESS: It's not required. It actually is a common phenomenon for people to play with current friends, especially family members.

I think the last research I saw suggested that happens. About 20 to 30 percent of players are playing with somebody they know. So some subset of that is going to be in the same household.

But in my study that is probably less likely because of the way I did the sampling. It is not clear whether my referral test would accurately reflect existing relationships in my sample versus the real data. It's hard to answer.

BY MR. KASPER:

Q But you didn't track that, the question of whether they were in the same room or not?

A No.

Q And in your deposition, you also said that one of the things that attracted you to this game was the interactive social nature of the game?

A Yes.

Q Is that this notion where there are many people playing all at the same time?

A Yes. That is actually – the major part of most of my research is about the social interactions in these online [184] spaces as opposed to just effects work.

Q And did you gather any information during the course of your study about what other games the participants were playing at the same time?

A Yes. I asked how many hours per week they were playing both pre-test and post-test.

Q Did you ask what the nature of the play was pre-test and post-test?

A I had indications of their preference for graphic violence and their preference for action in games. So that's a rough proxy of that but isn't dead on that. As I have indicated earlier, it is very hard to quantify content by self-report.

Q So what I am trying to get at is, if a player was playing a particular game 56 hours a month before they started this study and then they substituted 56 hours of your game, would you know that?

A I would have seen some drop in those scores, yes. I would have seen some kind of change in those things, I am pretty sure.

Q Well, did you ask them?

A I looked at those scores pre-test and post-test and did what we call a T-test, to test to see if they are significantly different before and after. I don't recall off the top of my head what the scores were. It's the kind of thing I would have checked for just the reason you are implying.

[185] Q Now, the game that you chose, Asheron's Call 2, how did you come to choose that?

A Dumb luck more than theoretical significance. I had a relationship with the people at Microsoft Usability. I wanted to get a test of a game, and I was interested in social phenomena.

I actually first approached Maxis, the people that make the Sims online, because that was the game I wanted to do a test on. They weren't interested in working with me or helping me.

One of the challenges for a game researcher is what we would really like to get is data reported from inside the game world rather than asking people their opinions. It's much stronger to get unobtrusive measures than it is to ask people what they think or they do.

So I tried to cultivate a relationship with Microsoft, and we worked up a long series of potential studies that we could have done together that could have been interesting and beneficial for them. They are interested in retaining these people because they are paying a monthly subscription fee. So they have an incentive to find out why people leave the game.

My mechanism – my method would have been the kind of thing where they could have answered those questions. But when it came time to actually talk about literally doing it and rolling it out, the lawyers for Microsoft said: No way, Jose, [186] there is no way we can do this. What if we wind up finding there is some kind of problem with our game? We can't be in possession of those documents and we can't work with you anymore.

And I said: Well, we have done all this work. I have to do a dissertation. What can you do for me? And they said, look, we will give you copies of the game, how many do you want, and we will just wash our hands of dealing with you.

I said – I remember this phone call very clearly – 400.

So that is why I have 400 in my sample.

Q So the short answer is Microsoft gave you 400 copies of the game?

A They donated it to me, that's right.

Q The cost of the game was about 50 bucks apiece?

A That is the retail value, right.

That includes – the subscription fee per month is about -- was then about $13. So the total value for the first month is sort of 37 plus 13, and then 13 for subsequent months. So, yes, 50 bucks up front.

Q So that is $20,000?

A Yes.

Q Is it fair to say that is the lion's share of the cost of this study?

A Yes. I think my costs were $2,000 supplied by the [187] University of Michigan's communication department and a dissertation grant, and I think it barely covered my postage. So, yes, I couldn't have done it without their donation.

Q Did you hear Dr. Kronenberger earlier today talking about his funding or the work that he does?

A I did catch some of that, yes.

Q Did you hear him say that he puts his funding on his CV?

A I did hear him say that.

Q You don't do that, though, do you?

A Well, I have only done this one study where I had a donation, and I reported it in the article itself, which seems to be a much more important place to be transparent than on my CV because it's the thing that people read.

Q Is it –

A I don't have a problem with the transparency. They donated the stuff.

Q Was it in your dissertation?

A The donation?

Q Yes.

A I think so. It's not a published document.

Q You are aware that Microsoft is one of the members of one of the plaintiff groups in this case?

A I am.

Q All right. Now, if we could just go back to your study a little bit.

[188] Asheron's Call 2, do you know if there were any previous studies involving that that showed that it increased aggression in the short-term?

A Asheron's Call 2?

Q Yes.

A No.

Q And if I recall the way it worked, you asked the players to keep a journal of how long they played?

A That is correct.

Q Each week?

A They were sent an actual piece of paper with a journal. Research suggests that when you give people a diary to fill it out that it's much more reliable data than if you just ask them to sort of kind of keep track and give an approximation.

There is a recall issue that is greatly aided by giving them a diary.

Q Your request was a minimum of five hours a week?

A That's right. It's a tradeoff between trying to get them to play as they normally would versus fulfilling some kind of minimum condition psychologically to be invested in the study to keep on with it.

It's a tradeoff between control and naturalism, in other words.

Q But at least one-third of them didn't play even five hours a week, isn't that right?

[189] A I can't remember what the proportion was. Some chunk of people didn't fulfill the study's requirement and dropped out, and some people played a small number of hours, that is correct.

There was variance on the hours played. It went from five hours up to about I think 2- or 300 in some extreme cases.

Q Okay. And then I think there were 11 people that didn't play at all, reported not playing any of the game; that's being dropped?

A That sounds right.

Q But that means they actually went to the trouble of filling out the form and sending it back to you so that you knew they didn't play?

A They did the pre-test, which is what they had to do in order to get the thing mailed to them, and then I never heard from them again.

So I had their data from time one but that is it. So I dropped them because they had no stimulus.

Q So in order to get to an average of 56, if one-third are playing less than five hours a week, some people have to be really playing a lot, several hundred hours?

A That's correct. There are people out at the other end who have significant leverage on that mean, yes.

Q And did you bring that into your calculations at all?

A Well, the question about the distribution there is whether [190] or not it violates the assumption statistically.

You want to make sure that the data are distributed in such a way that you can perform some tests and not have others knocked out. And there are actual statistical tests to make sure that the data are in those correct formats, and I ran those tests, and they passed, and they were okay.

Q Now, with your measure of aggression, you used the verbal measure of aggression?

A I did.

Q It was a binary measure meaning yes – a yes or no question?

A Well, I thought what you were saying with the verbal measure of aggression was actually going to be the verbal aggression subscale of the Buss and Perry scale which I used. But if you are asking me about whether or not they had arguments with a spouse or a boyfriend, girlfriend, the answer would be yes, it was a binary measure: Did you or did you not.

Q Then the next measure of aggression was did you have a fight with a friend?

A That is correct.

Q Also binary, a yes or no question?

A That's correct.

Q And when you took those measures, did you measure the severity?

A No. It's just a yes or no.

[191] Q So did you measure the frequency?

A It's still just a yes or no.

Q So if a player had one argument in the month before the test with their spouse, and then during the month of the test or the month after the test they had 10, that would not be an increase under your study, is that right?

A That is correct. A yes or no question won't get an intensity.

And so I think, if I am understanding your implication correctly, you are wondering if there is some kind of floor or ceiling effect to be worried about with the interpretation of the data. The thing is I asked the control and the treatment groups equally, what I am interested in is the difference between the two, not in the time order in this case.

Q Right. So you weren't interested in whether or not somebody became more aggressive if they were aggressive according to that scale?

A No, I am. I am interested in that change as it compares to the change that occurred in the control group as well.

I am perfectly willing to go along with the implication that it's not an in-depth measure because it doesn't have, say, a Lichert scale range, how many times did this happen, and it smushes that variance down into yes or no, absolutely. That is why we ask multiple questions.

Q Similarly, if someone had had an argument with their spouse [192] during the pre-test month and then, say, had a physical assault, the second one, you would not have measured that one either?

A Well, I think they would have probably said yes both times. So it would have shown consistent real world behavioral aggression. So I think it would have captured exactly what I intended.

Q For that participant, there would be no increase in aggression reflected?

A It would be steady, that's correct, but the same would be true with a control group, and the same could work true in the opposite fashion as well. That is how these things get smoothed out and why we have large numbers of subjects.

Q What about single people?

THE COURT: Single?

BY MR. KASPER:

Q People, people who don't have a spouse or a boyfriend or a girlfriend?

A They wouldn't be captured by this.

Q So if it was impossible for them to answer the first question yes in either month, they would all likewise have no –

A That's correct. There is some subset of the population for whom this is an invalid question.

Q Did you exclude those in any way?

[193] A No. I never asked people whether they had a boyfriend or girlfriend or spouse, but, again, it's the same in treatment versus control, which is the strength of experimental design.

Q Are you familiar with the concept of subject mortality?

A Yes.

Q What is that?

A Despite its name, it really just refers to the drop-out rate.

Q What was your drop-out rate?

A I could guess. It's a pretty good rate for the treatment condition, and it drops way down for the people in the control condition. I am going to guess it's 70s or 80s for one and 40s for probably the other.

Q And you are talking not about your drop-out rate but your retention rate, isn't that right?

A Correct.

Q So –

A Same idea. I was thinking about it inversely.

Q Right. I just want to make sure we are talking about the same thing.

A So the people in the control group dropped out at a higher rate than people in the treatment group.

Q More than half of the people in the control group dropped out?

A That's correct.

[194] Q What implications did that have for the results of your study? Did you think that there was some difference between the control group drop-outs and the control group who stayed there, and did you do anything to work that into your findings?

A Absolutely, yes, of course.

Q What did you do?

A Well, the first thing that we do is think, well, what characteristics about someone dropping out would interact with one of my dependent variables of interest in some way. What are the things I need to worry about? Get a laundry list of every variable and see if random assignment still holds to see if at time one their scores are still equivalent.

So I have to knock out half or more than half – I can't remember the figure – of the people out of the control group right away, which I oversampled to do on purpose, knowing that this would happen, just not exactly knowing the extent.

I go back to their time one scores, and what I want to find out is, well, okay, let's say I have a hypothesis that the game makes people lonely. Well, I want to go to time one and find out if the people who are left after those weird drop-out rates are different on loneliness.

So we do a test called a T-test, or we test this very question on all of the main variables of interest to see if they are skewed, to see if random assignment was violated, to see if that equal starting point idea was violated.

[195] Q So you had to do this because you ended up with more than 300 people – or I am sorry – more than 200 people in your – or about 200 people in your target group and more than half of the people in the control group that dropped out, right? That was the cause in needing to do that?

A That's right. The differential mortality rate is exactly the reason to run a T-test, to safeguard oneself from the criticism that they might not have achieved random assignment and equal starting points.

That is exactly what I did, and it was okay. And if it wasn't okay, then you know to include that variable later as a control in the analysis.

Q One of the features of this online role-playing game is that you interact with other players at the same time?

A That's right.

Q So it's different from, say, a first-person shooter game where it's you against the world sort of difference?

A I wouldn't agree with that because many first-person shooters are games in which people are interacting with others as opponents and teammates, just not scale-wise to the extent, and usually it is a question of weaponry rather than interface. So I think I disagree.

Q Would you agree that it's different in that regard from the other first-person shooter game you were talking about earlier, Wolfenstein?

[196] A Could you be more specific? Different how?

Q Different in that there is no sort of role-playing and interacting with other players as there is in the game that you used?

A Well, Wolfenstein certainly doesn't have a role-playing equivalent. So that part of it is definitely different. These are different genres. An action shooter versus a role-playing game would be apples and oranges.

The interacting with other people, I am still going to have to disagree with the premise of the question. It's just a question of extent because many first-person shooters are multiplayer, interacting with others.

Probably the most popular game in the whole world is Counterstrike and that is people in groups of 8 to 32 playing together all the time. No one plays Counterstrike alone.

The difference between, say, a game like Counterstrike and a massive multiplayer game is that instead of 8 to 32, you are grouping usually with five people but in a crowd of a thousand.

Q Okay. And what I am getting at is one of the features of these massive multiplayer games is the formation of alliances and working cooperatively with other players to achieve your goals, isn't that right?

A Absolutely.

Q And, in fact, some of the accomplishments required in your [197] game cannot be completed by a single player?

A That is correct. There is a strong game mechanic incentive to interact and work along with other people.

Q That is a feature of the game that may have implications for the effects on aggression, isn't it?

A Absolutely. And I think I mentioned this when I talked about the two studies I reviewed last week. I think this is very consistent with those findings.

Q Okay. I am going to move on right now to the Sherry meta-analysis that you cited before. You rely on that at least to some degree in your criticisms of Dr. Anderson's declaration, isn't that right?

A Yes.

Q And the Sherry meta-analysis, one of the features of that was the duration of game play; you talked about that?

A That is correct.

Q And the Sherry meta-analysis relied on two studies, one by a Professor Hoffman and one by two people named Ballard, B-a-l-l-a-r-d, and Weist, W, I think, i-e-s-t, is that correct?

A It's e-i actually.

Q e-i, sorry.

A That is correct.

Q You have not read the Hoffman piece, have you?

A Well, after the deposition where the Hoffman piece came up a few times, I was given a copy of it and I looked through it [198] so that I could be a little bit more familiar.

I have not read it through extensively. It's a dissertation, and unfortunately my time is finite.

Q Just to reflect your recollection, that is the game – the study involving moral combat in each study in a different control game, isn't that right?

A That is correct.

Q And one of the features of it was the effect size of playing over a long period of time. You mentioned this difference between 5 minutes or 10 minutes and 75 minutes as in the Hoffman study, isn't that right?

A Yes.

Q And the Hoffman study reported an effect size of .05, is that right?

A That is how Dr. Sherry reports it.

Q Yes, and you relied on that in making your statements in this case, didn't you?

A The specific statement about the comparison between those two studies, yes.

Q And since you have not read the Hoffman study, at least not at the time of your deposition, and it doesn't seem like very carefully yet today, if the Hoffman effect side was calculated incorrectly and you and Dr. Sherry relied upon that and you in turn relied upon Dr. Sherry, that reliance would be incorrect as well, isn't that right?

[199] A Well, I did go back and look at the section specifically of interest here. I didn't read

through the whole thing, but I certainly went through and looked carefully at the sections about effect size.

And it was hard for me to draw a conclusion and figure out how Dr. Sherry calculated his number because Dr. Hoffman doesn't report it in the same way. I think Dr. Sherry had to make some kind of transformation.

I also went back and looked at Dr. Sherry's meta-analysis to look at the methodology for how he calculated those things. And based on what he says on the specific page talking about these two studies and also what he says a few pages earlier about how the average effect size is, he could have gone a couple of different ways in how he calculated that number.

So without having him here, it's hard to know if he calculated that .05 based on one measure or a few measures mean together or what. So if someone didn't know what Dr. Sherry was thinking, they could potentially come up with a different number than he did, but I have no reason to think that he did anything untoward. But if he is dead wrong, I would also be dead wrong because, yes, I am relying on his analysis.

Q And are you familiar with Dr. Anderson's work in this area?

A His meta-analysis paper?

Q Dr. Anderson's work in general, his body of work?

[200] A Yes.

Q Do you consider him to be an expert in this field?

A Absolutely.

Q You mentioned before the GAM, or the general aggression model?

A Yes.

Q That is the model that Dr. Anderson developed, right?

A Yes.

Q Do you recognize that as a leading theory in your field?

A It depends on your definition of leading, but it's certainly a model that people are testing and using and trying.

Q Is it, in fact, the most cited theory in your literature?

A Yes.

Q You know that how?

A Because I went to the ISI web of knowledge citation index to look at the most cited papers in this area, so that I was not wasting everyone's time with talking about papers that didn't get a lot of play.

And Professor Anderson's two papers of interest were the two top most cited papers in the field.

Q And one of those was his study in 2000 with Karen Dill, is that right?

A That is correct. I believe that was the most cited paper.

Q That is the one that you were talking about earlier involving Wolfenstein and Myst?

[201] A Correct.

Q At least in the experimental phase?

A Correct.

Q And you were critical of the choice of those games, Wolfenstein and Myst?

A I was.

Q Based on I believe either its action component or its arousal component?

A The different pre-testing scores and whether they didn't reflect the actual content of the game, correct.

Q But you don't base that criticism on any analysis that you have done or any sort of statistical research that you have done; that's just your opinion, having played the games?

A To me it's the equivalent – I think I said this in my deposition – of looking at the Sopranos and the Little Mermaid made and not seeing the difference. On the face of them, it's obvious enough to me that they are different and mismatched that it seemed to be a waste of time to consider doing some kind of statistical analysis.

To give you a direct answer, no, I didn't perform my own pre-test on those games.

Q And you recognized, I think later on in the study, that the second study that you have talked about by Dr. Anderson, that he has done tests to correlate the games, isn't that right?

A You are referring to the study in which he has pre-tested a [202] series of 10 games to look for better matching pairs? Is that what we are talking about now?

Q Yes.

A Yes, I am familiar with that study.

Q And you believe that that is a worthwhile thing to do?

A Pre-testing, absolutely. It makes a lot of sense.

Q Dr. Anderson did a pre-test with the Karen Dill study as well, didn't he?

A Yes.

Q Those two games tested out best?

A They did.

Q And your criticism of that is just based on, again, on your opinion?

A It is.

Q In paragraph 16 of your declaration, you quote Dr. Anderson as saying, quote, "Longitudinal research is badly needed;" isn't that right?

A Yes.

Q Then you go on to add your comment: "This begs the question. If the findings to date are so conclusive, why would need we long-term research." That is your sort of comment about that?

A It is.

Q And Dr. Anderson wrote that in 2001?

A He did.

[203] Q And a lot has happened since then?

A What do you mean by a lot?

Q Well, a lot of things have transpired since 2001 in this area?

A Well, if by "a lot" you would imply that there are enough studies now to do a decent meta-analysis, I would still say no because I would toss out most of the ones prior to 2000.

If by "a lot" you mean that there has been additional research that is done that is interesting and that affects our theoretical considerations, then I say yes.

Q And a lot has happened to you since 2001?

A It's true. I got married and we had a kid.

Q You were a graphic designer in 2001, isn't that right?

A I was still doing some mild freelance work but not a lot at that point. PhD work turns out to be fairly time-intensive.

Q Now, you have been critical of researchers – I am sorry.

Going to this question on television versus video games. You have talked a lot about the social contextual variable. What do you mean by that?

A What I mean is it probably makes a big difference if you are playing with somebody than if you are not and the way in which you are playing with somebody, the presence of other people who might have a relationship with you in the room.

I can imagine radically different effects if a child, for example, is playing with, you know, a friend who is up to [204] no good versus playing with their parent.

I can imagine different effects if they are playing with somebody on the same team or playing against them, again, as recent research studies seem to show.

And my recollection, again, of the early communication research is it turns out that the social variables are immensely powerful, and they explain almost everything.

So it seems like we need to put those in the model so we know exactly if there are effects, when they are happening and under what circumstances. I am as interested in finding that out as anybody.

Q And the participation or participatory variable, that is also something that differentiates television and video games in your mind?

A I think people play games together in a different way than they watch television together, yes.

Q And you mentioned before something called a mean world effect?

A Yes.

Q And do you think that is more likely from video games than from television?

A This is the cultivation finding I was talking about under the opening session, and it's more likely in this targeted sense than it is in the spreading sense.

But I am also not aware of parallel research on [205] television of this spreading versus more targeted application. That might be something that I might have been the first to come up with that and tested in any medium. I am not really sure.

I spoke with one of the leading figures in cultivation research about this at a conference last year, and as far as he knew, no one had tested that distinction with television literature.

So I am pretty sure it happens in games, or at least for this kind of game. It's an open question as to whether it might happen with different games. I am less sure about whether or not it would happen with television.

That is why I make the statement that it's at least more likely – I know it is possible in one of those two media.

Q And one of the reasons that you rely on making that statement is the repetitive nature.

You were talking about one of your games, I think your game from your study, and you had used the phrase over and over and over again, people just pounding and pounding and pounding. That is a feature more likely found on video games than it is on television, right?

A I think so, for many video games, not all. I would hate to draw rash generalizations there, but certainly the kind of game I was studying, it certainly afforded that sort of test.

Some games have a lot more variety and are played with [206] a lot more variety. But MMO is so subject to repetitive action that many players describe the playing of the game as a grind because of the repetitive nature of the play.

But that doesn't always apply to other game titles. So I would be hesitant to go along with that.

[207] Q Okay. But you have used the phrase apples and oranges in describing television and video games, haven't you?

A I have.

Q And do you also agree – this gets to the difference between children and adults. Do you also agree with the statement that an adult's personality is less likely to change over the course of one month, say, with your study than a child's is?

A I do.

Q And why is that?

A I do that based on the research on television. I think that's one place when it's okay to bring back literature over because we're talking about the characteristics of the people rather than the characteristics of the media and how it's used. I'm specifically thinking of the work by Paik and Comstock, which is a meta-analysis of television violence effects work, and it shows this age-based finding.

Q Okay. And going back to the social context, it's your opinion – or you've talked about in some of your literature and at your deposition this idea of the home becoming more and more segregated, and by that you mean children and parents are living in separate space more frequently now; isn't that right?

A Yes.

Q And the game playing is subject to that segregation; isn't that right?

[208] A I think that's a fair implication. That's what I'm getting at is what's probably happening.

Q And what is it that you're referring to?

A That within the home we have more subdivided space, and since we know that there are so many video game players in children's bedrooms, as opposed to in common living room areas, I think it's a reasonable assumption to make the leap and say that children are probably playing video games alone in their bedrooms more than they used to. It's not directly tested. It's my best guess.

Q And it's your belief that the more parental involvement in children's video selection and play, the better, isn't it?

A Absolutely.

Q Okay. Thank you.

MR. KASPER: I have nothing further.

THE COURT: Redirect.

MR. SMITH: I have no questions, your Honor. I did neglect to move into evidence Exhibits 1 through 4.

THE COURT: Those are admitted. Hang on a second. Let me just see if I have a couple of questions.

(Brief pause.)

THE COURT: One of the questions that Mr. Kasper asked you on cross examination had to do with the difference between these multiplayer games, which require working with others, and then the games where somebody plays them by themselves, and I [209] think the question was might that have an effect on whether there's some sort of aggressive outcome. Okay? And you said yes, but then I didn't get – then you started to explain, but I wanted to get a handle on what the differences and what the similarities were. Do you understand what I'm asking you about?

THE WITNESS: The ball park of whether playing with or against other people in games might affect things?

THE COURT: Yes.

THE WITNESS: I think rather than relying on my own work, which it's hard to parse that out because some of the people who played the game I studied played against each other and some didn't. Most didn't, but I haven't included that as a control. So, I just don't feel comfortable making an assessment.

But there is again this research that's coming out which suggests that when people are playing on the same team, if they're playing against other teams, they're going to be more aggressive than if they're playing against the computer as a team. And then if their teams – if they are individuals and they're playing competitively versus collaboratively, that also explains the hostility effect. So, the social context of play within the game setting seems to have a big impact on the aggression outcomes. I think that those more recent studies are better than my own in isolating that. I think it's the [210] area I'd like to see more new research happen because its such a big deal.

THE COURT: All right. Let me just check. I think that was the only thing I wanted to ask you. Let me just make sure here.

(Brief pause.)

THE COURT: That's all I have. Does anybody have any follow-up questions based on the question I asked?

MR. SMITH: No, your Honor. Thank you.

MR. KASPER: No, your Honor.

THE COURT: Thanks. You're excused.

(Witness excused.)

THE COURT: Okay. I assume that the other people are set up for tomorrow or no? Do you want to start now?

MR. KASPER: We –

THE COURT: Well, let me just – let's just take a little interlude here. There was a question I wanted to ask you as I was thinking about this. You know, we're doing this as a preliminary injunction hearing, and I guess as I was thinking about it over lunch – and I know I didn't bring this up before, but one of the things I guess that concerns me is why should I be doing this twice. In other words, as a preliminary injunction hearing and them [sic] some other day as a trial. And I recognize that we don't have all the witnesses available, but there are ways around that. I mean, I can [211] consider the affidavits. You could give me the depositions. You can give me whatever you want. But I'd like you to think about between now and tomorrow morning the question of what your positions are as to whether a decision on the preliminary injunction should be combined with the final disposition of the case, which is something that's covered by Rule 65(a)(2), I think. Maybe (a)(3), but I think it's (a)(2). So, think about that. I don't want you to react on your feet.

MR. SMITH: I appreciate the opportunity to think about it.

THE COURT: But, anyway, if you're ready to start with the next witness, I'm happy to do that now. I mean, I wouldn't want to go much more than about another 20 minutes.

MR. KASPER: Do you mind if I talk to Dr. Anderson?

THE COURT: That's fine. Go ahead and talk.

(Brief pause.)

THE COURT: As long as you think we can finish everything else tomorrow, I'm comfortable starting tomorrow morning, except perhaps the argument. In other words, if you think we would finish all the witnesses tomorrow, the remaining witnesses tomorrow, we can start tomorrow morning.

MR. KASPER: We're certainly prepared to start with Dr. Anderson. I'm happy to start.

THE COURT: Okay. Fine. Then let's go. We'll go 'til 4:15.

[212] Please raise your right hand.

(Witness duly sworn.)

THE COURT: Please have a seat.

MR. KASPER: Your Honor, I'm going to use demonstrative exhibits. Should I just set it up over there?

THE COURT: Whatever you want to do.

CRAIG ANDERSON, PLAINTIFFS' WITNESS, SWORN
DIRECT EXAMINATION

BY MR. KASPER:

Q Dr. Anderson, would you please state your name for the record?

A Craig Allen Anderson.

Q And what do you do for a living, Dr. Anderson?

A I am a distinguished professor of psychology at Iowa State University.

Q And how long have you been at Iowa State?

A This is my seventh year at Iowa State.

Q And what did you do before that?

A I was at the University of Missouri Columbia for eleven years, and then I was at Rice University for eight years. One year of that actually was spent as a visiting faculty member at Ohio State University.

Q Okay. And, Dr. Anderson, do you have an opinion regarding the relationship between violent video games and aggression?

A Yes, I do.

[213] Q And do you hold that opinion to a reasonable degree of scientific certainty?

A Yes, I do.

Q And what is that opinion?

A Based on all of the research and also to some extent on the much more extensive research literature on television violence, it seems clear that exposure to violent video games increases aggressive behavior, aggressive thinking, physiological arousal, aggressive feelings, and is also associated with a decrease in prosocial behavior.

Q Okay. And when you say aggression, how do you define the term aggression?

A Aggression in social psychology is defined as behavior that is intended to harm another individual, and the assumption also is that that other individual wishes to avoid that harm.

Q Okay. And then how do you define violence?

A We conceive of aggression as being along a continuum from fairly mild to very severe, and violence is thought of basically as aggression at the high end of this sort of severity dimension.

Q Okay. And how do you define aggressive cognition or aggressive thinking?

A Aggressive cognition, aggressive thinking – we've sort of used those interchangeably – has to do with in some sense beliefs about aggression, maybe attitudes towards aggression. [214] It can be what we think of as accessibility of aggressive thoughts. It to some extent is defined by the way that it gets measured.

Q Okay. And how about aggressive feelings? How do you define that?

A We define aggressive feelings as emotion involving anger or feelings of hostility, annoyance, things like that.

Okay. And you also used the term prosocial behavior. What do you mean by that?

A Prosocial behavior is behavior that's intended to help someone else in some way. There's various kinds of prosocial behavior.

Q Okay. And how long have you been studying aggression?

A My first publication on aggression came out in 1979, and I really concentrated, focused on doing aggression research probably since the late 1980s, early 1990s. Prior to that I was doing a lot of research on human inference and social judgment and some research on attribution, attributional style, and a few other topics.

Q How many publications have you had on aggression?

A On aggression, probably 50 or so.

Q And how many of those were peer-reviewed?

A Probably around – somewhere in the thirties, I would guess. Somewhere around 30 maybe.

Q Have you also had publications regarding video games and [215] aggression?

A Yes. Somewhere around 30 publications on video game or that included discussion of video games and aggression.

Q And how many of those were peer-reviewed?

A Let me think. It was probably 20 on video games and aggression. Probably in the low 20s, not

30. I was thinking media violence. And of those 20, probably around ten or so in peer-reviewed journals.

Q Thank you.

MR. KASPER: I'm going to tender Defendants' Exhibit Number 4, which is a copy of your C.V.

THE COURT: Is this the same one that's attached to his declaration?

MR. KASPER: Yes

THE COURT: I don't need another one.

BY MR. KASPER:

Q Dr. Anderson, would you describe the general aggression model?

A Yes. A general aggression model is an integration of a number of other theories and data basically relating to the sort of development, learning, instigation, and expression of human aggression.

Q Okay. And when did you develop the model?

A We started working on that in the early 1990s. The first publication that's clearly part of that model would have come [216] out in the mid-1990s when we were doing mostly at that time research on temperature effects on aggression.

Q And did you do a study with Dr. Bushman regarding the general aggression model?

A We've developed – Dr. Bushman has played an important part in a couple of publications very specifically focused on general aggression model. So has Professor Huesmann at University of Michigan.

Q I'm going to hand you a copy of what has been marked as Defendants' Exhibit Number 5. This is a copy of an article you published – it appears in the record – called Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior that you published with Dr. Bushman; is that correct?

A Yes, that is correct.

MR. KASPER: And the purpose of this, your Honor, is on Page 355 of this article. The charts that Dr. Anderson is going to be relying on appear in this publication.

BY MR. KASPER:

Q Would you briefly explain your general aggression model, Dr. Anderson?

A Sure.

MR. KASPER: Your Honor, may he approach?

THE COURT: You can go down there, if you want, but [217] you're really going to have to struggle to keep your voice up because you're soft-spoken, and you're not in front of a microphone.

THE WITNESS: It's my allergies.

THE COURT: Okay.

THE WITNESS: Very few of my students would say I'm soft-spoken.

BY THE WITNESS:

A Okay. There are sort of two major sort of segments to the general aggression model. And, again, this is an attempt to integrate social learning theory.

BY MR. KASPER:

Q Excuse me. What is social learning theory?

A Social learning theory is a theory about how people in general, especially children, but adults, as well, learn lots of their behaviors, attitudes, beliefs, and so on by observing events around them, including watching television and so on. Al Bandura is most closely identified with that work, and that theory goes back to the 1960s, actually, some of that work.

So, again, the model is an attempt to kind of integrate the insights from social learning theory and a number of other sort of social cognitive theories in this domain, including work by Leonard Berkowitz, who is an emeritus professor at the University of Wisconsin, Ken Dodge and his work on social information processing, and Russ Geen and his [218] work on affect aggression.

Again, the idea was to try to pull together a number of theories that really seemed to have many of the same underlying ideas and to try to pull it together in a way that would be useful to researchers as a way of organizing lots of information and lots of theoretical thoughts.

What this figure illustrates here, this is what we call an episode, a social episode of some kind, of a social encounter. And we can start at the top where we talk about what kind of input variables we have, and we have person variables and situation variables.

By person variables we mean things that the person brings to the situation with them. So, it would be their personality traits, their attitudes, their skills, beliefs, and so on, but it would also include temporary mood states, things like that. Situation variables would include whatever is present in the situation. So, are there other people around or is this person alone, are they in a bar, are they in a church, have they been recently provoked, have they recently played a violent video game, things like that. And these variables then combine to influence a person's present internal state, which is represented by cognition, cognitive variables of one kind or another, affects, and arousal.

So, if I can get concrete, imagine a situation where a child is in a lunchroom and while carrying their lunch tray, [219] someone bumps into them causing them to spill their milk or juice or whatever it is they're drinking in lunchrooms these days. One way the person variables can come into play here is some children have this tendency to attribute such ambiguous kind of events to hostile intent on the part of the person that bumped them. So, there's a tendency for them to say, oh, that was done on purpose, whereas others are less likely to draw that kind of a conclusion, and this happens pretty quickly and automatically. This is not necessarily a thoughtful process.

So, anyway, that can again influence this present internal state. They may think this person did this on purpose. They may get angry as a result of that. And down here at this stage what we're talking about is a host of what we call appraisal and decision processes. I think appraisal is spelled wrong.

THE COURT: You need two "P"s. That's okay. So, you'll get graded down.

THE WITNESS: Yes.

MR. KASPER: The lawyers will note that the mistake is in the original, not in the blowup.

THE WITNESS: That's right.

THE COURT: So much for peer review.

THE WITNESS: That's right.

BY THE WITNESS:

A Okay. Some of these appraisal decision processes occur [220] very quickly without much awareness or thought. Some take more time and thought. The idea, though, is that as a result of these processes, at some point some kind of thoughtful action emerges or some kind of impulsive action emerges, which in turn then, of course, influences in some sense the outcome of this social encounter. But, of course, that's not the end of the story because what happens – I mean, if a child interprets this bump as intentional and then responds aggressively in some way, then that becomes a provocation that enters into sort of the next part of this continuing interaction cycle.

So, the way that aggression or nonaggression sort of occurs here is dependent on, again, person variables, as well as what's going on in the immediate situation. And in a sense we can think of each time one of these events occurs, it is in some sense a learning trial where one can learn what are the consequences of certain kinds of actions, attitudes, beliefs, things like that.

BY MR. KASPER:

Q And will you describe the concept of priming as it relates to that?

A Yes. Priming in this context refers to the case where certain kinds of situational cues can increase the likelihood or increase the accessibility of certain kinds of thoughts or certain kinds of knowledge structures.

Not in a video context, but in a somewhat different [221] aggression context, there's research showing that simply seeing a photo of a gun – a handgun, a rifle, whatever – primes aggressive thoughts, that is, it increases the accessibility of aggressive thoughts, and that priming itself can lead to an increase in the likelihood that aggressive behavior will occur sometime fairly shortly after the prime took place.

Q Okay. And how many of these episodes that you're talking about does a person have every day?

A Well, a lot of these kind of interactions take place very, very quickly. And so, it could easily be thousands, certainly hundreds, sort of depending on how big a scale you want to draw.

Q And how does repeated exposure to media and video game violence affect long term propensity for aggression? I think that requires us to move over here.

THE COURT: Let me ask you this. If using this other chart is going to take more than a few minutes, I'd rather hold it until tomorrow morning.

MR. KASPER: This is probably a good place to stop.

THE COURT: Let's hold it until tomorrow.

MR. KASPER: Okay.

THE COURT: Okay. We'll be able to start at 9:45. So, I'll see you then.

MR. SMITH: Thank you, your Honor.

THE COURT: This is Mr. Dryjanski. She wasn't there [222] when we gave the names. Give your name for the record.

MR. DRYJANSKI: Andrew Dryjanski. I represent Attorney General Madigan and the Governor.

Earlier you had talked a little bit about the motions to dismiss and how you might deal with those after this. Are you –

THE COURT: No. I said as part of.

MR. DRYJANSKI: Are you going to hear –

THE COURT: Together with. I expect people to argue whatever they want to argue at the end of this.

MR. DRYJANSKI: Okay. Thank you.

(Whereupon, the within trial was adjourned to Tuesday, November 15, 2005, at 9:45 o'clock a.m.)

Supreme Court, U.S.
FILED
[illegible]
OFFICE OF THE CLERK

No. 08-1448

In The
Supreme Court of the United States

◆

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN Jr., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

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◆

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ENTERTAINMENT SOFTWARE ASSOCIATION, et al.,) No. 05 C 4265
)
Plaintiffs,) Chicago, Illinois
) November 15, 2005
v.) 9:45 a.m.
)
ROD BLAGOJEVICH, et al.,)
)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MATTHEW F. KENNELLY

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[225] (The following proceedings were had in open court:)

THE CLERK: 05 C 4265, Entertainment v. Blagojevich.

THE COURT: Well, so much for 9:45.

All right, can the lawyers please give your names for the record?

MR. SMITH: Paul Smith for the plaintiffs.

MS. FALLOW: Katherine Fallow for the plaintiffs.

MS. HARTNETT: Kathleen Hartnett for the plaintiffs

MR. SANDERS: David Sanders for the plaintiffs.

MR. KASPER: Michael Kasper for defendant Blagojevich.

MR. DEADY: Patrick Deady for defendant Blagojevich.

MR. DRYJANSKI: Andrew Dryjanski for defendants Madigan and Blagojevich.

MR. GARCIA: And Stephen Garcia for defendant Devine.

THE COURT: Are we ready to resume with Professor Anderson?

MR. KASPER: Yes, we are.

THE COURT: Come on right back up here and we will get going.

Do you understand you are still under oath?

THE WITNESS: Yes.

THE COURT: Okay, you can start.

CRAIG ANDERSON, DEFENDANTS' WITNESS
PREVIOUSLY SWORN
CONTINUED DIRECT EXAMINATION

[226] BY MR. KASPER:

Q Professor Anderson, as you recall yesterday, we were talking about the general aggression model before we broke, and in particular we were talking about this concept of priming. I was wondering if you could just begin by describing the concept once again.

A Priming is the phenomenon in which some sort of cue in the environment – it can be a visual cue, auditory, it doesn't matter – leads to an increase in the accessibility of a particular kind of thought or cognition.

So, for example, a photo of a gun for many people automatically primes thoughts about violence.

Q How long does the priming effect take?

A There are kind of different types of priming, some of which take place very, very quickly, less than a second in some cases.

In the kind of situation that we are talking about here, exposure to violent video games, it presumably would take somewhat longer, somewhere on the order of maybe 5 minutes, 10 minutes, maybe even as long as 15 minutes or so. But it certainly wouldn't take a really long time.

Q How does that relate to this concept of duration of play that Dr. Williams was talking about yesterday?

A Well, what it really means is that there is no particular reason to expect – in a short-term experimental context, there [227] is no real reason to expect that the effects of playing a violent versus a non-violent video game would get bigger over time.

Q Why is that?

A Because the priming would take place and, in some sense, reach maximal level fairly quickly. No one has really done the studies to see exactly how long in this context is optimal. But certainly 75 minutes, for example, of playing is much longer than what it would be reasonable to expect that priming would require.

Q Turning your attention to the second chart over here –

A Yes.

Q – how does violent video game exposure affect the long-term propensity for aggression?

A If I may?

THE COURT: That is fine.

THE WITNESS: The top part here that is labeled in this version Repeated Violent Game Playing really contains an awful lot of sort of history of psychological research from several different domains. Social learning theory is in there, cognitive psychology type processes, developmental processes, and so on.

But basically the idea is that what one is really doing is learning different kinds of knowledge structures, rehearsing a particular way of thinking and decision-making, [228] and, in addition, getting reinforced, that is rewarded, for making decisions such as decisions about how to deal with conflict by use of force.

Q So what is a knowledge structure?

A A knowledge structure is sort of a broad label for a variety of kinds of basically variables that are thought to exist internally, things like beliefs, attitudes, perceptual schemata.

We can think of knowledge structures as ranging from fairly – what we might think as fairly simple kinds of ideas such as how do you identify a chair. Well, someone has to learn with experience what a chair is, how to perceive what a chair is, or how does one learn how to read.

As Dr. Kronenberger kind of illustrated when he was talking about Stroop effects, where color words are presented sometimes in ink colors that don't match the words, so the word "red" maybe printed in blue, and that turns out to be a difficult kind of task to do because there is a conflict between this automatic reading response. Well, its automatic in people who have learned how to read.

So this kind of a knowledge structure, in this case about what a particular formation of letters and what that means, happens – takes place over time with practice and eventually gets automatized.

Q You used the word "rehearsal" in the top box there. What [229] types of behaviors are rehearsed in video games, in violent video games?

A In violent video games, you rehearse really the whole sequence. You rehearse, you practice being vigilant, that is, looking for sources of threat. You practice identifying sources of threat. You practice making decisions about how to respond to that threat. And eventually you actually carry out some form of action, typically a violent action to deal with that threat, clicking a mouse button or something on the keyboard or a pretend sort of gun of some kind.

Q Yesterday Dr. Williams used the term, hostile attribution bias. Where does that fit into that chart?

A A hostile attribution bias is probably best thought of as a type of fairly high level perceptual schemata, sort of a propensity to see threat, see intentional harm in ambiguous situations where harm may or may not have actually been attendant.

Q And what happens as you go down further in the chart?

A The idea in developmental psychology, personal psychology, and so on is that – and that is why this model isn't really just a model of video game playing; it is a much more general model than that.

The idea is that with practice, these types of schemata, knowledge structures and so on, essentially become more chronically accessible or available for the person to use [230] in situations that seem to fit that particular schemata.

Q Give me an example.

A Well, in terms of, like, hostile attribution bias, someone who has developed this idea that when bad things happen to them, it is probably caused by someone else, this idea of you are looking for threat or, you know, insults or something along that line.

What that means is that when one then gets in an ambiguous situation where some kind of harm has been done, that person is more likely to decide very quickly, in some cases automatically, without even realizing they are making a decision, but they are more likely to decide that the harm was intentional.

And as a consequence of that, they are more likely to respond, say, to that bump in the lunchroom that we talked about yesterday with some kind of aggressive behavior on their own.

Q How does that relate to the third box?

A Increase in aggressive personality. Basically these are different ways that one's propensity to behave aggressively in a variety of situations can be increased.

One thing I guess I should point out here is the general aggression model does not specifically say that playing a violent video game will influence each and every single one of these. That actually is an empirical question, and there [231] are studies showing some of these linkages in the video game literature.

Again, the general aggression model was designed to be general, not just a media violence model. But the idea, again, is that these kind of rehearsals and practice and so on can lead to an increase in aggressive personality, sort of loosely defined, which in turn then can influence person variables and actually situation variables.

Q What does that mean, the increase in the aggressive personality regarding – how does that relate to the bottom two boxes?

A Well, there are lot of different ways of measuring aggressive personality, but basically it's usually defined as a tendency to respond more aggressively than what sort of non-aggressive individuals or sort of normal individuals would respond in a variety of situations.

Q And the two boxes down at the bottom, do they equate to the top two boxes on the first chart?

A Yes. That is actually how one gets from all this learning aspect of the model back to any particular episode is an increase in aggressive personality over time.

Well, first of all, that is a person variable, so that any situation that one goes into, they are sort of bringing these now well-rehearsed knowledge structures with them. So if the situation happens to be one that involves a provocation of [232] some kind or an ambiguous provocation of some kind, it increases the likelihood that the person will interpret it and act on it as if it was an intentional action that requires an aggressive response.

It is also the case that as children, for example, become more aggressive, the kind of situations that they find themselves in also tends to change; that is, their social relationships with say, parents, or peers or teachers tend to deteriorate, and so they start interacting with a – or there is a tendency for them to start hanging out more with other kids who have in some sense become social rejects from the classroom or wherever they are.

Q And you talked also in your research about the concept of pro social behavior. How does that apply in this situation?

A It's – that hasn't seen as much research, but there is some research suggesting that if one –

Well, let me back up a second. The one way in which exposure to violent media in general, exposure to violent video games can decrease pro social behavior is through this aggression desensitization box. And desensitization here really refers to a decrease in negative emotional reactions to violence or scenes of violence.

Typically when children and both adults as well see a scene of violence or see someone being injured or in pain or whatever, they have a fairly strong emotional reaction to it. [233] One consequence of that is that that can lead to – first of all, a negative emotional reaction to violence can lead to a decrease in aggression. So if you are actually hurting someone, perhaps unintentionally, perhaps intentionally, but that then produces a negative emotional reaction in you, you are likely to stop it.

There is also evidence from some of the work Rowell Huesmann has done suggesting that when children are making decisions about how to behave towards some person, that thinking about hurting them, hurting another person, influences their decision to inhibit any sort of aggressive impulse they might have.

Q So how does desensitization work with this concept of knowledge structure?

A I think of this as, in some sense, a somewhat more primitive kind of – I guess one can still call it a knowledge structure, but it's more based in emotion that is sort of an older part of the brain.

And how this relates to pro social behavior, which is where I got started on all this, is if you are in a situation where someone needs help, one of the first things that has to happen in order for you to decide to help is you have to notice that they need help. And to some extent the judgment of whether someone needs help or not is a judgment about how whether they are in fact in pain or how severe it is whatever [234] it is that they are suffering.

So if you tend to downplay that because you are not desensitized to violence, then you are less likely to help. That is kind of how you get to –

Q Thank you.

Doctor, have you personally conducted any experimental studies measuring the relationship between violent video games and aggression?

A Yes, I have.

Q Did you publish a study with Professor Karen Dill in 2000 which included an experimental study of this nature?

A Yes.

Q Is that the experiment that Dr. Williams talked about yesterday involving the game Wolfenstein 3D and Myst?

A Yes, that is.

Q Could you explain briefly why you chose those games?

A Yes. We chose those two games because pre-testing indicated that they were fairly similar on dimensions that are important in testing theories of aggression, that they tended to produce the same amount of arousal as measured by heart rate and blood pressure, tended to be similar in enjoyment and frustration, some of those other kinds of dimensions.

Q Did you find that those were the two most closely matched games?

A Those were the two most closely matched games that we [235] looked at in the pre-test.

Q Thank you.

Have you done any other experiments involving violent video games and aggression?

A Yes, we have done a number of them since that time.

Q Have you done Professor Nicholas Carnagey's?

A Yes.

Q I hand you a copy of Exhibit Number 6, which is a copy of that study, and I would ask you to take a look at it.

MR. KASPER: Your Honor, would you like a copy?

THE COURT: I thought I had one.

MR. KASPER: You have got that one.

THE COURT: I can get rid of the other one.

MR. KASPER: Thank you.

THE COURT: The rule is I always get the first one.

BY MR. KASPER:

Q Is that a copy of the study?

A Yes, it is.

Q In that study what games did you select?

A In the first experiment we started off with 10 different games. We had two goals in that first experiment. One was to test the idea, the hypothesis, that exposure to violent games would increase the accessibility of aggressive cognitions, aggressive thoughts, and by using multiple examples of violent games and nonviolent games, you basically increase the – your [236] ability to generalize to a broader category of games.

The second goal of that study then was to try to use some of the ratings data and the heart rate data and so on to select two games that were again similar on theoretically relevant dimensions and different in terms of violent content.

[237] Q And what were the results of that first experiment?

A The main result was that, in fact, exposure to one of the violent games did significantly increase aggressive thoughts or accessibility of aggressive thoughts. And then the other piece was that we did, in fact, find two games that matched pretty well on a number of dimensions, and those two games were Marathon 2 and Glider Pro.

Q And going back to the first point, the level of aggressive cognition, how did you measure aggressive cognition in that study?

A In that study aggressive cognition was measured by a task called the word completion task. In that task participants are presented with a list of partially completed words. So, for example, H blank T. And then their task is to go through this list and as quickly as possible fill in the blanks to make words, real words, out of each letter string.

About half of the – I don't remember the exact number now. Half of the words, roughly, could be completed with an aggressive word completion or a nonaggressive completion. So, H blank T could be hit, it could be hot, hat, hut.

Q And is the word completion a standard measure of aggression in your field?

A It is a measure of – the word completion task is used as a measure of accessibility of different kinds of thoughts in the cognitive research literature, and this version, using words [238] that can be completed with aggressive words, is a standard measure of or would be considered a standard measure of aggressive cognition, accessibility to aggressive cognition.

Q And regarding the second finding involving Marathon 2 and Glider Pro, would you explain that?

A Well, we went through the data that we had gathered in that first study in terms of cardiovascular arousal and ratings in terms of things like enjoyment, how frustrating was the game, things like that, and those two games seemed to match quite well on those dimensions.

Q And you've mentioned a first experiment. Does that mean there was a second experiment?

A Yes. The second experiment then used those two games, Marathon 2 and Glider Pro, and basically measured – you know, had people play one game or another, that is, subjects randomly assigned to play one game or another, and then a short time afterwards were put in a version of what's called the competitive reaction time task, which is frequently used to measure aggressive behavior in a laboratory setting.

Q And how is the aggression measured?

A In this version of the task, participants are led to believe that they're competing against another participant in another room on a reaction time task, a series of reaction time trials, and again in this particular version they're told that there's going to be two different phases to this task.

[239] In the first phase of 25 trials, if the participant loses a reaction time trial – in other words, if they respond more slowly than their

opponent – I should point out there is no real opponent here. This is all computer controlled. But they're told if they lose to their opponent, they will receive a noise blast over a set of headphones, and the noise blast is – the amount of noise blast is essentially set by the opponent, that is, again, from the participant's perspective. In fact, it's all set by the computer.

So, this goes on for 25 reaction time trials, and then their roles are supposedly reversed, in which the participant now sets a punishment level, essentially, for his or her opponent prior to each trial, and then the opponent supposedly would receive those noise blasts whenever the participant won the trial or the opponent lost the trial.

Q And is the noise blast a standard measure of aggression used in your field?

A Yes, the noise blast has been used quite a bit, and the competitive reaction time procedure actually goes back many, many years and has been used in a wide array of research studies on aggression.

Q And what were the results of experiment two?

A The main result was – well, I should back up. One of the other manipulations we did in this study was we had the computer vary the pattern of punishment or noise blast that the [240] participant received in those first 25 trials. In one condition the noise blast pattern increased fairly systematically over the course of the 25 trials. In the other condition the noise blast pattern was much more ambiguous. And we had found in some other research that the ambiguous – we call it the ambiguous provocation condition – seems to produce both higher levels of aggression, higher levels of noise blast settings, and seems to be a more sensitive measure than the increasing provocation pattern.

And then in terms of results, that's pretty much what we found, that is, there was a significant violent video game effect on noise blasts in the ambiguous provocation condition and not in the increasing provocation condition.

Q Did you do a third experiment in that study?

A We did. We then did a third experiment. It differed in several important ways. One was we went back to the standard, the more standard version of the competitive reaction time task. In the standard version, again from the subject's perspective, both the participant and his or her opponent sets punishment levels for each other on each trial. So, we no longer have this two-phase kind of thing. So, that was one change, again, and this is really the more standard version of the competitive reaction time task.

We also used four different games in this study, two violent games, two nonviolent games. We actually used some of [241] the editing software that comes with Marathon to modify the game. So, we basically used mods, in the lingo of the game domain. We modified Marathon 2 in several ways, the most important one of which is in the original version of the game, you're essentially shooting green-blooded aliens on this space station. And so, we had that condition still in there, but then we modified it for a second condition in which the green-blooded aliens were replaced with red-blooded more humanlike characters. So, again, we have two violent game conditions here.

And then we also had two nonviolent game conditions, one of which was Glider Pro, as we had used in the second study. The other was another modification of the Marathon game, and in this version we basically made it a nonviolent version. We took out all of the people that you might be able to shoot, basically removed them from the game, so there was nothing to shoot, and instead turned the game into more of an exploration game where you had to go from one part of the space station to another part of the space station in order to find oxygen containers and eventually to try to get off the ship before you ran out of oxygen.

Q What were the results of that?

A The results were – and again I should also point out we only used the ambiguous provocation pattern in the second study, and what we found was essentially to say that those who [242] had played a violent video game gave more or higher punishment levels to their opponent than those who played one of the nonviolent games.

Q And you've talked about using the noise blast and the word completion measures of aggression. Have you used other measures of aggression in your studies?

A Yes. I should point out that one of the things that some people in the field, including Dr. Williams on occasion, kind of makes – I don't know if you want to call them verbal mistakes on. When social psychologists talk about aggression, they very specifically mean aggressive behavior, that is, behavior intended to harm another person. So, we don't really talk about word completion as a measure of aggression. It's a measure of aggressive cognition. And we have used a number of other different measures of aggressive cognition and aggressive affect in different studies.

Q And the noise blast, is that a measure of aggressive behavior?

A Yes, the noise blast is a measure of aggressive behavior.

Q And are you aware of Dr. Goldstein's view that many of these measures of aggression are not valid?

A Yes, I have read some of his comments to that effect.

Q And do you have any response to those?

A Well, the simple and probably the best response is simply that these are well accepted measures by the field. His views [243] have very much a minority view. These mechanics of aggression have been validated in a number of different ways over the last – well, over 40 years now, I believe, the competitive reaction time task has been used.

THE COURT: When you say validated, what do you mean?

THE WITNESS: There's several ways of validating such measures. One way is to see whether variables that seem to influence aggression in the real world also influence responses to these laboratory measures.

So, for example, is it the case that people, whether it's at sort of adolescent age or adults, who are known to be highly aggressive individuals, either because they're in, for example, juvenile facilities or have been diagnosed as having an identified aggression kind of problem, do they tend to behave more aggressively in these laboratory settings using these laboratory tasks. So, that's one way of doing it. And the answer is yes, they do.

Another way is to look at whether certain kinds of situational variables that we know produce or lead to an increased likelihood of aggression in the real world, do they also do so with these laboratory tasks. So, does provocation of some kind tend to lead to an increase in aggression on these lab measures, and the answer is yes, they do.

Another way that such validation is done is to see whether very different kinds of laboratory measures of [244] aggression themselves tend to yield the same kinds of effects, and there are some nice, actually, meta-analytic studies of this kind done by Norman Miller's group out at UNC that show, in fact, that some of these verbal measures or some of the written measures of aggression that have been used in electric shocks, noise blasts, things like that, do tend to yield the same kinds of effects, actually to a great extent.

BY MR. KASPER:

Q And did you understand Dr. Williams' testimony yesterday that he agreed with you regarding the acceptability of these measures of aggression?

A Yes. I mean, my understanding is that he basically takes a pretty mainstream view that these are well validated and widely accepted measures.

Q Okay. Now I want to talk to you about the question of controlling. When you say to control something in an experiment, what do you mean by that?

A A couple ways of controlling for a variable that you, in essence, either want to equate entirely or at least statistically control for it. So, for example, in terms of arousal, which has been talked a lot about, if one is interested in testing the hypothesis that violent video games can increase aggressive behavior by increasing aggressive cognition, then under those circumstances you would want to control for arousal because under some circumstances heightened [245] arousal can lead to increases in aggressive behavior.

I should also point out, though, if, in fact, one has a different hypothesis that one wants to test – and my research group hasn't done this because we're not as interested in it for theoretical reasons, but one could also ask whether or not arousal, say produced by a violent video game or produced by a nonviolent video game, for that matter, can arousal produced by any kind of a game increase aggressive behavior, and in that case you wouldn't want to control arousal, but, in fact, you'd want to control other factors such as possibly aggressive thinking.

Q So, why do you control for arousal specifically in the violent video game area?

A My colleagues and I have been primarily interested in what we call the cognitive route to aggression, mainly because of an assumption on our part that the cognitive route is the one that's most likely to have long lasting effects with repeated exposure, that is, the cognitive route is the one where we would expect learning type effects, development of particular kinds of knowledge structures, and so on.

For the most part, we tend to think that arousal produced by playing a violent video game is likely to dissipate relatively quickly after one ceases playing the game, relatively quickly meaning within a half hour or so, and we don't think that there's going to be a big in some sense [246] learning piece having to do with arousal.

I should point out, however, there are some medical people who are a little bit concerned about the arousal aspect, but that's outside my area of expertise.

Q And do you also control for something called trait hostility and, if so, why?

A In a number of these studies, we have also measured trait hostility, or trait aggressiveness sometimes is the label that gets used, and we do that for a couple of reasons. One is to be able to control for – because we know that trait aggressiveness is, in fact, related to aggressive behavior. I mean, in some sense that's why it's called trait aggressiveness, and we know that that's related to aggressive behavior very often, at least, in laboratory studies. So, that's kind of one reason.

Another reason is to give you the ability to see whether or not the experimental manipulations, for example, of playing a violent or nonviolent video game, whether that violent video game effect is the same for people who score low on trait aggressiveness as it is for those who score high on trait aggressiveness, or is one sort of end of that continuum in some sense more susceptible to these kinds of effects.

Q Dr. Anderson, have you reviewed the other experimental research by other people in this field?

A Yes. There are a number of experimental studies done by a [247] variety of people. Eric Ullman at Yale has done a study in which he looked at what I would call aggressive cognitions as a result of playing a violent or nonviolent video game and found an increase.

Q And are the results generally consistent with –

A The results are generally consistent across these studies.

Q Okay. Thank you.

And moving on to this notion of correlational studies, what's the value of a correlational study that Dr. Williams talked about yesterday?

A That's a good question, and the answer is perhaps a little more complicated than what Dr. Williams indicated. I mean, he was right to a large degree, but not quite complete.

One of the things that's very important in any science is the development and testing of theoretical models of whatever it is the underlying phenomenon is. The value of theoretical knowledge – well, in fact, one of the often considered founding fathers of social psychology, a guy named Kurt Lewin, put it very succinctly when he said there's nothing so practical as a good theory, and by a good theory he means one that has been tested, revised, you know, is consistent with data.

And theories are basically causal in nature, and the reason they're so practical or useful is because they give you ideas about how to change things in some way in the environment [248] that might produce a desired change in whatever problem that you're looking at. And a good theory also tells you or at least gives you a fairly good idea of what kinds of proposed change programs are unlikely to work.

So, for example, we know that Head Start programs work, and the founding of Head Start programs was based on an awful lot of research by a lot of people, and we know that they work. We know that midnight basketball programs to reduce violent crime in the inner city don't really work, and we could have known that had people looked at the research before. Again, theoretical models about aggression and crime and so on.

So, what I'm getting at is then what we're really interested in doing is testing theoretical models and developing them, and correlational studies play an integral role in that, and they play an integral role in several ways. One, they allow you to see whether or not your predictor variables, the variables you think are causal, actually relate to real world measures of aggression, things that you cannot do in the lab. Obviously, we cannot run laboratory studies where people actually get into fist fights, but we can use correlational studies and measure such in more extreme types of aggressive behavior.

Correlational studies also provide the opportunity for a theory to be falsified, and that's very important because if a theory is not falsifiable, it isn't a scientific theory, and, [249] in fact, that is to some extent the crux of some of the debate involving intelligent design and teaching intelligent design in biology classrooms.

THE COURT: What do you mean by falsified, can it be falsified? What does that mean?

THE WITNESS: To be falsifiable means that you can, in fact, gather data that show that the theory or some aspect of the theory is incorrect. So, in this context if, in fact, we ran a bunch of correlational studies looking at violent video game exposure and some other kind of measure of aggression, if those correlational studies tended to find no relationship, then that would suggest either that there's something wrong with the theory or that there's something wrong with one's measures, and, of course, one typically – you know, in the early stages of a research program, you're never sure which is which. So, that's what falsifiability has to do with.

BY MR. KASPER:

Q And Dr. Williams indicated yesterday that correlational studies cannot prove causation. What do you have to say in response to that?

A Well, first of all, we don't in science circles typically talk about proving unless we're writing for a more general audience, but, you know, sometimes that word slips out in – actually, in all of our writings from time to time.

It's certainly the case that no single study – and [250] this is true whether an experiment or a correlational study – can definitively answer questions about big phenomenon, complex phenomenon. But one of the other things that correlational studies can do for you is that they allow you to test plausible alternative explanations. And as you might recall from Dr. Williams' presentation yesterday, that actually is one of the criteria that he wanted to talk about as being important, an important function of research, and establishing causality is can you rule out plausible alternative explanations.

So, for example, in the video game violence domain, one plausible alternative explanation for the observed correlation between violent video game exposure and aggression is that kids who play or people who play a lot of violent video games also just in general are spending a lot of time in front of a screen, whether it's a television screen or a computer screen, and that time spent in front of a screen reduces one's opportunities to learn social skills in that over time that can lead to more aggression problems in the real world.

But one can test that alternative explanation by measuring something like total screen time and measuring video game violence exposure and measuring aggressive behavior and see whether the correlation between violent video game exposure and aggression disappears when you statistically control for total screen time.

[251] Q Have you been involved in any correlational studies yourself?

A Yes, we have done a number of correlational studies.

Q Did you do one with Karen Dill in 2000?

A Yes, we did.

Q What measure of aggression did you use in that study?

A We had several, but one of – the main one was a measure of basically delinquency taken from the criminology literature. We took items from what is called the National Youth Survey and selected items that had an aggressive component to it.

The National Youth Survey is a big, big scale that includes items about drug use and all sorts of other kinds of things. We took 10 items from that scale that had an aggressive component to them.

Q What were your findings?

A What we found was that – we found that participants who reported higher level –

Basically we found a strong positive correlation between violent video game exposure and aggressive behavior on this measure.

Q Have you reviewed the other research in the correlational area, in this area as well?

A Yes. There are a number of correlational studies done, again, by a number of research teams.

Q I am going to hand you what has been marked as Exhibit [252] Number 7, which is an article by Doug Gentile. Do you recognize this article, Doctor?

A Yes, I do.

Q In particular, I would like to direct your attention to page 146 of that study chart –

A Yes.

Q – entitled "Playing Violent Video Games Makes a Difference."

Can you explain that chart?

A Yes. This is a study that Doug Gentile ran, and I believe it's the one that was published in 2004, I believe, but we reproduced this one figure in this book chapter.

Basically what happened in this study was a number of measures. This was a correlational study, a cross-sectional correlational study, in which we – I shouldn't say "we" because I wasn't involved in this study – in which Dr. Gentile and his associates measured violent video game play; that is, exposure to violent video games and a measure of trait hostility or, again, sort of trait aggression and also measured whether or not these students had been in a fight, I believe it was in like the last six months or the last year. I don't remember specifically.

Q What were the findings there?

A The basic findings were that for both low hostility individuals and high hostility individuals, the likelihood of [253] being in a physical fight was much higher if one scored high on this measure of violent video game exposure.

Q Thank you. Are you familiar with the concept of longitudinal study, and what do longitudinal studies help resolve?

A Longitudinal studies are useful in – basically you can sort of think of them as the third leg of a three-legged stool with experimental studies and correlational studies being the other two.

The longitudinal studies allow you to see whether or not a variable measured at one point in time can predict another variable measured at a later point in time while controlling for a number of other factors.

In other words, it's another way of looking at alternative explanations. It allows somewhat stronger causal conclusions than their typical correlational study.

Q Are you aware of any longitudinal studies in the area of video games?

A At this point, as far as I know of, there are three, two of which are not terribly clear for methodological reasons.

One was done by Slater. I believe it came out in about 2003. In that study they measured exposure to violent video games and violent television and violent movies and kind of lumped it all together. And they did find that media violence over the course of that study, media violence at time [254] one did predict aggression at time two even after controlling for sort of aggressiveness in time one and controlling for some other factors as well.

But it is not – it's not clean in the sense that the video game measure – there wasn't a – video games were lumped together with t.v. violence exposure as well.

A second longitudinal study that I know about was done in Japan by a group of people. The first author's name, I believe, was Ihori. I think it's I-h-o-r-i.

And in their study they focused on video games, but they did not distinguish between violent – you know, exposure to violent video games versus sort of exposure to video games in general. They just had sort of the more general measure.

We know from other studies that that kind of a measure is not as good a predictor of aggressive behavior as a more pure measure of violent video game exposure. Again, they found a small but significant longitudinal effect.

Q Okay.

THE COURT: You said there were three. What is the third one?

THE WITNESS: The third one is a currently unpublished study that Doug Gentile and his colleagues ran. It is going to appear eventually in a book. We just recently signed a contract with Oxford University Press to have this published. There is actually a couple other studies in that, what will be [255] that book.

That was a study of third-, fourth- and fifth-graders.

THE COURT: That was the one that was mentioned.

THE WITNESS: This was the one that Dr. Williams discussed.

THE COURT: Thanks.

BY MR. KASPER:

Q Getting to that, the one involving the third-, fourth- and fifth-graders, Dr. Williams claimed that third-, fourth- and fifth-graders would not be able to accurately complete the self-report test regarding the level of violence in video games.

What do you have to say in response to that?

A Well, I suspect that he has not run third-, fourth- and fifth-graders in research. In fact, you can, and Dr. Gentile did so successfully and was able to get usable measures.

Q His next criticism involved the reliability factor. What is that?

A Typically when you construct a scale, let's say a scale designed to measure a trait like trait aggression, you create a number of statements, a number of items, each of which is designed to measure this underlying trait.

THE COURT: Pardon me. That's starting to get annoying.

(Brief interruption.)

[256] THE COURT: Go ahead.

THE WITNESS: Typically you get a more accurate measure of whatever it is you are measuring, say, trait aggression, if you have more items.

Now, there are limits to that. I mean, at some point the items get so redundant that you don't need more.

The concept of reliability, he is actually referring to a statistical concept called coefficient alpha. And basically what coefficient alpha is is if you took each item from a scale and correlated it with the average of the other items on the scale and then did that repeatedly and then averaged those correlations, that is essentially – it is not quite mathematically what happens, but that is essentially – conceptually that is what coefficient alpha is.

The idea is that if, in fact, all these items are measuring the same thing, that number should be relatively higher, or at least you hope that it will be relatively high.

Q The reliability factor is point .68 according to Dr. Williams?

A On the video game violence exposure measure, the reliability estimate was .68.

Q Is that an acceptable reliability factor?

A That is, in fact, considered acceptable. You will see publications with that in top journals. It would be nice if it was bigger but –

[257] Q What is the impact of a lower reliability?

A The impact of having a lower reliability scale is that in order to find a true underlying correlation with something else, you have to have a bigger sample size. And the reason for that is basically when the internal reliability or the coefficient alpha, as it goes down, you tend to get smaller and smaller effect sizes.

Q Dr. Williams' next criticism of that study was he used the phrase that he looked at video games writ large rather than a single game.

What do you say in response to that?

A I am not sure what that means. I mean, generally speaking, the more versions of whatever kind of stimulus you are looking at gets sampled, the general feeling is the more you can generalize to other domains or other sort of stimulus samples.

And in a longitudinal study, of course you are going to be looking at whatever games kids play. It's not an experimental study where you, as a researcher, control that. So I don't see that as a criticism. I don't understand.

Q Then he went on to talk about the percentage of variance, the 1, 2 and the 3.6 percentage of variance.

Could you briefly explain that?

A Yes. Well, in fact, you can translate those into something that looks like effect sizes.

Q So, for example, the 3.6, which I believe was the measure [258] of physical aggression, could you translate that?

A Yes. That is roughly the same as an effect size in correlation terms of .19.

Q What type of effect size is that?

A That effect size is as big as most factors that have been identified as being risk factors for aggression in adolescents and youth. So that is actually bigger than the effect size reported at least in one surgeon general's report.

That is bigger than the effect size reported for things like having abusive parents, coming from a broken home, things like that.

The only one in that particular list, the only risk factor that was identified as being a lot bigger was gang membership. So it is a sizable effect.

Q I am going to hand you what has been marked as Defendants' Exhibit Number 8 and ask if you could tell me if you recognize this. This is another one of the studies.

Can you tell us what that is?

THE COURT: I tell you what, before we get into this, let's take a 10-minute break at this point.

(Brief recess.)

THE COURT: Go ahead.

BY MR. KASPER:

Q Dr. Anderson, we had just left off with Exhibit Number 8. Would you turn your attention to page 235 of that exhibit, [259] please?

A Yes.

Q Do you see that chart?

A Yes, I do.

Q Would you please explain that?

A Yes. This is an illustration of --

THE COURT: First of all, what is this? This is a chapter from what book?

THE WITNESS: It's a book that has not yet appeared.

THE COURT: That is what I was trying to figure out. It is about to be published.

THE WITNESS: It's about to be published.

THE COURT: Go ahead.

THE WITNESS: That is what they tell us, any day.

THE COURT: 235 was the page?

MR. KASPER: Yes, page 235, your Honor.

BY MR. KASPER:

Q Would you please explain that chart, Dr. Anderson?

A Yes. This chart illustrates from this longitudinal study the effect of violent video game exposure on likelihood of being in a fight as measured at time two, controlling for whether or not people were in a fight at time – had been in a fight as measured at time one, controlling for – the HA refers to hostile attribution bias – and controlling for whether they are male or female.

[260] What we see, for example, the white bar – the two white bars – one that is labeled 18 percent, the other is labeled 36 percent – shows that, again, controlling for these other – or actually, for low hostile attribution bias, females who did not report being in a fight at time one. The likelihood of reporting a fight at time two was higher for those who reported playing a lot of violent video games.

You can see that there is an increase for each of the four separate groups in that figure.

Q Thank you. Moving on to the area –

THE COURT: Pause. Hang on. I just want to make sure I am absorbing this here.

So what you are doing here – I am looking at this same chart. If you look at the column that is to the left or the graph column that is to the left in both sets, on the left-hand side what that basically says is that 18 percent of the females who had not previously been in a fight and had a low HA, hostile attribution bias –

THE WITNESS: Right.

THE COURT: And that's the thing about assuming somebody is bumping into you and did it on purpose.

THE WITNESS: Right.

THE COURT: 18 percent of them were in a fight later –

THE WITNESS: Yes.

[261] THE COURT: – as compared to 36 percent of the people in that same category where the only difference was that they had a high violent video game exposure?

THE WITNESS: Right.

I should point out now, you see in the figures this predicted likelihood. It is predicted from the statistical model. So, in other words, the statistical model that found significant violent video game effects –

THE COURT: I see. In other words, we are not talking about somebody saying, "okay, I was never in a fight before, then I played all these all violent video games and then I was in a fight;" you're taking a statistical model that comes from other studies and trying –

THE WITNESS: No, no, a statistical model from these data.

THE COURT: From the data.

THE WITNESS: In the model. Basically the regression model would have sex in the model. It would have all these other things.

THE COURT: Right.

THE WITNESS: And that is a common way of trying to illustrate fairly complicated findings.

THE COURT: Okay. All right, thanks.

BY MR. KASPER:

Q Moving on, Dr. Anderson, to the meta-analysis area, have [262] you ever done a meta-analysis involving video games?

A Yes, I have.

Q And when did you do your first meta-analysis?

A The first one was published in 2001 with Brad Bushman, who is now at the University of Michigan.

Q Again, Dr. Williams talked about this briefly, but can you just very briefly describe the meta-analysis?

A Yes. Basically meta-analysis is a set of statistical procedures used to combine the results of studies of, let's say, the same hypothesis, so that you can get an overall view of what does this research literature in general tend to show us.

Q What were the results of your 2001 meta-analysis?

A The 2001 meta-analysis found that exposure to violent video games was associated with increases in aggressive behavior, aggressive thinking or cognitions, aggressive affect and physiological arousal and was also associated with a decrease in pro social behavior.

Q Have you done any other meta-analyses?

A Yes.

Q When was the next one?

A The next one would have been published in 2003.

Q What was the difference between the second one and the first one?

A One of the things in the 2003 meta-analysis that we did –

[263] Well, first of all, there were a few more studies added because a few more studies had come out. And, in addition, we did a separate breakdown of studies that used participants, I believe it was 18-years-old or younger.

Q What was your finding in the 2003 meta-analysis?

A As I recall, we had essentially the same findings. If I remember right, there weren't enough studies of physiological arousal that had used younger populations.

But the other four effects were essentially the same as in the 2001 meta-analysis.

Q Have you done any other meta-analyses?

A We have in 2004 published an updated meta-analysis.

Q What was the difference between the 2004 and the 2003 version?

A One of the key differences is that we went in and identified what we call best practices or violations of best practices in this area and then calculated average effect sizes, basically meta-analysis, for studies that are considered best practices studies versus those that had at least one of these kind of not best practices features.

Q What are some of the best practices?

A One of the best practices features involves, particularly like in correlational studies, using a measure of time spent playing any kind of video game as a predictor variable instead of something that more specifically focused on video game [264] violence exposure.

Q What were the results of that meta-analysis?

A The results were essentially that, when you combine all the studies, that you get significant effects, the same five significant effects, but that those effect sizes are somewhat larger in the best practices studies than they are in the not best practices studies.

Q Yesterday we heard a lot about Dr. Williams' study. Are you familiar with his study?

A Yes, I am.

Q What were his findings?

A His basic finding was no appreciable change in arguments over the course of this – over this one-month study as a function of playing what was Asheron's Call 2.

Q Were you surprised by those findings?

A No, not at all, not once I read the methodology.

Q Why not?

A There are a number of problems with that study, one of which is the age, you know, the average age of 27. You know, would you really expect major changes in personality essentially involving fights and whatnot to occur after playing a violent game for one month?

Another problem is all of these participants, or at least it looked like all of these participants, certainly a huge portion of them, are very experienced computer users and [265] gamers. I mean, they were recruited to a great extent from gaming sites.

The control group was not given a nonviolent game to play, and as a consequence, we don't know whether or not those in the Asheron's Call condition, we don't know whether they actually spent more hours playing a violent game during that one-month period than how much time they normally spent playing violent games, say, in the month prior or whether they spent more time playing violent games during that one-month period than participants in the control condition spent on playing maybe even more violent games because we don't really know what they did.

So we don't know whether or not – I mean, the real advantage of an experimental manipulation typically is that you have control over the independent variable. You know what your subjects are getting in terms of violent video game exposure. We don't know what they got here.

Furthermore, in the Asheron's Call condition, we had something like 30 some percent played fewer than five hours a week. Actually there was a group that didn't play at all and were dropped from the study. One apparently played almost as much as 300 hours.

Again, the advantage of experimental control kind of disappeared.

Q What was the measure of aggression that Dr. Williams –

[266] A Well, actually let me –

There is one more big problem I want to mention and it was discussed a little bit in Dr. Williams' testimony, but the subject attrition rate was huge. Something like almost 60 percent, at least in terms of the dissertation, dropped out of the control condition.

I believe he reported something on the order of 25 or 30 percent, in the paper itself, or the article itself, dropped out, and a big portion dropped out of the treatment condition.

Q Why is that a problem?

A That is a problem in that –

Again, the reason you do random assignment is to, using sort of law as a probability, create groups that are likely to be equivalent on average on all kinds of dimensions that you have not measured.

But once you start allowing a large portion of people who are randomly assigned to one condition or another, you no longer have a true experimental study. You don't know that the people who dropped out of one condition are the same kinds of people than the people who dropped out of another condition.

Now, he did a good job in trying to do T-tests on those things that he had measured, and that is very commendable, but the problem is there are things that you have not measured.

Q What about the measure of aggression?

[267] A The measure of aggression is suspect in a couple of ways. One is that measurement of argument is essentially a measure of verbal aggression. At least that is how it would usually be coded in the research literature.

And video games typically, for the most part, are modeling physical aggression. And as we have seen in some of the correlational studies, violent video game exposure tends to correlate better with measures of physical aggression than with measures of verbal aggression. So the measure itself is a little bit strange.

Using whether or not you had a fight in the last month creates somewhat of a problem, not insurmountable, in some ways, but basically people who had reported that they had been in an argument at time one could not show an increase in aggression across time no matter what. I mean, the most they could do at time two was show that they had another argument.

Similarly, we know one of the other measures, argument with a spouse, boyfriend, whatever, but we don't know what portion of the subjects didn't have a spouse, boyfriend, significant other, girlfriend, I mean, whatever the measure was.

I guess I would also like to point out that this argument, this whole bit about reliability of measures, you can – in this dissertation, you essentially have two measures of aggression, and this was arguments with friends, arguments with [268] boyfriend and girlfriend, whatever. Those two measures themselves, as reported in the article, only correlated with each other .22.

So if you were to think about that in terms of a scale, that reliability – I mean, that is essentially a reliability estimate – is considerably lower than what Dr. Williams was saying was minimal for using a scale.

Q And another thing Dr. Williams relied upon talking about these mathematics is the meta-analysis by Dr. Sherry.

Could you tell us about that meta-analysis and in particular with relation to the Hoffman and Ballard studies that Dr. Williams talked about?

A Yes. One of the things that Sherry reported and Dr. Williams also talked about to some extent was this idea that, in experimental studies, there seemed to be a negative relationship between amount of time spent playing a game and effect size on some measure of aggression or aggression-related variables. And, in particular, they talked about – focused on two studies. One was a Hoffman dissertation, the other was, I believe, Ballard and Weist, or Weist, W-e-i-s-t, I believe, both of which used mortal combat as the violent video game.

Hoffman had the participants play for 75 minutes, I believe, and, according to Sherry, reported an effect size of something like .05 whereas Ballard had participants play I believe it was 10 minutes or so and reported a much larger [269] effect size.

Now, both those studies also used I believe it was the Buss Durke hostility inventory as their measure. But if you go back to the original Hoffman dissertation, it turns out that Hoffman had 64 total participants, but half of those participants were observers; that is, they did not actually play a video game. But the effect size that Sherry reports reports using all 64. And what we really want to look at is those participants who played the game.

And so we went back, or I went back – and actually I didn't go back. I mean, I did this when we did the original meta-analysis and estimated effect sizes or the effect size using players and just using the Buss Durke hostility inventory. It is not clear what Sherry used.

Q When you say you went back, do you mean you went back in 2001? In 2001 you are talking about with your Bushman meta-analysis?

A I believe that was when, yes.

And the effect size that we came up with – again, there's a couple ways of doing that, but the effect size on Buss Durke inventory was somewhere around .28 to about .36, much bigger and within the normal range than one would expect here.

Then there is a third real problem with comparing these two studies and perhaps is maybe the biggest problem of [270] all is that, again, these are experimental studies, subjects randomly assigned to play a violent game or a nonviolent game. So the effect size depends not only on the characteristics of the violent game, but also on the characteristics of the nonviolent game.

They used two very different nonviolent games. The game that Hoffman used, Sonic 2, actually has some aggressive behavior in it whereas the game that Ballard and Weist used was a game call [sic] Corner Pocket that is basically a billiards game. So the studies really aren't comparable at all.

And, realistically, if you really want to know what the time course is, what are the time effects, the way to do it is not by comparing studies in some kind of meta-analysis that way because the methods are different, the subject populations are different and so on; the right way to do that is to do a study where you randomly assign people to play either a violent or nonviolent game, and then you have some of them randomly assigned to play the game for 10 minutes and some for 20 and some for 30 and so on.

Q Okay.

A That study hasn't been done.

Q Dr. Anderson, in your opinion, are there characteristics of violent video games that differentiate them from television?

A Yes, there are, and actually Dr. Williams, I believe, talked a little bit about them.

[271] One of the big differences is that in a violent video game, you have to identify with the violent – with one of the violent characters; that is, the character that you control. You in some sense become that character. And that is a little bit different from what happens when watching a t.v. show, not to say that people don't identify with characters, but they don't have to. They don't become that person.

Q Do you rely on any research in making that study?

A Pardon?

Q Do you rely on any research or any authority in making that statement about the identification?

A There is research showing that, in the television violence literature, that children who identify more strongly with aggressive characters tend to show bigger effects of television violence across time.

Q Are there any other characteristics of video games?

A One is, in a video game, as an active participant as opposed to a passive participant.

Q What do you mean by that?

A By that you basically are determining the course of the game. Again, this gets back to you're looking for threats and deciding how to deal with them and deciding how to accomplish whatever goals you have in the game.

Q Are there any others?

A You also get to, or have to, rehearse sort of the entire [272] aggression sequence.

Q What do you mean by that, the entire aggression sequence?

A That goes back to this idea that you are perceptually sort of looking for sources of threat or enemies and making decisions about how to deal with it and then actually carrying out that action.

Q How does that relate to this chart here?

A In a sense what you are really doing is sort of a virtual social encounter. You are practicing all the pieces in the computer world, but you're practicing social behaviors or anti-social behaviors and the decision processes and so on that go along with it.

Q Dr. Anderson, would you please summarize your professional opinion on the effects of violent video game exposure on aggression?

A Yes. Based on all the research literature, based on other theories and data involving personality, cognitive development, and so on, it is my opinion that in fact – and based on the t.v. movie violence literature as well, that exposure to violent video games increases aggression, increases aggressive thoughts, increases aggressive affect. I am less concerned about increases in physiological arousal, but in terms of the pieces that matter to this case, those are my conclusions.

Q You have used the term "effect size" throughout your testimony. In terms of the effect size of video game violence [273] exposure on aggression, how does that translate into sort of the real world for comparison?

A You know, that is always a difficult question. We do know that the effect size is bigger in the media violence literature in general, as well as what has come out of the meta-analyses on video game effects, that the effect sizes are bigger than, for instance, the effect of asbestos exposure on larynx cancer. It's bigger than the effect of second-hand tobacco smoke in the workplace on cancer. It's smaller than the effect of tobacco smoking on lung cancer.

[274] Q Thank you. Have you reviewed the findings of the legislation at issue in this case?

A Yes, I have.

Q And in your opinion are those findings supported by the research and authority in your field?

A Yes, they are supported.

Q Thank you.

MR. KASPER: Nothing further.

THE COURT: Mr. Smith.

CROSS EXAMINATION

BY MR. SMITH:

Q Good morning, Professor.

A Good morning.

Q I want to begin, if I might, by just being clear about the particular effects that you are pointing to here so we can understand that.

You mentioned I think in your summary that video game exposure causes aggressive thoughts and aggressive feelings and aggressive behavior, putting aside the issue of physiological arousal. Those thoughts and feelings are short term phenomena?

A My judgment is, again, based on both the TV literature and existing video game literature, that its reasonable to conclude that those are going to be longer term effects, as well.

Q Well, do you have your declaration in this case in front of [275] you by any chance?

A No.

Q Handing you a copy of your declaration submitted to the court in support of the motion and asking you to refer to paragraph 12 at the bottom of Page 4, you've just listed short term effects of exposure to video games there, right? Do you see the four bullet points?

MR. SMITH: Would you like us to get another copy, your Honor? I think we probably have one.

THE COURT: I think I've got it right here. What page? I've got it right here. It's Tab 1 in the response. Which paragraph?

MR. SMITH: I'm looking at paragraphs 11 and 12.

BY MR. SMITH:

Q You've just listed four of what you call short term effects of most relevance to this case. Do you see that?

A Um-hm.

Q And then you say, "It is generally believed by media violence researchers that the last three of these four short term effects of exposure usually dissipate fairly quickly." And those three are an increase in aggressive behavior, an increase in aggressive thinking, and an increase in aggressive emotions.

So, it is true, is it not, that your belief is that aggressive thinking and aggressive emotions triggered by [276] exposure dissipate fairly quickly?

A No. This section specifically refers to short term effects.

Q Okay. Let's turn over then to the next section, which refers to the long term effects. That would be paragraph 14. And you say there that the most relevant long term effects of repeated exposure to violent media are an increase in aggressive behavior, an increase in positive attitudes, beliefs, and thought processes, and a reduction of normal inhibitions against aggression; is that right?

A Yes.

Q Okay. So, now, we understand the increase in aggressive behavior. The other two are effectively mechanisms that lead to an increase of aggressive behavior? Is that fair to say?

A Yes.

Q And essentially what those are are part of your model over here, the part that reflected how exposure to particular media lead to a more aggressive set of attitudes or beliefs or perceptions about the word, right?

A Yes.

Q Okay. So, just so I understand it, ultimately all of that part of your testimony, in terms of attitudes and beliefs and perceptions, effectively those are all things which you ultimately say are harmful because those ways of thinking and feeling lead to aggressive behavior; is that right?

[277] A Yes and no. Yes in the sense that they are what seems to lead to increases in aggressive behavior. What's less – I guess the part that I wouldn't necessarily agree with is whether or not that's the only harm.

Q I guess that's what I'm trying to isolate, if I could, so we know what's at stake here, Professor.

Is there some long term serious effect of playing video games other than this behavioral effect which you're telling us about that the court should be taking into account?

A If, in fact, one views thinking of the world in a more aggressive kind of way as harmful and getting into more fights, what does that impact – what impact does that have on other sort of psychological things, presumably there could be other harms, as well.

Q So, just so I understand it, you've now identified in addition to aggressive behavior thinking about the world in a more aggressive way –

A Aggressive cognitions.

Q – and then the psychological effects of getting into fights? What did you mean by that?

A Again, this is hypothetical. We don't have – well, there is at least one study, correlational study, showing increased -- showing an association between violent video game play and problems, sort of psychological problems.

Q You mean clinical problems?

[278] A Yes. Well, yeah, identified by a clinical instrument.

Q But you've certainly never testified here or in any other place that the courts of this country or the legislatures of this country should suppress video games because they cause clinical problems, have you?

A Oh, no. Never.

Q And that's not your opinion today?

A That's not my opinion, no.

Q Now, going back to the aggressive model then, is it fair to say that all of that portion of your testimony was an explanation of the kinds of psychological effects in terms of feelings and thinking that leads ultimately to what you predict would be greater aggressive behavior down the road?

A Yes.

Q And that is really the gist of what that whole model is about is explaining behavior ultimately?

A Yes.

Q Now, you would agree, wouldn't you, that the evidence that exposure to a violent medium is clearer with respect to other media, like TV and movies, than it is with respect to violent video games?

A Yes.

Q And the effect sizes, putting aside the fact that there's vastly more research on the TV side and that the evidence is much clearer, the effect sizes that have been calculated by [279] people in your field are about the same on both sides of that line?

A Yes, for the most part.

Q So, that's about a .2 correlation, you said –

A Right.

Q – is roughly where we are?

A Yeah, roughly.

Q Or about 4 percent of the variance; is that right?

A Four percent of the variance here is a statistical concept. It's not easily translated into understandable terms, but yes.

Q But that is, in fact, the statistical concept. You square the correlation, and you get the R squared, and that gives you the 4 percent of the variance. Now, you were about to clarify that that's –

THE COURT: Hang on just one second, Mr. Smith.

(Brief pause.)

THE COURT: Go ahead.

BY MR. SMITH:

Q That 4 percent of the variance, roughly speaking, doesn't mean that exposure to violent media causes 4 percent of the aggression among people who'd had that exposure, does it?

A Right. It does not mean that.

Q What it means is if you could somehow -- for example, in the experimental context, if you expose a pool of people to games, either a violent game or a less violent game, and then [280] you give them sort of a test, like the noise blast, you're going to have a vast range of difference in terms of how long they hold that button down or how hard they push it, and of that vast range, only 4 percent of that variation is in any way statistically linked to the fact that they've just either played a violent game or a nonviolent game?

A Yes.

Q 96 percent of that variation has to do with something else altogether in what they brought into the room?

A Yes.

Q And, in fact, just so we understand it, if you look at the research overall, in your judgment, if you're trying to predict not immediate aggressive behavior like noise blasts, but long term criminal behavior, serious violence, the effect size is actually quite a bit less than .2; isn't that right?

A If you're trying to predict – yeah. It tends to go down the more severe form of aggressive behavior one is looking at, and that would be true of any predictor.

Q Right. Because it's farther away and because it's a rare event?

A Essentially, yes.

Q Now, just so I understand it, this .1 or – it's more like .1 for the more serious violence?

A It ranges from about .13 to a little bit larger, but the .13 is one estimate that gets used a lot.

[281] Q Okay. And what these measures are, this .13 or this .2, are a correlation – a perfect correlation is a 1.0?

A Yes.

Q And a perfect negative correlation is a zero; is that right?

A No. A perfect negative is a minus one.

Q The absence of correlation is a zero; is that correct?

A Yes, exactly.

Q And so, these are on the scale – from the absence of correlation to a perfect correlation, they're at .13 or .2, and that scale runs from zero to one; is that right?

A Well, it runs from minus – yeah, okay. Minus one, plus one, and zero being nothing. Okay.

Q Now, Professor, you don't believe, do you, that media exposure of any kind by itself causes anybody to engage in violent behavior?

A No.

Q You consider it just one of what you call risk factors?

A Exactly.

Q And in order for somebody to end up being a person that would engage in violence, they have to have been exposed to a number of different risk factors?

A Typically, yes. More extreme forms of violence usually you can identify a number of risk factors.

Q But your belief is that in all cases for somebody to – [282] that media violence alone can't be the only risk factor?

A Except in rare cases of imitation, which we really haven't talked about, where one directly copycats – young children in particular have a tendency to imitate exactly what they see. That's a relatively rare phenomenon.

Q But in terms of what we're talking about here, which is long term effects leading to people growing up to be more aggressive people –

A Yes, exactly.

Q – you need to have risk factors like poverty or abuse in the family or some sort of violence in your environment that you grow up?

A Yes.

Q Something like that, right?

A Exactly.

Q Or you would look at genetic factors?

A Certain genetic factors are also risk factors, yes.

Q Are there other powerful risk factors other than those we've just named here that come to mind?

A Gang membership, or sometimes it's called antisocial peers. There's probably a dozen or so. I mean, it varies a little bit depending on who's writing the report, but there's about a dozen or so such factors.

Q Now, you would say that exposure to a violent TV show or a video game is a risk factor for everyone?

[283] A Yes, in the sense that to date there really haven't been any particular groups or subgroups identified that seem consistently immune – you know, totally immune, but there probably are groups, certainly in the television violence literature, that are more susceptible.

Q Right. Because they have other risk factors?

A Well, it's beyond the number of other risk factors, but yes.

Q Certainly whether it's a risk factor for everyone or not, you don't believe, do you, that most people who are exposed to a healthy dose of violent TV or video games will end up committing a lot of violent acts in their life?

A If by healthy, yeah. I mean –

THE COURT: You'd call it unhealthy.

BY THE WITNESS:

A I would call it unhealthy dose. But, no, I agree with the gist of the statement.

BY MR. SMITH:

Q In fact, the vast majority of the kids that are out there playing video games right now that you consider violent video games are going to grow up and be just fine; isn't that right?

A I would guess that – I would predict that, yes.

Q And when you talked in your testimony about how children who are exposed to violent video games tend to become social rejects and that leads to a greater series of psychological [284] problems, you don't consider most of the kids who are playing violent video games or other kinds of video games right now to be social rejects, do you?

A Oh, I don't believe I said – it may have been misunderstood.

Q Well, you did say that was one of the – I'm sorry.

A What I was trying to convey was that kids who become more aggressive, for whatever reason, tend to go off on this developmental trajectory where their relationships with their parents deteriorate, relationships with teachers deteriorate, and so on. But I did not mean to imply that there's any research saying that violent video games has led to this increase in aggression and that we now also have evidence that they become the social rejects and blah, blah, blah.

Q Right. Whatever effects the video games have, they don't lead to the kind of aggression which you said leads people to have problems with their teachers and their families and their peers?

A It's another risk factor. It's one of many.

Q And the reality is, of course, that a large majority of kids these days are playing these games; is that right?

A It looks like, yes, a majority of kids are at least occasionally playing some violent video games, the vast majority.

Q And one of the reasons for that is because when you use the [285] term violent video games, you're talking about games that range all the way from Sonic The Hedgehog, which you've just mentioned, up through Mortal Kombat and beyond, up to Grand Theft Auto; is that right?

A Yes. Although, obviously, there are degrees of violent content.

Q Sure, there are degrees, but in your world view, an E-rated game that's rated absolutely appropriate by the industry for everyone, like a Sonic The Hedgehog game, is a violent video game that can be harmful to kids of any age and to adults, for that matter; is that right?

A Yes. We have some research evidence that – not on Sonic The Hedgehog game, but on some other E-rated games.

Q You did just mention that as one of the games that was being used in those prior studies?

A Right.

Q As one that would be a different comparison than a billiard game because it is more violent?

A It's more violent than the billiard game, but it would still be on the low violent.

THE COURT: I suppose not if you're the billiard ball.

THE WITNESS: Well, that's true.

MR. SMITH: Fair point, your Honor.

BY MR. SMITH:

Q Now, Professor, you can't sit here and tell us how much [286] violence would be reduced in the world if we were to, in fact, cut off people under 18 from buying games that are covered by the statute, can you?

A No.

Q And that's for a whole variety of reasons. For one thing, you've never tried to do any calculation of what percentage of the violence in this country is, in fact, caused by exposure to violent media, have you?

A That is correct.

Q And we also know, don't we, that most of the games that are played by people under age 18 are bought by their parents, right?

A I don't know that.

Q You don't have any information about that subject?

A Some of my coauthors in various papers may have, but I don't recollect. I mean, I wouldn't be surprised, but I don't know.

Q Well, does the psychological literature tell us anything about what happens if you cut off access to one particular medium or one particular set of games in terms of what kids do to replace that in their media diet?

A Not that I know of.

Q Do you have any basis to say whether or not if, in fact, we had an effective mechanism that said we're not going to let the kids in Illinois have any more access to violent video games, [287] whether they're bought by their parents or not, whether they would, in fact, be exposed to less violence in the media thereafter?

A There's some reason to believe that their in some sense total media violence consumption would go down, but also there's some reason to believe it wouldn't go down exactly the amount of hours that they're playing violent video. There's some reason to believe that their consumption of TV violence would go up, but probably not by a comparable or at least an exact same amount. But, again, I just – that's speculation.

Q Basically we have to speculate about whether or not there would be any reduction at all?

A Yes, at this point.

Q Now, is it fair to say that violent video games did not become particularly violent until the early 1990s?

A They certainly took a jump in the early '90s, yes.

Q Prior to that time the violence in games was very stylized and cartoonish, and then there was kind of a revolution in game design around 1993, 1994?

A Yes.

Q And because of the technological changes, the games become more realistic, and we also saw the introduction of the first person shooter games that are a matter of concern to you about that time?

A Yes.

[288] Q Now, it's also true, is it not, that if you went back to the early 1990s about the time that revolution occurred and compared that to the present, the amount of time that kids are spending playing video games per capita has probably tripled?

A Yes. I don't have the exact figures in front of me, but yes, it's gone up a lot.

Q Well, did you discuss that in your draft of the book that you talked about in which the longitudinal study is included?

A Probably.

Q Let me put that in front of you, if I could, and ask you to look at Page 13 and see if that refreshes your recollection about whether or not the hours per week played by kids in this country has tripled since the early 1990s up to the time when this book was drafted. Do you see there on Page 13 it reports an average back in the early 1990s of two hours for girls and four hours for boys, and then later on we're up to nine hours per week for both?

A With boys averaging thirteen hours and girls five.

Q Right.

A Right.

Q Now, it's also true, is it not, Professor, that during that same roughly eleven or twelve-year period since the introduction of these much more graphic violent games, the introduction of first person shooters, and during that time when the exposure was going up by threefold, the crime rate, [289] the violent crime rate for adolescents in this country, has gone down substantially?

A I don't actually have those numbers. Certainly the arrest rates and – there's different ways of measuring that.

Q If you look at arrest rates and victimization rates, they peaked in 1994 in this country and have gone down roughly 50 percent, both for juvenile crime and for overall violent crime; is that right?

A I don't know.

Q You've never looked at those data?

A No, I have not. Not that I can recall.

Q Isn't it a fact that in all of your articles you wrote until the early 1990s, in many of them you would report those exact violent crime rates, and you stopped doing it in more recent articles?

A Yeah, in a couple articles with Brad Bushman. Brad – we reported some FBI crime rate statistics, yes.

Q Right. And the last time you did that with him was about 2001?

A Um-hm.

Q You talked about how there had been an explosion of violence in this country from 1950 up until about 1994. Do you recall that?

A I recall the figure. I don't recall exactly where the peak was.

[290] Q So, you would agree with me, having signed on to those articles, that looking at the overall crime rate in this country is something that we ought to think about when we're looking at the effects of violent media?

A Actually, I don't think it's terribly relevant, but Brad really liked that figure and wanted to use it.

Q You've also authored at least five or six articles which all start off with a paragraph talking about Columbine and Paducah and all the other high school shootings, haven't you, Professor?

A Yes, I have.

Q And you don't have any basis to say that any of those shootings had anything to do with video games, do you?

A Correct. And, in fact, in most, if not all of those cases, those articles also point out that such incidents do not constitute scientific evidence, that that's why we need to do research.

Q But despite that fact, you thought it was appropriate to make them the introductory paragraph in your articles in the psychological journals?

A Yes.

Q And especially the ones that you wrote for the more popular audiences?

A I don't have a recollection of what appears where.

Q Now, I want to, if I could, turn to the categories of [291] methods that we have available that you and others have used to study the effects of violent video games.

The first we have is these experiments that you've been describing and that Professor Williams talked about, which are the ones where you expose people to a game for ten or 15 minutes at the most and then you see in the immediate aftermath where they are or they are not more aggressive on some measure.

The great strength of those kinds of studies is that they can really establish cause and effect in the short term; is that right?

A Yes, that's the biggest.

Q And the real drawback of them is that they can't tell you anything about long term effects on their own, right?

A What they can tell you in conjunction with psychological theory about learning processes is what's likely to happen.

Q So, that's basically what these charts and graphs over here are supposed to do is to sort of get you from the noise blasts up to some prediction about how somebody is going to behave in ten or 15 years and a prediction about their being more violent?

A That's generally what the theoretical models are about.

Q Now, there's never been any experiment that shows that somebody engages in serious aggression in the immediate aftermath of being exposed to a violent video game; is that right?

[292] A Not that I know of, that would not get by an institutional review board.

Q Now, so, in order for anybody to draw any conclusions about serious aggression, long term effects, the kinds of things which you ask the court to take into account here, we have to buy into the model as somehow a predictor, as a way to sort of make that leap from the experiments up to the real world in the long run?

A One doesn't have to buy into necessarily my preferred model because there are other models out there.

Q We just have to buy one of them.

A You have to buy one of them, and you have to – well, and it's also the case that, at least in my view, the longitudinal studies done in the television violence area are relevant, as well.

Q So, you basically go over and say if it happened with television, it must happen with video games?

A It's very likely, yes.

Q Now, before we get to the longitudinal piece, let me talk about these correlation studies. You had some discussion in your direct examination about causation and what they show about causation. You agreed I think in your direct that no single correlation study can establish causation between exposure to the game and the aggression measure that's happening simultaneously; is that right?

[293] A Correct.

Q And the reason for that is you're basically taking the two measures at the same time. You're asking people what games do you play and what do you like as a person simultaneously?

A Right.

Q And so, the problem is that people who have particular characteristics, whether it be aggressiveness or loneliness or whatever it might be, are very likely to have those characteristics play a role in their decisions about what media they want to consume, what games or what TV or whatever it may be?

A There certainly is research in the TV literature suggestive of that.

Q And you yourself believe that some of this .2 effect that you've talked about is, in fact, reflective of that bidirectional causality, that the causation is, in fact, going the other direction?

A From the correlational studies, yes. The effect sizes that are estimated from, say, the longitudinal studies take that into account.

Q Right. But we're talking here about correlation studies.

A Okay.

Q And so, to the extent that you report a .2 correlation between aggressive measures and the amount of violent video game somebody plays, you would agree and it is, in fact, your [294] belief that some percentage of that .2 correlation reflects the aggressive personality of the person causing them to decide what game to play?

A Yes.

Q So, if we were actually going to try to isolate what the amount of the so-called effect size is, which really is an effect size, which is to say the game's causing the agresssion [sic], it would be something less than .2?

A Yes. Although, you know, again, the estimates – I guess the estimates don't particularly matter, whether you start at .2 or start at .25 or whatever.

Q And one of the problems with correlations is sitting here today you can't tell us how far down that would go, whether it would go all the way to zero, for example. You have no way to separate in the correlation studies themselves how much the causation goes this way and how much the causation goes that way?

A Yes and no. There are a few studies that have a measure of aggressive personality and a measure of violent video game exposure and a measure of aggressive behavior, and those studies do tend to find that you still have a significant effect of video game violence on aggressive behavior after you control for sort of trait aggression. Those are fairly rare.

Q Most of the correlations don't have anything like that in them?

[295] A Most don't.

Q Including the ones that you've done?

A Well, some of the ones we've done do.

Q Now, if we look at the research on violent video games, leaving aside the television, which we'll get to, if we sit here today, we have your one longitudinal study and the unpublished book chapter, and everything else that's ever been done is either one of these short term experiments or it's a correlation study or it's Dr. Williams' one month, whatever you want to call that. That's the total state of the research that exists in the world at this point; is that right?

A Well, on violent video games, yes.

Q Yes. And you believe basically that the ones you've described here and in the exhibits that have been put in are the state of the art, both experimental and correlational studies, that are out there?

A I believe what I talked about for the most part are representative of generally good studies.

Q Right.

A I'm not sure what –

Q Well, and if you go back to the Anderson and Dill piece in the year 2000, basically you think that's the first time anybody did it right in either side. The first experimental study that made an attempt to control for arousal and the first correlation study that focused on the right measures of [296] aggression and the right measures of video game exposure, right?

A No. There were some prior studies that had some pretty good methods, but didn't have what I would regard, at least at that time, as a good sample – they didn't have a big enough sample size.

Q So, if we throw that in the mix, it was certainly your view at the time, the year 2000, that those were the first studies that were done the right way in either of those categories, right?

A Only if you include –

Q Sample size.

A – the caveat that – sample size.

Q Well, that's a pretty important caveat, wouldn't you say, whether the sample size is large enough to give you meaningful results?

A It is – yes, I think it's very important, except when one is – I mean, you could have a lot of well designed, well carried out studies with a too small sample size that when you combined meta-analytically start to make more sense.

Q Right. But going back to that time in the year 2000, we didn't have that, either. The only meta-analysis that first appeared in this area was a year later?

A Yes.

Q Right. But in that year, early 2000, when you had just [297] done what you thought was the first adequate correlations and experimental studies and we had no meta-analysis yet, you were already testifying before a Senate committee that the evidence was very clear that video games caused violence; is that right?

A I don't remember the exact testimony, but I believe that it seemed clear to me in part because we had already started the meta-analysis.

Q You had started the meta-analysis, but not completed it?

A We had done most of the analyses by then.

Q And what that was was the study combining correlations and experiments that existed as of the year 2000?

A Yes. Well, that's the 2001 meta-analysis.

Q Right. But as of March 21st, 2000, when you testified in front of Senator Brownback, you had done some of that meta-analysis?

A That's my recollection.

Q And you had done the Anderson and Dill experiment with Wolfenstein and Myst?

A Yes, that would have been done.

Q And you had done the correlations that you talked about, that you had done the correlations that were included in that same Anderson and Dill piece?

A Yes, I would assume so.

Q And you were willing at that point to come in and say to the Senate committee that "Though there are many complexities [298] in the realm of behavioral research, there was one clear and simple message that parents, educators, and public policymakers such as yourselves need to hear. Playing violent video games can cause increases in aggression and violence." Is that right?

A Yes. I mean, I assume that's – you're reading. I don't know exactly where that is.

Q Now, I wanted to ask you, if I could, about the correlation that you talked about. You had started doing this in the Anderson and Dill piece, and you've done it more recently, where you actually try to do some kind of a calculation of aggressiveness using some scales off the National Youth Survey?

A Yes.

Q You mentioned that, I think, in your direct testimony, that you picked some measures of aggression off the National Youth Survey?

A Yes.

Q And you've said in the past that you think that's an indication that there's a correlation between video game play and criminal behavior, haven't you?

A Yes.

Q Do you still take that position?

A Yes.

Q But the reality, in fact, is that some of those measures that you had on that scale were criminal and some of them were [299] not?

A One of them is not.

Q And what was that behavior?

A That was throwing rocks, snowballs, or other objects at people.

Q Okay. So, you produced a composite score for these college kids that were in this survey and asked them "In the past year have you done any of the following things" and combined all of these self-reports about the things they had done into a score, and since your deposition you've now gone back and checked to figure out there was only one of those that was noncriminal?

A Yes.

Q Okay. Now, can you tell us have you gone back and checked how many of the people got a high score on this measure of criminal aggressiveness because they had thrown snowballs in the past year?

A No, but we have gone back – I did go back – not in the Anderson and Dill data sets. That's an old data set. I'm not sure I can recreate it there. But in a newer data set that appears in this book with high school students, where we have the same measure of video game violence exposure, the National Youth Survey thing, I went back and calculated a correlation without that item, and the correlation dropped from about .36 to about .33 when you delete that item.

Q Right. But can you tell us – you can't tell us sitting [300] here then on the Anderson and Dill article what percentage of people got a high score because that was the behavior they had engaged in?

A Well, no, not exactly.

Q Okay. Now, in the Anderson and Dill correlation, you had 227 college students that you gave these questionnaires to?

A Yes, roughly.

Q Roughly. And two-thirds of them or more were women?

A Could be. It was more women than men.

Q Can you tell us what percentage of these undergraduates at the midwestern university had, in fact, engaged in criminal aggression in the past year when you asked them that question?

A Well, we deleted two items that no one reported having done.

Q That was two out of ten, right?

A Two out of ten. So, that left six that at least one person in this sample reported having done recently.

Q But is it fair to say that it was a minute fraction of the 227 people who had engaged in any form of criminal aggressive behavior?

A I would guess that it would be a small fraction, yes.

Q Is it under ten? You have no idea?

A I would guess that it would be under ten.

Q Was it under five?

THE COURT: What now are you talking about?

[301] MR. SMITH: Five people, your Honor, is what I –

BY THE WITNESS:

A No, no, no. I'm sorry. Ten? I thought you meant 10 percent. I'm sorry.

BY MR. SMITH:

Q Thank you for that clarification. You think it's under ten, which would be 22 people?

A Well, we know at least six.

Q How do we know that again?

A No, that wouldn't necessarily be the case.

Q You know there are eight things that one person did.

THE COURT: There could be one person that did all six categories.

THE WITNESS: There could be one person, right.

BY MR. SMITH:

Q That's eight, right, categories, isn't it?

A Yeah. It actually couldn't be one person doing six, or the reliability coefficient couldn't have been what it was.

Q Where does the number six come from?

A There were six items that at least one person –

Q I thought it was ten, and you deleted two, leaving eight. That's just what's confusing me. It was eight, and you deleted two, and it was six?

A I was deleting the –

Q Oh, the snowballs.

[302] A The snowballs. So, it's actually seven. You're right. I was thinking of – sorry.

Q So, we know there were seven behaviors that somebody engaged in?

A It's the "apraisal [sic]".

Q Right. Like "apraisal [sic]."

But we don't know how many people out of that 227 engaged in any of those seven behaviors?

A I don't at this point, no.

Q But you think it was less than 22, at least?

A I would think so. Less than 22.

Q Now –

THE COURT: Find a convenient place to pause.

MR. SMITH: This would be fine, your Honor.

THE COURT: Okay. We've [sic] going to break until about 1:40, but before we do that, I want to revisit the topic I raised at the end of the day yesterday about combining this with the final determination of the case. So, give me your thoughts.

MR. SMITH: Your Honor, we've gone back and thought about that and tried to figure out whether there's a lot of other evidence we would put in if this was a merits trial, and with the caveat that we think Dr. Goldstein's testimony is very important and that that will get weight, even though it's on paper – he's effectively been cross-examined in his [303] deposition.

THE COURT: So, somebody could give me the deposition.

MR. SMITH: Yes.

MR. KASPER: We have it here today.

MR. SMITH: And obviously with the caveat that the other declarants' testimony will get the weight it would get, because we do have to establish vagueness and the censorship aspects of this, we would certainly think it appropriate, because I really can't think of what else we would put on, for you to go ahead and decide the case.

MR. KASPER: We agree with that, your Honor.

MR. DRYJANSKI: Your Honor, just speaking for the Attorney General's Office, our position is we may not necessarily not disagree with what was just said.

THE COURT: Whoa. You got to do that again.

MR. DRYJANSKI: Basically our position is because there are still motions pending, motions to dismiss –

THE COURT: Let's assume they're denied. What's your position? I'm not saying I'm going to deny them, but I need to know the answer now, not whenever I end up deciding them.

MR. DRYJANSKI: I think our position would still be that assuming the motion is denied, our office would really want to look at it more in detail to see if there is something we would want to put on.

But that may not end up being the case. And I understand you don't want to put that off very [304] long.

THE COURT: So, that's a nonanswer, basically. What's your answer, Mr. Garcia?

MR. GARCIA: We have no position. I can't imagine there's anything else we would put on.

THE COURT: Okay. Fine. I'll rule on your motion at 1:30. I'll see you at 1:40. Actually, 1:40, not 1:30.

(Whereupon, the within trial was recessed to 1:40 o'clock p.m. of the same day.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ENTERTAINMENT SOFTWARE ASSOCIATION, et al.,	)	
	)	No. 05 C 4265
Plaintiffs,	)	Chicago, Illinois
	)	November 15, 2005
v.	)	1:40 p.m.
	)	
ROD BLAGOJEVICH, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MATTHEW F. KENNELLY

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[307] (The following proceedings were had in open court:)

THE CLERK: 05 C 4265, Entertainment v. Blagojevich.

THE COURT: Could the lawyers please give your names?

MR. SMITH: Paul Smith for the plaintiffs.

MS. FALLOW: Katherine Fallow for the plaintiffs.

MS. HARTNETT: Kathleen Hartnett for the plaintiffs.

MR. SANDERS: Dave Sanders for the plaintiffs.

MR. KASPER: Michael Kasper for defendant Blagojevich.

MR. DEADY: Patrick Deady for defendant Blagojevich.

MR. DRYJANSKI: Andrew Dryjanski for defendants Madigan and Blagojevich.

MS. PARSELL-BURKE: Ellecia Parsell-Burke for defendant Madigan and defendant Blagojevich.

MR. GARCIA: Stephen Garcia for defendant Devine.

THE COURT: Okay, you can all have a seat.

MR. DRYJANSKI: Your Honor, may I say something to the Court?

Earlier you had the question regarding the conversion. We would – the office of the attorney general would go along with the conversion with the plaintiff and defendant Blagojevich.

THE COURT: All right. Well, I am going to go ahead and rule on these motions anyway. Quite honestly, if I had planned to do them orally, I would have been in a position to do it at the beginning of the hearing, and the only reason I [308] didn't do that was that my intention was to put it in an opinion, in the written opinion, whatever it turns out to be, that I write after this.

But now that I spent not only that time, but the time over the last hour and a half collecting my thoughts on that, I am just going to go ahead and rule on it. Both motions to dismiss are denied. Here are the reasons.

First of all, the primary argument that is made by both defendant Madigan and defendant Devine is that the lawsuit is barred by the Eleventh Amendment, which, as some commentators have noted, despite its language, precludes the commencement of a suit not only by citizens of one state against another state, but by citizens of the same state, although I am not sure it would matter in this case. I am not sure what the citizenship of the plaintiffs is.

There is an exception to that rule under the case of Ex Parte Young, 209 U.S. 123, a decision by the Supreme Court about 97 years ago. And what the Supreme Court said in Ex Parte Young is that a state officer can be made a defendant in a suit to enjoin the enforcement of an allegedly unconstitutional act so long as the officer has "some connection with the enforcement of the act."

And actually the full quote is a little bit broader than that. It's quoted by the plaintiffs in their response. What the Supreme Court said at page 157 is:

[309] "The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it rises out of the general law or especially created by the act itself is not material so long as it exists."

Now, as the plaintiffs correctly point out, if you read defendant Madigan and defendant Devine's motions together, essentially there would be no one to sue, I suppose, unless you were to sue the entire citizenry of the State of Illinois. Defendant Madigan basically says, well, I don't have anything to do with prosecuting local offenses, and defendant Devine says, we don't prosecute misdemeanors unless a citizen or a law enforcement agency brings them to us.

The "unless" would probably be good enough anyway, and there is some indication in the interrogatory answers that there is a little bit more to it than that. But if you take these together, there would essentially be no one to sue. I guess we would still have one defendant left in the lawsuit, defendant Blagojevich, which, somewhat paradoxically I think is the defendant that has the best Eleventh Amendment argument but has chosen not to make it for whatever reason.

But in looking at what has been cited to me, I am persuaded by the plaintiffs' contention, first of all, with regard to the attorney general, that under Illinois statute, she has the obligation to institute and prosecute all actions [310] and proceedings in favor of or for the use of the state which may be necessary in the execution of the duties of any state officer. She has exclusive jurisdiction to represent the state in appellate criminal proceedings. She has the duty to provide assistance and guidance to county state's attorneys and their prosecutions under state laws.

She can investigate criminal offenses in conjunction with state's attorneys.

So this is more than just a generalized duty to enforce the law, and I think that, under Ex Parte Young, it is sufficient. So that is why defendant Madigan's motion is denied.

With regard to defendant Devine, as I indicated, there is an interrogatory answer that suggests at least some closer connection with enforcement of the law. It was initially discussed in the briefs, and I think that either one of those would be sufficient.

There is a second argument made by defendant Devine, that because they basically said, well, we are not going to do anything about any of these cases until the case is over, until the present case is over with, that there isn't really a viable claim for a declaratory judgment against him; in other words, it's a hypothetical case.

I don't agree with that, and really the reason I don't agree with that is because it is a First Amendment case. And really that takes me back to one of the real problems with the, [311] it seems to me, with the Eleventh Amendment argument that has been made is that if the defendants are both right – and I think that if one of them is right, in all likelihood both of them are right – you would have a situation where someone who claims a First Amendment interest would essentially have to risk prosecution, actual criminal prosecution, before they could challenge it, and that would essentially overturn several decades of First Amendment law about chilling effect.

But with regard to defendant Devine, it seems to me that the fact that he has the authority to institute prosecutions and the fact that in the First Amendment context the plaintiff only needs to show that they have a well-founded fear that the law will be enforced I think is sufficient, and so the motion to dismiss is denied.

All right. Based on what everybody has said, I am combining the preliminary injunction hearing with the decision on the merits, and so we will now pick up where we left off with Professor Anderson. I do intend to include a more elaborate explanation of that in whatever ruling I make, but I wanted to give you the reasoning now.

Okay, Mr. Smith, you can proceed.

MR. SMITH: Thank you, your Honor.

CRAIG ANDERSON, DEFENDANTS' WITNESS
PREVIOUSLY SWORN
CONTINUED CROSS EXAMINATION

[312] BY MR. SMITH:

Q Good afternoon, Professor.

A Good afternoon.

Q I want to turn, if I might, to the issue of longitudinal studies, and longitudinal studies, I believe you said, are important essentially for two reasons. They can study longer term effects directly and they help you identify causation, is that correct, or is that a fair summary?

A They also help you rule out alternative explanations, which is what is relevant to the causation issue.

Q Now, in fact, you believe that consistent results across all three categories of studies, experimental, correlational and longitudinal are necessary before scientists can avowedly conclude that video game play causes aggressive behavior, don't you?

A Yes, but with the caveat that I believe that the television violence longitudinal studies are certainly relevant.

Q But referring to Exhibit 8, which I guess I am not sure whether it's in evidence.

THE COURT: 8?

BY MR. SMITH:

Q 8, which is the article. Defendant's Exhibit 8, I am sorry.

THE COURT: You know, I am considering all the exhibits that have been offered to be in evidence.

[313] MR. SMITH: That is helpful.

BY MR. SMITH:

Q This is the article that is in evidence, I guess, now, Professor Anderson, if you turn over to page 229 of your public policy article.

Do you have that up there?

A Which page?

Q 229, top of the left-hand column.

A Okay.

Q This is a document which was authored this year and is about to be published in a book, is that right?

A Yes, it is.

Q That is where you made the statement that before scientists are willing to believe that playing violent video games predicts aggressive behavior, they would want to see studies of each type performed and determine whether the results of the different studies converged.

In that sentence, you were referring to experimental, correlational and longitudinal, right?

A Yes.

Q If you look back at the previous three?

A Yes.

Q You made that statement in this article, or in this chapter, I guess it was, after you had a longitudinal study in hand to report, which you then go on to describe in the rest of [314] this publication, right?

A Yes.

Q You certainly didn't make that statement in any of your previous articles which have made similar causal claims based solely on experimental and correlational studies, right?

A I am sorry?

Q You didn't make the same statement that longitudinal studies are essential before scientists would believe – would accept the claim of causation in any of your previous articles, did you?

A I can't honestly say. I mean, I have certainly talked about the value and the need for longitudinal studies as part of a triangulation on truth regarding that particular hypothesis. But I also believe that television violence longitudinal studies are relevant.

Q You didn't say here that the television studies were not. You said longitudinal studies on video games were essential before all three – before scientists would believe that video games predict aggressive behavior, right?

A That's not quite what the sentence says.

It says before scientists are willing to believe that playing violent video games predicts aggressive behavior, they would want to see studies of each type performed and determine whether the results of the different studies converged.

It does not say that all three would have to be [315] specifically with video games. It could be media violence studies.

Q You go on to the end of the paragraph and you say:

"Although more research is needed, all of these types of studies have been conducted with similar results. Playing violent video games can indeed cause increases in aggressive thoughts, feelings and behaviors."

You are not referring there to television studies, right?

A You say the same paragraph?

Q Yes.

THE COURT: Last sentence of the same paragraph.

THE WITNESS: I see, okay.

I am not sure.

BY MR. SMITH:

Q Let me ask you about the one longitudinal study you have done. You mentioned there were three

There are two others which you said had been poorly done, Slater and some other one?

A I am not sure I would say that they were necessarily poorly done, but they are not as relevant.

Q Okay. They are –

A Slater and Ihori.

Q You don't consider them particularly significant for present purposes, is that fair to say?

[316] A Yes.

Q Now, the one that you did differs substantially from the television studies that you mentioned just now in that the length of the study period was something like two to five months as opposed to something like 15 or 20 years?

A Yes. The time period in the one in this book was two to six months.

Q Six months, thanks.

And the games that were being played by these elementary school kids were whatever games they happened to be playing, right?

A Yes.

Q So they are primarily games that are played by elementary school kids?

A Yes, although that is, obviously, quite a range.

Q Quite a range including a lot of very childish cartoonish games, is that right?

A I would assume some of them are, yes.

Q A lot of the games that we are studying here then would be games functionally equivalent to a Saturday morning cartoon show?

A I can't really say how equivalent they would be. I know that there are certainly E rated children's games that have a lot of shooting in them, but so does Road Runner, not so much shooting, but –

[317] Q You would certainly call Road Runner a very violent cartoon?

A In the television literature, it's considered a pretty violent cartoon, yes.

Q I think you said in your deposition that television literature concludes that things like Road Runner and Bugs Bunny have caused significant amounts of harm in causing aggression?

A They certainly have been identified as some of the violent media that young children consume that was part of that measure of childhood media violence consumption that later predicted long-term effects.

Q Now, turning back to your longitudinal study, whether or not a game like Super Mario Brothers or Sonic The Hedgehog or whatever it may be was considered violent was something that you left up to the third or fourth-graders to decide themselves?

A Yes. They rated violent content.

Q Did you tell them what it means to be violent?

A This study was actually run by Dr. Gentile, and I don't know the exact instructions that the students got.

Q As I understand it, what you did is you asked them to tell you how much those kinds of games they played and other kinds of games, and you came up with some sort of measure of their video game – violent video game exposure?

[318] A Yes. They used a fairly standard measure of violent video game exposure.

Q Then you had various measures of aggression before the start of the time frame which were done by what, peer reports as well as teacher?

A Peer reports, teacher reports and self-report.

Q Then essentially what you did is you said is the aggression at time two, taking into account the aggression at time one, is the change in aggression significantly related to the kinds of games they were watching back at time one? Is that a fair summary?

A Yes.

Q Now, when you did that, once you took into account the other possible variables, just so we are clear, the percentage of the change that occurred between time one and time two that was related to violent video game exposure was somewhere between 1 and 4 percent?

A Yes. For physical aggression, it was – depending on how many variables you controlled for was about 3.6 percent, if you control for a whole bunch of things, to I believe it was about 15 percent as sort of like the raw correlation.

Q To get to 15 percent, you would have to not control for the aggression at time one, which is to say you are basically comparing their overall level of aggression with their video game consumption, which makes it a correlation study?

[319] A Yes. I mean, a correlation study across time, but, yes.

Q If you don't back out the aggression at time one, you are basically not accomplishing the purpose of a longitudinal study; is that fair?

A Exactly.

Q So the 15 percent figure isn't really relevant, is it?

A Not as relevant, certainly.

Q Now, the documents at least that we have been provided don't report this, and maybe you can tell us: What was the amount of change in aggression that occurred between time one and time two in this period of two to six months in elementary school years for these children?

A On the composite physical aggression measure, that's not really easy as specifying. We did look at one of the – earlier today, one of the figures that just focused on fighting at school, and it showed changes on the order of roughly 20 to 30 percent increase in percentage of kids comparing low video game violence children to high video game violence children.

Q I don't think that is quite responsive to my question.

My question is: How much did these kids actually change? We have a figure of – the video game exposure explains 3.6 of the variance. I want to know what a hundred percent of the variance is in terms of changes over this one short period of time in one school year, in elementary school years.

[320] Is there a way you can tell us? Was there a great increase in aggression for these kids, or is there any way you can quantify that at all?

A Well, about the only way, off the top of my head at least, that we can quantify that is by looking at the changes in the proportion, who got into fights as a function of whether they were low game players or high game players.

That's not quite what you are looking for, I don't think.

Q I guess what I am asking you is can you tell us, isn't it true that the people who started out very aggressive stayed very aggressive, and the people that started out low aggressive stayed pretty low aggressive?

A That's generally true, yes.

Q There was a high correlation between aggression at time one and aggression at time two?

A Yes. That correlation probably, going from memory here, was probably about .4, .5.

Q So whatever amount of change there was, and it was a reasonably small amount, is that fair to say?

A In terms of the average level?

Q Yes.

A I would assume that the amount of change overall would be small.

Q And that variance, then you were able to explain something [321] like 3.6 of that small variance by looking at their video game exposure?

A Yes, that would be a fair statement.

Q Now, in this study, one of the things that they got in advance of the study period was not just a measure of video game exposure but also a measure of violent television exposure, violent movie exposure, exposure to professional wrestling, exposure basically to other violent media that kids consume, is that right?

A Yes.

Q And when we got to the end of the study period, and there were variables then put in to try to see whether or not they helped to eliminate other causes, those three variables, although they were calculated, were not included to try to see whether they affected the measure of video game exposure effects, right?

A That is true, yes.

Q So essentially even though you had the data and you knew that you could go in – whoever did this study, I guess it's in your book, but it's somebody else who did it.

Even though they had the data on these other media, which we know, according to your approach, is equally likely to cause increases in aggression, nobody went in to see whether or not those variables had greater explanatory power or at least reduced the perceived effect of video game violence?

[322] A That was true as of the time that I gave my deposition. Since then Dr. Gentile has gone back and looked at those results and essentially partialed out the effects of time one television and film violence.

Q How about the professional wrestling?

A That was measured in a different way, so it wasn't a comparable scale.

Q Is it fair to say that that meant that the perceived effect of the video games went down further?

A It didn't. It stayed about the same.

Q Stayed about the same?

A Yes.

Q What was the effect size for violent television?

A The effect size for violent television was marginally significant, about a .1 effect size. That's when you control for violent video game exposure.

And the effect size for violent video games was about .13, which was statistically significant.

Q And the effect size for video games that you initially found is .19, right?

A Those are different kinds of analyses, but roughly speaking. I mean, you are comparing the path analysis results to the destructive testing analysis.

Q Which was it that Dr. Gentile did?

A He redid path analysis.

[323] Q Why didn't he use it in the destructive analysis?

A Pardon me?

Q Why didn't he use those variables in the destructive analysis?

A They're essentially doing the same thing but not quite identical in terms of controlling.

Q But you can't tell us if he had treated it the same way that he treated the other variables like parental involvement and hostile attribution bias and other things whether that would have made the effect size for video games go away after the destructive analysis?

A It would not have.

[324] Q You could tell us that sitting here today?

A I could tell you that with certainty.

Q But you didn't know that at the time of your deposition?

A Correct. I did not.

Q And as this book went to the publisher, nobody had bothered to try to partial out the effects of TV and movie violence?

A When it went to the publisher for review, it had not, right.

Q Now, I want to ask you a few questions, if I could, Professor Anderson, about how the research relates to the statute that we actually have in front of us. At the time of your deposition, you actually hadn't read the statute, except for the findings; is that right?

A That is correct.

Q Have you read it now?

A No.

Q Are you aware, for example, that the statute only regulates access for people under 18?

A I have heard that, yes.

Q And the reality, though, is that the research that you've done and others have done on video games does not support any hypothesis that people under 18 are more vulnerable to these effects you've been talking about than adults; is that right?

A Right. That is correct. In the video game literature, there's not a clear age vulnerability, I guess, would be the [325] word I was looking for.

Q Yet earlier in your direct testimony when you were dealing with Professor Williams' study, you said that because his average age was 27, we wouldn't expect to see the kinds of effects that you found in your two to six-month study because that involved children. The reality is that the vulnerability is the same.

A Lack of evidence of a vulnerability effect is not the same as there being no vulnerability effect.

Q So, it may be that –

A There is, in fact, some evidence, fairly good evidence, in the television violence literature that long term effects are bigger for children than for older individuals. A lot of the studies in the video game domain, I mean, where we're looking at the shorter term effects, it's not clear to me that there should be bigger effects on children than adults in a short term context.

Q Such as a month or a three-month study?

A No. I'm talking about a one-hour study where we're dealing with priming effects.

Q So, in the one-month context, turning back to Professor Williams' study, the fact he had an average age of 27 doesn't – there's no reason to think based on the research that that population average would be less vulnerable to effects than some other age?

[326] A Not in the video game literature. In the television literature there is.

Q Now, you also have set out in your research to try to determine whether games that are more graphic and more realistic have a greater impact than games that are more cartoonish –

A Right.

Q – more juvenile, right?

A Yes.

Q And, surprisingly, you found no difference at all, right?

A Correct. I mean, in terms of mean differences, there was a slight hint, but not anywhere near, you know, statistical significance.

Q Well, and the slight difference that you found that was statistically insignificant was that the E-rated games, the most childish cartoonist games, were more harmful than the T-rated games, the more realistic and violent ones, right?

A Oh, I was thinking about a different study. I'm sorry.

Q Well, let's focus on the one I remember, which there was an experiment in which you focused on –

A Yes.

Q – teenagers' access. You did an experimental study.

A Right.

Q You had teenagers play little kid games and games like James Bond, more T-rated games, right?

[327] A Yes.

Q And you found that they became more violent on your measures of aggression when they played the E-rated games than the T-rated games, right?

A Yes, for that sample. Although, as you said, that wasn't a statistically reliable difference. That is, the T violent games versus the E violent games.

Q Right. And the E-rated games that showed up to be marginally more harmful, although maybe not quite statistically significant, those were games with like happy music and little cartoony characters?

A Yes.

Q Now, you also set out to test – I think you mentioned in your direct testimony whether or not changing the nature of the victims that you attack in your play from green-blooded aliens to red-blooded humans might change the effect. I believe you didn't give the answer, but the answer is there's no difference at all, right?

A The answer is there was no statistically significant – and that's what I was just referring to a couple minutes ago. There was a hint, but it was not close to significant.

Q So, there's no support in the research that you've done or that you can report on video games for saying that games that single out humanlike victims ought to be treated differently from games that have alien victims?

[328] A That is correct.

Q Now, you mentioned a couple of times that there are other kinds of stimuli other than video games that can kind of trigger this GAM model that you have, and I think you've mentioned a couple times that just viewing a picture of a gun can lead somebody in experimental research to be more aggressive?

A Yes, that's true.

Q In fact, you did a study like that and published it, right?

A Yes.

Q And what that illustrates is that there are probably almost an infinite number of stimuli that you could give somebody in one of these experimental situations and show some immediate priming of slightly more aggressive behavior in the aftermath, right?

A Infinite is very big, but yes. Stimuli that are associated with aggressive thinking.

Q Yes.

A It would be a very large number.

Q So, the fact that you have focused on video games is largely a matter of your choice rather than some suggestion that they're different from the large number of other things that could have exactly the same effect in the experimental context, right?

A Yes.

[329] Q And just so we understand on these – back to these experiments for a moment. The differences that you're calculating between those who watched Wolfenstein and those who watched Myst – or I mean played in each case – are tiny fractions of a second differentials in terms of how long they push that button down on the noise blast?

A In that particular study, yes, it was a duration measure, and it was a relatively small difference in terms of like number of seconds or milliseconds.

Q Milliseconds, right?

A I assume so. I don't remember.

Q And, in fact, what you've done is you've studied both intensity and duration at the same time a couple of times, and in some studies the duration goes up, but the intensity doesn't, and in other studies the intensity goes up, and the duration doesn't at all, right?

A That has happened in a couple of studies, yes.

Q Now, is it fair to say, Professor, that you're a pretty much outspoken critic of the video game industry?

A Yes, I would say that.

Q And you've actually criticized the industry for fighting the passage of laws of the kind we're dealing with here today?

A Yes, you could characterize that.

Q And indeed if we look back at Exhibit 8, you've gone so far as to advocate the passage of laws of the kind we're dealing [330] with here, have you not?

A I don't know that – I mean, I've tried very hard to stay out of giving my personal views about what the proper role is.

Q Let me ask you to look at Page 250 in Exhibit 8, the public policy. This is the article where you set out to discuss the public policy implications of your research, Exhibit 8?

A At what page?

Q 240.

A 240. Sure.

Q Just to finish the prefatory question, this is the article where you set out to discuss the public policy implications of your research?

A Yes. We wanted to list what some possible public policy options might be.

Q And one of the options you discuss at Page 240 is legal access restrictions?

A Yes.

Q And you say there that – let me get my marked up version of that. You say there, don't you, Professor, that legal access restrictions of the kind we're dealing with here would be both appropriate and feasible in the United States?

A Where are you referring to?

Q Well, let's start with there's a mention of United Kingdom, Australia, Canada, Germany, and then you say, "Nonetheless, this approach seems feasible in the United States for two [331] reasons," right?

A Yes.

Q And then you go on to say, "Legal precedent in the United States has established that the government has an entirely appropriate role in specific instances in limiting the influence and activities to which children are exposed." Do you see that?

A Yes.

Q And you go on to discuss the legal precedent that would support such a law, arguing that the Ginsberg case supports the constitutionality of such a law?

A Yes.

Q Then you go on at the top of the next column to say, "It's important to note that this," meaning Ginsberg, "is not the only legal precedent under which regulating access could be legally defensible while still being sensitive to First Amendment concerns." Do you see that?

A Yes.

Q And then you endorse as an excellent review this Law Review article by Professor Saunders at Michigan State?

A Yes.

Q And he's the fellow who wrote the book called Saving Our Children from the First Amendment?

A Yes, he is.

Q One thing I wanted to just catch up on before we finish [332] here, Professor, is on your discussion of Professor Williams' article.

I think you said something about how he had brought in a lot of gamers to be the subjects. Isn't it, in fact, true that he made a very careful effort to ensure that a large percentage of the people on both the control side and on the treatment side were people that had never played games before?

A I think he made a lot of effort to be sure that they had not played role – these massively multiplayer online role-playing games.

Q Well, the exhibit will speak for itself, Professor, but you don't remember him indicating in the exhibit that a significant percentage of the people in the test had never played any games at all?

A I don't remember that.

Q You also focused on his measures of aggression and focused on this arguments with partners or girlfriends or boyfriends or whatever. He had a whole range of measures of aggression that he used in there; isn't that right?

A Not in his published article.

Q Don't you remember seeing the reference to the normative – what's it called – the normative beliefs in the aggression scale?

A Yes, but that's not a measure of aggression.

Q What would you call that?

[333] A It's aggressive cognition.

Q So, what you were saying here is that he didn't use very good measures of aggression, but he might have done a pretty good job in measuring aggressive cognition and how it changed over the month?

A That could be. I don't remember much about that particular scale.

Q Certainly you have measured aggressive cognition changes in much of your work, right?

A Yes.

Q And the fact that he found no change in aggressive cognition over the period of a month would be pretty significant, would it not?

A Not given the way that that study was conducted.

Q Now, a couple of other things, Professor. One is you have on your website a discussion of the video game industry in which you make the point that because the video game industry is owned by media conglomerates, the media have suppressed the truth about the research on video games; is that right?

A I think we've implied that. I'm not sure we state it quite as volatilely as that, but it might have been. I just don't remember.

Q Certainly you intended to imply that in what you have on your website, right?

A Pardon me?

[334] Q You certainly intended to imply that in what you put on your website?

A Well, one of the things that we've discussed in several publications, and I don't remember exactly where and whatnot, is that there certainly can be multiple reasons why an industry would object to or contradict research that they think might not look favorably upon them. You know, one reason might be something as simple as economic self-interest.

Q You don't have any evidence of that, though, do you?

A No.

Q And the reality is that another reason might be that there's a much greater controversy about this among the professionals in your field and related fields than you would like to let on; isn't that right?

A Pardon me?

Q There's a much greater controversy about the validity of your studies and your conclusions than you like to let on, isn't there?

A Not within the scientific research community, no.

Q And those social scientists who disagree with you, are they outside the scientific research community?

A They're very much in the minority in terms of their views about media violence effects.

Q And have you reviewed Dr. Goldstein's declaration in this case?

[335] A Yes.

Q And he lists there a whole range of people who criticize fundamentally everything that you do in your research, don't they?

A He has an interesting and unique set of criticisms.

Q Well, and he's not just offering his own. He's pointing to any number of other scholars around the world who find this entire method of study is inapt and inappropriate, right?

A Well, he can cite some. I mean, without rereading his entire deposition, it would be hard to comment specifically on it, but, in fact, the major critics of the conclusions that media violence researchers have come to have not actually conducted original empirical research and are not seen in the psychological community, certainly, as truly understanding how to do such research and what the research implications are of existing studies.

Q Well, Dr. Goldstein has conducted original research and is a social psychologist just like you, is he not?

A He has never conducted original research on media violence.

Q Have you ever read his depositions in these cases where you and he testify against each other?

A I have looked over his entire publication record.

Q But the answer to my question is you haven't read the deposition?

A Pardon me?

[336] Q The answer is you haven't read the deposition?

A I have read the deposition.

Q And you don't recall references there to the fact that he did original research on media effects on aggression?

A No. Do you have a specific –

Q No. I'm just asking you. You don't recall that.

A No, I don't recall that.

MR. SMITH: I have no further questions, your Honor.

THE COURT: Redirect?

MR. KASPER: No further questions, your Honor.

THE COURT: I have a few, and I suspect that some of these – I was noting them as I went along. I suspect that some of these ended up getting answered in later questions. So, I may be asking you to repeat something. Please excuse that.

MR. SMITH: Your Honor, perhaps before – I'm sorry to interrupt you like that. I intended to offer as exhibits the two portions of the Justice Department websites which summarize crime rates in the last 12 years that I was –

THE COURT: Do you have any objection to these?

MR. KASPER: No. No objection.

THE COURT: What are the numbers?

MR. SMITH: They are Plaintiffs' Exhibits 5 and 6, your Honor.

THE COURT: They're admitted. Just give them to my [337] law clerk.

All right. I wanted to go back to something you talked about yesterday, and I wanted to make sure I heard it right; although, I think you repeated it this morning at the beginning of your testimony. It had to do with your explanation of this concept of priming, and I think you said that something as, I guess I would say, inconsequential as seeing a photograph of a gun could actually prime aggressive thoughts in a person. Did I hear you right on that?

THE WITNESS: Yes.

THE COURT: Explain that to me. How does that work?

THE WITNESS: The most current models of human memory think of memory – by memory, I'm including understanding concepts, words, you know, not just memory for events. Okay? (Continuing) – as a series or as a system of nodes that are interconnected, that are linked in some fashion.

And so, one might have a node that in some sense represents the concept of gun, and one might have a node that represent a concept of killing or of harming. And these nodes themselves, the idea is that they get linked to each other in a couple of ways. Nodes that are - or concepts that are very similar in meaning are thought of as kind of being close to each other. And this is all sort of by analogy. It's not like one thinks that there's, you know, six particular neurons that –

[338] THE COURT: I understand.

THE WITNESS: Okay. And the second way that nodes or concepts can be highly associated is if they are thought about at about the same point in time, if they're thought about in conjunction with each other alot. The more often a particular pair of concepts are paired with each other, the stronger the linkage is between those concepts.

And so, the idea of priming is that if one concept is activated – for example, by seeing a photo of a gun makes you sort of activate that concept of gun in your mind, that nodes that are closely linked to it, in essence, get a little bit of the energy that goes into that gun concept. It's called spreading activation. So that this – again, so if you activate or think about a gun, some of that energy or that activation spreads out along these linkages to related concepts. And so, I mean – and this is a common model.

THE COURT: Are there studies that suggest that something like seeing pictures not of somebody committing violence, but of an implement that might be used in doing that is enough to cause the same or similar kinds of effects that you've talked about here with violent video games?

THE WITNESS: There are studies, both field experiments and laboratory experiments, that show such effects.

THE COURT: Okay.

THE WITNESS: I'd also point out that one of the [339] things that we've done is –

THE COURT: You need to talk louder because you're talking to me now, and they're not hearing you, probably.

THE WITNESS: I'm sorry. One of the things that we've done, some colleagues of mine and I have done, in the last couple of years is to look at life experiences with guns to see how that might change how one thinks of guns and then in turn to see whether that has an impact on what commonly is called this weapons priming effect. So, we've looked at hunters versus nonhunters. The idea that hunters think of hunting weapons, at least, not so much as instruments of killing people, but they might tend to associate it with more like family, going out hunting with dad, growing up, like those sorts of things. And, in fact, that's what our results tend to show, that hunters, when you show them a picture of a hunting gun, you don't get this same kind of effect that you do with nonhunters.

THE COURT: Okay. You were talking about these experimental studies where the measure – and I know I'm using the wrong terminology here, but the measure was the noise blast.

THE WITNESS: The noise blast.

THE COURT: The noise blast thing. And as I understand it, what the people in those studies are typically told is that they're actually noise blasting another person [340] they might be playing against or something like that, but they don't see the person.

THE WITNESS: Correct.

THE COURT: Is there some reason to think that somebody's willingness to noise blast some anonymous person that they can't see somehow translates into a willingness or a greater inclination to do harm to an actual person that they can see?

THE WITNESS: There certainly are studies suggesting that this whole sort of punishment reaction time paradigm is a valid measure of aggression in that people who are generally sort of identified as being more aggressive versus less aggressive behave very differently in those tasks. Variables that influence a sort of real world aggression also have the same kind of effect in the laboratory tasks. And so, there's all that kind of evidence, basically, that the task is a valid task.

THE COURT: But I gather – at least my sense from listening to you is that there aren't as many studies that measure whether somebody actually went out and did something to somebody else physically.

THE WITNESS: Some of the children's studies have done that.

THE COURT: Okay.

THE WITNESS: There's a study by Irwin and Gross, if I [341] remember right, where they had children playing either a violent or nonviolent video game and then later observed them, I believe on a playground, although it may have been, you know, like in a free-play situation indoors. I don't remember.

[342] THE COURT: I recall somebody saying something. It may have been somebody yesterday.

THE WITNESS: They had measures of kicking and hitting and punching.

They had – as I recall, they actually had measures both of aggression, what they call aggression against another person, as well as aggression, what they called aggression against objects.

THE COURT: Objects, like kicking something.

THE WITNESS: Yes, and we have sort of separated those out because we are primarily more interested in the aggression against other people, and you get that kind of an effect.

THE COURT: This morning when you were discussing – I don't know the word that was used – the critique of – actually your critique of Professor Williams' critique, okay. You were talking about the reliability issue, and there was a question and, honestly, I am just going to tell you, I didn't get it, okay. So I need you to explain it a little bit better. There was something about a factor of .68 which you said was considered acceptable, but it would be nice if it was bigger. I need you to walk me through that again.

THE WITNESS: Okay. Any measurement has a certain element of error in it. So in any science, in any measurement, whatever you can do to reduce that element of error in essence gives you more power to detect whatever kind of underlying [343] phenomenon might be there, in essence, sort of like having a better microscope or something.

This reliability measure is actually an internal reliability measure. There's other forms of reliability out there, but those weren't discussed today or yesterday, as far as I know.

Internal reliability measure is typically used when you have multiple items on some kind of a scale, that each item is designed to measure sort of the same thing but in a slightly different way. And in basically test theory what you really want is a set of items that correlate pretty well with each other, so that a person who gives a 5 on item one will tend to give, you know, a similar answer on other items that, again, are supposedly measuring the same kind of thing.

And what a reliability measure is, this coefficient alpha, conceptually what it is is if you, say, have a ten-item scale, you can take item one and correlate it with the average of the other nine and you get some number. You can take item two and correlate it.

THE COURT: Now I get it.

THE WITNESS: Eventually you can sort of average those.

THE COURT: You average those out, and that is where you get to the figure that ended up as .68.

THE WITNESS: Yes, although it is not exactly that, [344] but conceptually that is what that is.

THE COURT: All right. When you say it would be nice if it was bigger, how much bigger would be better, I suppose?

THE WITNESS: Well, ideally you would want things to be in the 90s.

THE COURT: Okay, ideal is in the 90s. That tells me what I need to know.

THE WITNESS: If you get bigger maybe –

THE COURT: Go ahead.

THE WITNESS: If you get bigger than that, then you have wasted time on items you didn't really need.

THE COURT: Okay, fair enough.

THE WITNESS: One way you improve reliability is by adding more items.

THE COURT: I may just not have caught this, but in the last or second to the last question that Mr. Kasper had asked you, basically sort of summing up your opinion, and your opinion – I am leaving out some of it – was that exposure to violent video games, and I got down, "increases aggressive thoughts and affect."

Did I also hear you say, because if I did, I didn't catch it, that it increases actual physical aggression? Is that part of your opinion as well?

THE WITNESS: Yes.

THE COURT: Yes, okay. I thought that was the case, [345] but I didn't think I had it in my notes.

One more question about these figures. When Mr. Smith was questioning you, he asked you about the study that had the .2 correlation. And, see, now I am getting a blank stare, which means I am using the wrong terminology. There was something that was a .2 that translated to 4 percent?

THE WITNESS: Right.

THE COURT: Do you know what I am talking about?

THE WITNESS: Yes, I think he was talking about average effect sizes.

THE COURT: Yes, that is it. Explain that to me again.

THE WITNESS: When you do –

THE COURT: .2 of what, I guess?

THE WITNESS: .2 here is a measure of effect size. Actually there are a number of different measures of effect size. We have all been focusing on one specific one called correlation.

THE COURT: Okay.

THE WITNESS: Those can be translated into others, and it all has the same meaning.

A correlation effect size can range from minus one to plus one.

THE COURT: That I got.

THE WITNESS: Okay. That's right, we just did that.

[346] THE COURT: And plus one would be if the two factors essentially move together.

THE WITNESS: Right, perfectly lockstep.

THE COURT: Lockstep, and minus one would be if they moved in opposite directions or didn't do it together.

THE WITNESS: Yes, if they moved in opposite directions.

THE COURT: Zero would be if there is –

THE WITNESS: Just random.

THE COURT: Random, okay.

So what is a .2? What does that tell you? I get where it is on the scale, but what is that? They move together 20 percent of the time? I mean, how would I translate it, in other words?

THE WITNESS: No. If you –

Let's say you have a measure of anything, and let's just say it's aggressive behavior. So you have got a hundred participants, each of whom has a score, and you can plot those scores. And you just – you know, some are low, some are middle, some are high. You have got this mess of data points, okay.

If one calculates the average score, and then – that is called the mean.

THE COURT: Yes.

THE WITNESS: The average score.

[347] Then for each participant you take their score, subtract it from the mean, square it, that eliminates plus and minus signs.

THE COURT: Okay.

THE WITNESS: And then some of those 100 square deviation scores essentially, you get a measure that is called the variance of that measure.

A .2 correlation essentially means that knowing the person's score on some other variable, in this case let's say violent video game exposure, allows you to account for 4 percent of that variance.

THE COURT: Got it. Now I understand it. I am going to suggest that at new judge school they put in a statistics course. Of course, I probably would have forgotten it by now.

THE WITNESS: Yes. If you don't use it every day, it goes.

THE COURT: You have now just explained to me why it is that when my daughter got to a statistics class in high school, I stopped being able to help her with the math.

Okay. Just a second. I am just taking a note here.

THE WITNESS: You have learned in 30 seconds what my students take a whole semester –

THE COURT: Well, but they may actually retain it longer than I do. On the other hand, they probably have to because I don't have to wait until the end of the semester to [348] be tested on it.

I am actually now not talking just about violent video games, violent media generally. Is there any study that suggests that the context of the violence is at all significant?

In other words, compare, for example, like what's the Tom Cruise about the D-Day invasion which has this horribly violent scene that goes on for about half an hour at the beginning of it with, let's say, you know, a Van Damme movie where everybody is just kind of beating the heck out of each other all the time? Is there anything that suggests the context in which you see it is at all significant?

THE WITNESS: Yes, there are studies, especially in t.v. literature suggesting things such as –

And these aren't as solid as the basic findings.

THE COURT: I understand.

THE WITNESS: But suggesting that rewarding aggression in the film, showing characters being rewarded, can increase the effect versus punishing can reduce it.

What other kinds of context effects are out there? There is also some research – actually even some research in the video game area, as well as the t.v. area, that if parents – it's called mediate. If parents discuss issues of violence and what is in the media that they are consuming and basically talk about these kind of issues and point out how these are not [349] appropriate solutions in the real world context and so on, that that can reduce the media violence effect.

Just simply watching it with them presumably doesn't help, but actually discussing this whole issue of how does one really resolve conflict in the real world as opposed to the television world.

THE COURT: All right, then the last question, and I don't say this to make light of anything that you have said here, but there was one thing in this book chapter that really kind of caught my eye. I am just going read it here:

"In a study of college students, playing a golf video game improves student's actual control of force when putting even though the video game gave no physical feedback on that student's actual putting movement or force."

When you say "actual control of force when putting," do you mean – does this talk about playing the video game improving your actual putting when you are playing real golf?

THE WITNESS: Yes.

THE COURT: Can you tell me what video game that is so I can go out and buy it this afternoon? Maybe I will just recess the hearing and go get it right now.

THE WITNESS: I apologize, but my co-author wrote that part.

THE COURT: Okay, I will find that one. You cited the article.

[350] Again, not to make light of it, but that really kind of caught my attention. If there is something I can do to reduce the number of three-putt greens, I think I'd be for it.

THE WITNESS: Well, it certainly is the case then that video games are good teachers. So there are lots of interesting studies out there showing improvements in –

THE COURT: I notice there was a further discussion in here of it actually.

All right, do you have any further questions based on the questions I asked?

MR. SMITH: No, your Honor.

THE COURT: Do you?

MR. KASPER: No, your Honor.

THE COURT: Thank you very much. You are excused.

(Witness excused.)

THE COURT: Do you have another witness? Yes, no?

MS. FALLOW: Yes, your Honor.

THE COURT: Let's see. We have been going about an hour. Let's take a 10-minute break and then we will start back.

Is this the last one, the last live person?

MR. SMITH: Yes.

MS. FALLOW: Yes.

(Brief recess.)

THE COURT: Do you have the next witness in the room?

[351] MS. FALLOW: Yes, it's Howard Nusbaum.

(Witness sworn.)

HOWARD CHARLES NUSBAUM, PLAINTIFFS' WITNESS DULY SWORN DIRECT EXAMINATION

BY MS. FALLOW:

Q Professor Nusbaum, can you state your fall [sic] name for the record, please?

A Howard Charles Nusbaum.

THE REPORTER: Please spell your last name.

THE WITNESS: N-u-s-b-a-u-m.

BY MS. FALLOW:

And where are you currently employed?

A University of Chicago. I am the chair of the psychology department, the University of Chicago.

I have an appointment as a professor in the Department of Psychology, in the Committee on Computational Neuroscience, and I have membership in the Center for Integrated Neuroscience and Neuroengineering. And I am a member of the advisory board for the Brain Research Imaging Center.

Q How long have you been chair of the Department of Psychology?

A Since 1997.

Q And what courses do you teach?

A I teach a variety of courses in cognition and cognitive [352] neuroscience, so courses in language processing, attention, learning and memory, cognitive neuroscience, which I am teaching currently, research methods in cognitive neuroscience, and I participate in an fMRI research methods course.

Q I think you mentioned that you were a member of the Committee on Computational Neuroscience?

A Yes.

Q And are you involved in any other way in brain imaging at the University of Chicago?

A Yes. The current Brain Research Imaging Center, which was established about six years ago roughly, was set up in collaboration with my department, with me as the representative, to establish a basic research imaging center that would allow psychologists, neurologists, psychiatrists and neuroscientists to do imaging research.

We participated in the process of hiring the director and participated in financial planning.

Q With respect to your areas of research, are you involved in any journals?

A Yes. I am on the editorial board currently for Brain and Language. I serve as an ad hoc reviewer for a number of journals such as Nature, Nature Neuroscience, the Journal of Cognitive Neuroscience, Cognition, Brain and Neuroscience, Neurons, Cerebral Cortex, and others I can't remember.

Q Have you published in the area of cognitive neuroscience?

[353] A Yes. I have published a couple of studies having to do with spoken language processing and the cortical mechanisms underlying the process of language comprehension.

And, in addition, I have published several articles that are, shall we say, methodological issues regarding how to do and interpert [sic] fMRI research.

Q Just stepping back a bit, you have done –

Have you done any research in fMRI?

A Yes. I have done research involving how it is listeners shift attention between talkers, trying to understand which parts of the brain are involved in that process of changing attention from one person to another.

I have done research published in Neuroimage on how seeing a person's face affects your perception of speech in terms of recruiting motor cortex as part of the comprehension process.

Q I think you mentioned that you have published some pieces on how to do fMRI studies, is that correct?

A Correct. We were – I am sorry.

Q Can you just elaborate generally on what those pieces say?

A We were invited to write a commentary on a piece in the area of neuroeconomics that was published in the proceedings of the National Academy of Sciences. That was with John Caccioppo.

In that study, we looked at the brain areas that were [354] involved in making risky decisions or not risky decisions, a kind of gambling task and, shall we say, provided a little corrective guidance to the interpretation of the results that were reported by the original study.

Following that we published a paper – Steve Small and I published a paper in Brain and Language where we provide theoretic guidance on the problem of understanding language in the brain and natural behavior in context in fMRI research. And John Caccioppo and I and a large number of other collaborators published a paper in the Journal of Personality and Social Psychology as guidance for social psychologists on how to understand and carry out fMRI research.

Q Are those publications listed in your CV?

A They are.

Q Did you submit a CV to this Court attached to your declaration?

A Yes.

MS. FALLOW: Your Honor, I am going to mark this as Plaintiffs' Exhibit 7.

THE COURT: You don't need to give it back to me. I have got it. Exhibit how many?

MS. FALLOW: 7.

THE COURT: 7, that is admitted.

BY MS. FALLOW:

Q I am going to hand you this. Is this a current copy of [355] your CV?

A I believe reasonably current.

Q Dr. Nusbaum, are you a clinical psychologist?

A No. I'm a cognitive psychologist.

Q Can you just explain generally what the difference is between a clinical psychologist and a cognitive psychologist?

A Well, clinical psychologists deal with the diagnosis and treatment of mental illness.

When they do research, it's typically into the area of psychopathology or the effectiveness of therapy.

I'm a cognitive psychologist. I study mechanisms of learning, memory, attention, interpersonal communication, and the evaluation of information, affect of information.

Q In general are you in the area of basic science versus clinical treatment? Is there a difference between that?

A I don't do clinical treatment. I am not trained in providing therapy. I do basic research trying to understand sort of the fundamental psychological processes by which we understand each other as speech perceivers, speech producers, and the brain mechanisms that are involved in that process.

Q Professor Nusbaum, what were you asked do in your capacity as an expert for the plaintiffs in this case?

A I was asked to review – I think it's Section 12-5 – the findings with respect to the violent video game law, and specifically with respect to the third part of the findings [356] having to do with frontal lobe function, executive function as represented in Dr. Kronenberger's team's research.

Q I am just going to show you what has been already marked as Plaintiffs' Exhibit 2.

MS. FALLOW: This is the copy of the law, your Honor.

BY MS. FALLOW:

Q When you say you were asked to review the finding 12-A-5-A-3 –

If you look, is it that one?

A Yes.

Q – having to do with the general assembly, finds that minors who play violent video games are more likely to experience a reduction of activity in the frontal lobes of the brain which is responsible for controlling behavior?

A Yes, I was asked to review that in the research.

Q What is your opinion of that finding?

A I don't believe that there is any research supporting that claim. I was actually surprised to see it because it is not even qualified in respect of the research that could possibly be used to support it.

It's an unequivocal statement that the frontal lobes control behavior. That's not an accurate scientific statement. It's an unequivocal statement that playing a violent video game reduces frontal lobe activity. That's not well-supported by any research.

[357] Q You mentioned that you were asked to review both the findings and also Dr. Kronenberger's research as a basis for that finding, is that right?

A That is correct.

Q Do you have an opinion about whether Dr. Kronenberger's research supports this finding?

A I do. I don't believe it does support the finding.

Across the four studies that are most relevant, the Journal in Clinical Psychology, executive functioning study and the three fMRI studies, there is certainly no evidence within those studies that I think supports this –

Q Finding?

A – this finding. Sorry.

Q And you were here yesterday during Dr. Kronenberger's testimony, is that right?

A That is correct.

Q Or part of it at least?

A Yes.

Q You left at lunch time?

A Yes.

Q And Dr. Kronenberger said that his research was also building upon the research of Dr. Anderson and others showing a causal conclusion – I mean, causal connection between violent media and aggressive behavior, is that right?

A Yes.

[358] Q Do you have an opinion on that?

A Well, I have not read all of the research cited by Professor Anderson. I have read the papers that Dr. Kronenberger cites. I would say they are not compelling. I am not convinced by those studies, Anderson and Dill, the Bushman and Anderson work, that the case is particularly strong, that playing violent video games produces aggressive thoughts, behavior or feelings.

Q And, Professor Nusbaum, did you submit a declaration in this case?

A I did.

Q Again, I am marking this as Plaintiffs' Exhibit 8.

MS. FALLOW: I gather you don't need a copy?

THE COURT: I don't.

BY MS. FALLOW:

Q Is this the declaration that you submitted in this case?

A Yes.

Q Now, you have stated that you don't believe that Dr. Kronenberger's research supports the finding. I would just like to –

Can you just explain sort of in terms of general categories? I take it you have some criticisms of Dr. Kronenberger's research, is that right?

A Yes. Essentially I have problems with the background assumptions of the work, where it starts from, the methodology [359] that is represented in the work and the conclusions that are drawn.

Q All right. I would like to go through these one by one.

Starting with the first category of background assumptions, can a particular pattern of brain activity predict behavior?

A No. There is a many-to-many relationship between brain activity and behavior. So you can see for any particular brain activity multiple possible behaviors. For any particular behavior, there may be many possible brain activity patterns. So there is a many-to-many relationship between them.

Q And can you draw causal conclusions about behavior from observing a particular pattern of brain activity?

A Not to date. The technology and our understanding of the brain is not to the point where you could make that prediction, and I am dubious that it ever could get to that point because of the fundamental many-to-many relationship between brain and behavior.

Q So what do you see as the relationship between patterns of brain activity and a particular behavior?

A Well, there is a correlation between behavior and brain activity.

So there are many different behaviors that can result in different patterns of brain activity. Some of those change as a function of context. And it's useful in service of trying [360] to understand how the brain functions in any particular experiment or any particular task to a degree, but it is not particularly dispositive of what a person is going to do if there is a change in brain activity in one particular region.

Q Do you believe that Dr. Kronenberger is suggesting that a particular pattern of brain activity can be used to predict behavior?

A Well, Dr. Kronenberger seems to be suggesting a bunch of things. One of those is that a reduction in brain activity represents a kind of functional deficit.

Another is that a composite pattern of brain activity, an increase in arousal in one part of the brain, a decrease in arousal in another part of the brain would predict a propensity to aggression, largely by comparison to a model that Richard Davidson proposed in a science paper, and by comparison more generally or vaguely to a group of kids that he has diagnosed as disruptive behavior disorder.

Q I am going to address some of the things that you just talked about. I am actually going to show you –

MS. FALLOW: Actually, your Honor, I was going to have in front of him Defendants' Exhibits 1, 2 and 3, which is Dr. Kronenberger's material essentially.

THE COURT: Okay.

BY MS. FALLOW:

Q Professor Nusbaum, you reviewed Dr. Kronenberger's [361] declaration in giving your opinion in this case, is that right?

A Yes, I did.

Q If you just look at page 6 of Dr. Kronenberger's declaration, specifically paragraph 16, Dr. Kronenberger talks about – makes some general statements about the frontal lobes of the brain.

I just want to ask you: Are the frontal lobes associated with these functions or functions other than the ones he lists such as impulse, control, self-regulation, choice, attention and concentration?

A The frontal lobes is huge territory in the brain. So it's everything in front of what is called the central sulcus. It's right about here. That whole part of the brain is the frontal lobes.

There's lots of stuff going on in the frontal lobes. So they don't do any one thing at all. And there is no one behavior which is probably uniquely controlled by any single part of the brain. So, no, I don't agree with that.

Q So in addition to that the frontal lobes might be involved in other functions than what he lists, are other parts of the brain involved in some of these functions?

A Yes, sorry. That is what I was trying to say is that although the frontal lobes are implicated in attention, for example, the parietal lobes, the thalamus, the superior colliculus, which are subcortical structures in the brain stem, [362] are also involved in attention.

So any particular complex behavior that humans have, you're not going to find one particular spot in the brain that does just that, and any particular spot in the brain probably participates in lots of complex behaviors.

Q In paragraph 17 of his declaration, you sort of brought this up. He talks about a reduced activation of certain regions in the frontal lobes has been associated with greater impulsivity, difficulties in concentration and so forth.

Just as an initial matter, what does it mean to observe a reduced activation in certain regions in the frontal lobes?

A Well, in any particular research study where you have collected fMRI data, every part of the brain is typically active. So it is very difficult to see what is going on.

In order to make assessment about a relative reduction or a reduction in activity, it's always by comparison to another condition. So in one condition, there may be more activity; in another condition, there may be less activity; and it's under those circumstances that the reduction is inferred by that comparison.

Q And from Dr. Kronenberger's testimony, he also talks about observing reduced activity comparing one group to another, is that right?

A Yes. That is a little bit more questionable in the sense [363] that different people's brains have different states of activation, and different groups may have different chronic activation states, and so it becomes difficult to actually compare between groups. It's done, but that is a trickier kind of comparison.

Q In your opinion – I think you may have alluded to this – but does reduced activity in the frontal lobes always signal an impairment or a deficit?

A No. It can signal expertise, for example. If you develop expertise in a particular kind of task, for example, a certain kind of attentional task like looking for a stimulus coming up on a screen and you do that in conjunction with something else, you might see a reduction in activity as you develop what is called automaticity.

So automaticity refers to the case where, in performing a task over and over again, you develop a great facility with it. So, for example, in playing tennis, the first time you hit a ground stroke, you might think about every single part of the ground stroke. But once you get facility with that ground stroke, then you just look at the ball and try to move your body into the place where you hit the ball. You stop paying attention to the complement parts.

That kind of expertise in other kinds of studies is accompanied by a reduction in activity in the brain, and in attentional studies where expertise is developed, there is a [364] reduction in the frontal lobes, reflecting increased cortical efficiency of processing.

Q Just one thing. While you are testifying, if you can try to slow it down just a little bit so that the court reporter – you are saying a lot of terms that she may – well, I assume she knows everything, but, anyway, just to make it easier for her.

THE COURT: Since she just criticized you, I do want to thank you for not taking that example back to putting. It would have struck a little too close to home.

THE WITNESS: Then I won't bring up the LPGA study.

THE COURT: There you go.

THE WITNESS: Okay.

BY MS. FALLOW:

Q Actually is there a study involving golfing and expertise?

THE COURT: You had to do it. It's all right. I want to hear it.

That's fine.

THE WITNESS: My colleague, Steve Small, has tested members of the LPGA, or professsional golfers, against novice golfers. They show a picture of a green or something. Maybe it's a fairway. I don't know the parts. And you have to put yourself into the zone. In the process of putting yourself in the zone, these people are lying in a scanner and their brain activity is being recorded.

[365] What happens is that when you look at the professional golfers, they show significantly less cortical activity. They show less amygdala activity. They show less prefrontal activity than the novice golfers who basically light up like a Christmas tree.

[366] BY MS. FALLOW:

Q Okay. And then in paragraph 18 of his declaration – you also sort of talked about this – Dr. Kronenberger describes this particular pattern of underactivity of what he calls brain inhibitory mechanisms in the frontal cortex coupled with hyperarousal of the amygdala and temporal lobe regions, which he posits as responsible for chronic explosive and/or severe aggressive behavior. In your opinion can this pattern of activity be used as a diagnosis of behavior?

A No. I don't think any particular pattern of brain activity can be used as a diagnosis of behavior. New York Times Science Times had an article in the front page about this a month or so ago. In this particular instance, the pattern that Dr. Kronenberger is referring to is taken from a description in a study by

Richard Davidson published in Science, but Richard Davidson has also described depressives as having the same kind of brain activity pattern in general.

So, you could see that brain activity pattern and not decide is this person depressed or aggressive, or you could actually set up circumstances that might produce that pattern of brain activity in an experiment, and that would not lead to any particular behavioral outcome.

Q The same pattern of activity as described here.

A Exactly. It's also difficult to interpret the term hyperarousal. It sort of suggests that there's an absolute [367] level of arousal followed by a larger level of arousal.

Because the statement is made with respect to individuals who have presumably chronic levels of activity, one can't really say what hyperarousal is. There's no absolute standard. So, the measure that one gets off of an fMRI neuroimaging system is an arbitrary scale. And so, hyperarousal is really not a meaningful term.

Q Now, let's just turn to some of the methodological criticisms you have of Dr. Kronenberger's research. In your opinion, is it possible to draw a valid inference from Dr. Kronenberger's research about the effect of violent video games, as opposed to other kinds of violent media?

A Because the measures that Dr. Kronenberger uses conflate exposure to both and don't separate out the specific exposure to violent video games, no.

Q And what about Dr. Kronenberger's suggestion that he has found a correlation that teens who watch violent television are also more likely to watch violent video games? Would that support an inference from this research about the specific effect of violent video games?

A Well, that supports an inference about the teen's behavior with respect to watching video. It doesn't tell you which of those two activities has the causal role in producing the change in behavior or brain activity or anything. Since you can't separate out in his studies the specific effect of video [368] game exposure, you can't draw an inference about the specific effect of video game exposure.

Q Now, Dr. Kronenberger has testified about certain neurocognitive tests that he has used. Just as an initial matter, can you explain what neurocognitive testing is?

A Well, neurocognitive testing is a term that's used more typically within the neuropsychological or clinical psychology community. The way that it's used is with an inference given a particular pattern of behavior, can one decide what part of the brain is active, but in truth most of the research we now have on fMRI and better brain measures suggests, indeed as I had outlined earlier, you can't make those clear kinds of inferences.

Some areas may be more involved when you do a certain kind of thing, but that doesn't obviate the role of the rest of the networks of the brain in those particular activities. So, we can look at the relatively greater activity or lesser activity of a particular region in a particular task, but that doesn't say that region is specifically handling the processing for that task.

Q And Dr. Kronenberger also talked about executive functioning. Can you explain what executive functioning is?

A Well, executive functioning is a very broad term that's intended to cover a lot of different areas of psychological processing, everything from attention and choice, working [369] memory, some aspects of behavioral regulation and control. There isn't one particular executive function. There's no specific theory about what executive function is.

And although there's a lot of research and inference about how particular forms of brain damage affect particular kinds of executive functioning, there's no clear theory about it, no clear scientific agreement about it.

Q And Dr. Kronenberger explained that he had used in at least three of his four tests either a Stroop task or a continuous performance test. What is your opinion about the validity of using either the Stroop task or the CPT to measure control over behavior?

A Well, the Stroop task is used in lots of research, but its not typically used as a direct measure of control over behavior. It reflects the competition between two responses. So, when J.R. Stroop in 1935 proposed this as a way of investigating psychological processing, he wanted to pit the habits of reading against another habit, naming colors, one being stronger than the other, and showing, in fact, that they compete in various ways.

But that doesn't tell us anything about behavior control. There's a lot of similarity in the use of the term inhibiting a response where it refers to not naming the word, but naming the color, versus inhibiting a response where it means taking something that doesn't belong to you or hitting [370] somebody that you're angry at. Those kinds of inhibitory responses seem very different and look to be very different in the research.

Q And what about the continuous performance test?

A The continuous performance test is a kind of vigilance task that requires the inhibition of a propensity to respond. So, in those circumstances where you see a letter come up and you press the button, that's the most frequent kind of response. On some occasions a letter comes up you're not supposed to respond to, and you're supposed to inhibit a response.

That's a perfectly valid measure of some aspects of attentional processing, but again it's about inhibiting a response that's not tied to a particular motive or goal you would have. It's not oh, I desperately want this pretty thing here or I'm really angry at you. It's really about, well, you told me to do this task, and I'm going to do it this way.

So, it's more akin to what radar operators do when they're sitting in Greenland and looking for bogeys coming over the Poles or something, where they're just sort of looking for something, and they get pretty bored, and it's not terribly exciting.

Q Now, Dr. Kronenberger, as you know, also used fMRI in some of his studies about the effect of media violence. In your opinion, do fMRI images show an exact snapshot of a person's brain activity?

[371] A No. Very few people ever actually look at the raw data that comes off of an fMRI scanner. What we're looking at in most of the data presentations is not a direct picture of the brain activity. In fact, your brain is highly active all the time. What you're looking at is typically processed models, mathematical models that are made about the kind of brain activity or the kind of circumstance that one expects, and looking at, say, a 1 percent to 3 percent change in total brain activity that might be significant.

So, those images that we look at are not really snapshots of brain activity. They're snapshots of differences of brain activity. In fact, people seldom look at brain activity with fMRI.

Q And then in Dr. Kronenberger's studies, we saw these pictures of brain activity, as you've just described, but they're comparing it to group. It actually represents a group of some number of people. Do those images reflect the actual brain activity of each person in that group?

A No. There's an interesting problem that occurs in group images or group analyses. So, you can have a situation where activation appears in a nice fat clump in one part of the brain, but, in fact, if you looked at the activity in every individual subject, nobody shows activity in that part of the brain.

And the way to imagine this sort of as a picture is to [372] imagine that each subject had activity on the circumference of a circle, and then if you spatially averaged all those spatial locations, you'd get the center of the circle. So, it would appear like there's activity in the middle of the circle when nobody ever had activity there.

Q And Dr. Kronenberger, as you know, used something called a media exposure measure in order to assess each subject's exposure to media violence. In your opinion, is that measure valid?

A Well, valid of what? I mean, it's a highly retrospective measure. It's a subjective report. It's prone to recall error. It's prone to the potential to please an experiment or to fit into a particular setting. It doesn't necessarily tell you what kids were doing in terms of their exposure to media. It probably correlates with it, but there's also probably distortion, and who the subjects are that are making the reports might show different amounts of distortion, making it difficult to use.

Q And Dr. Kronenberger also used a measure called the DBD, I think disruptive behavioral disorder, in order to separate the subjects in his research into sort of two – control versus DBD. In your opinion, is the DBD classification used by Dr. Kronenberger a valid way to measure aggression?

A It seems like a funny way to measure aggression. I mean, it's true that the diagnostic criteria that he uses for [373] inclusion into the DBD group require reports of aggression, but there's no actual observation of aggression involved in any of those classifications. So, it could very well be the case that the DBD group is much more like an ADHD group, attention deficit hyperactivity disorder. And, in fact, in most of his studies, the measures correlate quite closely with ADHD.

Q And did the DBD classification also rely on reporting by parents?

A Reporting by parents, reporting by teachers, I think. I can't remember exactly. But, again, if you have a kid that's a little bit hyperactive or maybe doesn't follow rules particularly well, some of their behaviors can be judged to be aggressive if you have concerns about that kid in that context. Whether or not they actually hit anybody is another issue.

Q Judged to be aggressive by the parent or by the –

A Judged by parents, certainly. Parents can judge their kids to be aggressive when they've had trouble controlling them or having them comply with their requests.

Q Now, I'd like to turn to sort of the third – the classification of your criticism of Dr. Kronenberger's research, the actual results and conclusions. And if you see, I would like to talk about the Mathews, et al. study, which is the last study attached to Defendants' Exhibit 1, and that you're in the right document. And have you reviewed this study?

[374] A Yes, I have.

Q And this study involved which areas of the brain?

A I'm sorry?

Q This study involved which areas of the brain?

A Well, they examined activity specifically in the anterior cingulate, ACC, the inferior frontal gyrus, and the middle frontal gyrus, bilateral for both of those gyri.

Q And I know you've said that specific brain regions may be involved actually in a number of different functions, but can you just explain generally what those three areas of the brain are associated with?

A Lots of things. The anterior cingulate is involved – the anterior cingulate, the inferior frontal gyrus, and the middle frontal gyrus have relative involvement in different ways in working memory, memory encoding, memory retrieval, some aspects of emotion, some aspects of motor control, a lot of stuff.

Q Now, you said working memory. What does that mean?

A Sorry. Working memory is where someone tells you a phone number and you have to walk across the room and dial it. When you're holding it in your head, that's working memory. Working memory is thought of as a repository for information while you're operating on it.

Q And in your opinion, do these areas, the ACC, the IFG, and the MFG, do they correspond to aggression?

A No. These areas certainly are not highly associated with [375] people who are aggressive, or activity in these areas is certainly not highly associated with people who are aggressive.

Q Assuming that you wanted to measure the parts of the brain that are thought to be associated with aggression or control over behavior using fMRI, which areas would you look at?

A Well, I guess the best way to think about it is there's kind of a tale of two patients. In the 1800s Paul Broca had a patient who had damage in the dorsolateral prefrontal cortex, the left side inferior frontal gyrus, and middle frontal gyrus. That patient no problems in behavioral control that were reported, but that patient could only say the word "ton." In other words, damage to the left side IFG and MFG produces what's called Broca's aphasia, a problem producing speech. This is something actually that Dr. Kronenberger referred to, I believe, in his deposition, even though he didn't identify it with these areas.

However, another patient case, Phineas Gage was a railroad worker in the 1800s and was tamping explosives with an iron rod. That iron rod was shot by the explosive through the forehead damaging the orbitofrontal and ventromedial portions of the brain, ventromedial prefrontal cortex. He turned from a nice family guy, church-going, you know, very soft spoken, to someone who ended up being homeless, penniless, with no friends because he basically became a sociopath, couldn't keep his hands to himself, started a lot of fights in bars.

[376] So, within the realm of these two tales, the inferior frontal gyrus and middle frontal gyrus is typically associated with cognitive processes, like language use and working memory, but the orbitofrontal and ventromedial prefrontal cortex are more closely associated with aspects of behavioral control and self-regulation.

Q And in any of Dr. Kronenberger's research, did he look at the areas you've just identified? The orbitofrontal cortex or the ventromedial prefrontal cortex?

A Not that I know of. In Dr. Mathews' study there's a specific comment that they didn't look at those areas because they were not technically able to.

Q And in the Mathews study, as you know, Dr. Kronenberger said that they used a counting Stroop task. In your opinion, does the Stroop task used in this study measure self-control?

A No. It measures your ability to respond to one thing by picking it out of two choices and ignore the other thing. So, it's about filtering and selective attention and responding. Maybe working memory, but certainly not behavioral control in that sense.

Q And then in Dr. Mathews' studies, Dr. Kronenberger refers to the study as finding similarities between control adolescents with high media violence exposure and the teens with a diagnosis of a disruptive behavior disorder.

If you look at Table 1 on Page 289 of the Mathews [377] study, in your opinion does this show – do you agree that there are similarities in these two groups?

A I'm sorry. Which are the two groups again?

Q The control with a high media violence and the DBD group. The all DBD is what Dr. Kronenberger was comparing.

A The all DBD group actually shows bilateral activity in the middle frontal gyrus. That means on the left and right sides. The controls with high media violence exposure show left-sided middle frontal gyrus activity only. So, typically in our studies we'd say they look different.

Q And do you read the Mathews study as showing a reduction in activation in the frontal lobes for the DBD group and this control group with high media violence?

A It's really hard to make that assessment. If you look at the table, they report that there's one cluster of activity in the left middle frontal gyrus for controls with high media violence exposure and two clusters, one in the left inferior frontal gyrus and one in the anterior cingulate, although we don't actually know what part of the anterior cingulate.

Now, if you just counted clusters that way, you'd say, well, there's two here in one group and one in the other group, and so it looks like there's a reduction. However, the scientific standard for presenting data of this sort is not just to report numbers of clusters, but the size of the clusters, how many voxels in the cluster. So, actually, if you [378] were to look at the tables in the Wang study that's a presentation, they tell you how many voxels are active in a cluster and what the signal strength is. Here it's impossible to assess just because the number of clusters doesn't tell you how much signal is there.

Q And what about for the DBD group versus the control group? Is there a reduction in the number of clusters?

A Overall?

Q Yes.

A It doesn't look like it to me. It looks three and three.

Q And Dr. Kronenberger talked about, for the DBD group, finding activity actually at the – greater activity in the middle frontal gyrus, as opposed to the inferior frontal gyrus?

A Yes.

Q And what does it mean – what does that mean in terms of – what's your opinion of that finding?

A Well, Dr. Kronenberger doesn't really give us much of an interpretation of what the relative responsibilities are of the inferior frontal gyrus or the middle frontal gyrus. I could make up a good story here and say, well, the guys who are using the inferior frontal gyrus were talking to themselves when it's on the left side. They're kind of sub-vocalizing the task. The guys with the middle frontal gyrus activity maybe on both sides are using visuospatial working memory and verbal working memory in a slightly different way. So, in other words, you could say [379] you can get the same effects when two groups use different strategies, but it doesn't imply a deficit.

Q And then Dr. Kronenberger agreed that in this study there's no showing of a difference in Stroop task performance between, for instance, the control with high media violence versus the control with low media violence; that is right?

A That's my reading, yes.

Q So, if you do have two different groups and they have the same performance, but they show a different pattern of brain activity, what conclusion can you draw from that?

A Well, they're different groups with different strategies. So, Patty Reuter-Lorenz, who's a neuroscientist at Michigan, has been studying older adults over the age of 65 and younger adults under the age of 50 and looking at their memory performance, and when they're matched on memory performance, they show patterns like this.

In other words, they do equally well in memory, but they show a different strategy, the older adults being bilateral in their cortical recruitment and the young adults being more unilateral. Since there's no difference in performance, you can only say that they're using the brain differently to achieve this performance.

Q Assuming that this study does show a reduction of activity in the frontal lobes, could there be an explanation for this other than impairment?

[380] A Well, there could. A reduction in frontal lobe activity could reflect an increase in expertise in carrying out certain kinds of attentional tasks. So, Poldrack has reported a study where people do a certain kind of attentional task repeatedly, and what

he finds is there's a reduction in cortical activity in these kinds of regions.

So, reductions in cortical activity could reflect increases in efficiency. And indeed when people play violent video games, there's evidence from work by Green and Bavelier that they do improve in selective attention and attentional capacity.

So, there's behavioral evidence from one set of studies, one study, that shows that playing certain violent video games to a great degree improves your expertise with attention and attention capacity. There's another study that shows when you develop expertise with attention capacity, you get a reduction in these kinds of areas for activity in the brain. So, that's a possible explanation.

Q And how do you interpret the role of the DBD group in this study and in Dr. Kronenberger's other studies of brain imaging and executive function in terms of comparing DBD with the high media violence group?

A His intent or the effect when you read the paper?

Q Well, how do you interpret the role, or how do you read that?

[381] A Well, the implication of their inclusion is that they serve as a kind of blueprint to the brain. So, here's a group of kids that on basic criteria of report seem to be aggressive. They show a certain pattern of brain activity. Now, here's another group of

kids. They're not necessarily aggressive. Nobody's diagnosed them as aggressive. But look, Dr. Kronenberger would say. There are similarities in their brain activity. Thus we can take that as a kind of surrogate outcome measure. We can say, oh, there's an early warning sign there that they're going to turn out like these DBD kids, although the similarities don't really warrant that kind of conclusion.

Q Now I'd like to turn to the nonfMRI study of executive functioning, which is Defendants' Exhibit 2, and this is the study that Dr. Kronenberger was a principal author on. And you reviewed this study?

A I did.

Q And in your opinion, did this study find a difference in executive functioning along the lines of media violence exposure?

A No. I was confused about this study for a long time until I looked very carefully at the measures that were used. Dr. Kronenberger wants us to read this study and take the Stroop color-word data as indicating that a slowdown in Stroop color-word response is a measure of a problem of a certain kind [382] of executive function. And that might be a valid conclusion, except he doesn't actually report the data that represent the interference effect.

So, he tells us, oh, this is how long it takes people – well, he doesn't tell us how long it takes people to name things. He tells us that it takes longer to name color-word ink when you have high exposure to media violence regardless of other qualifications. But, in fact, what he could mean is that people with high exposure to media violence just slow down in everything they do because he didn't measure the difference between the time it takes them to name the color of X's in relation to the color-naming time for the words.

So, Stroop interference is actually the difference in the reaction time, and that's important. If you're really slow at naming everything, you'll be slow at naming the X's and slow at naming the ink for color-words. And then you subtract that difference, and there may or may not be a Stroop interference effect.

He only reported – even though he makes an argument about why he does it, he only reports the color-word naming times raw in relation to media exposure. And so, you can't tell anything about executive function from that.

Q Okay.

A Oh, and sorry. The continuous performance task is another situation of that kind. So, in the continuous performance [383] task, executive function might be reflected to some degree, at least in terms of attention and focus of attention vigilance, by your propensity to correctly withhold a response to an X or your failure to withhold that response, that is, to respond inappropriately when this infrequent X stimulus comes up in the continuous performance task. That's a task where letters come up, you press the button when you see a letter, and you don't press to an X. But what he reports is the variance - he reports a standard error of the mean, but it's the variance in reaction time. That means how slow are you to how fast are you, not whether or not you're responding incorrectly.

Now, the measure that you really want, if you believe that people can't inhibit their responses, is the false alarm rate. How many times do you press the button to the X. But he didn't give us that information.

So, from the two laboratory measures, there's no evidence in this paper that I can see about the relationship, raw or regressed out, about media exposure and executive function.

Q Now, I just want to talk briefly about the Wang study, which is not in evidence, but I know you've reviewed that study; is that right?

A Yes.

Q And you know that this is the study where they put the subjects in the fMRI scanner and had them watch filmed clips of [384] two kinds of video games; is that right?

A That's correct.

Q And Dr. Kronenberger described the study as involving simulated video game play. Do you agree with that characterization?

A I'm not sure what that characterization means. I understand from reading what he said that it means pressing a button when something is supposed to happen. But that doesn't simulate video game play because the world doesn't respond when you make an action. And anybody who's played a video game is going to immediately recognize there's a decoupling between what they do and what's happening in the world, and that's a very different situation. It doesn't simulate game play at all.

Q Now, would you expect the fMRI results to be different if the subjects were actually playing the game?

A Well, they could very well be very different. I mean, when you interact with something, your behavior, your attitude, your responses is different. In this particular case, we actually don't know a lot about the brain activity that was reported. They only reported, I believe, middle frontal gyrus and inferior frontal gyrus activity. So, they did not report whether or not there was anterior cingulate activity.

And also, quite surprising, given that there was a violent video game that they were watching, there was no [385] evidence of amygdala activity, which is something they would have predicted. At least they didn't report it.

So, I have no idea what it would be like, but since it's a very different situation for you to interact with the world and change it, I'm sure that the brain activity would be different.

Q Now, why do you say that amygdala activity is something they would have predicted?

A Well, that's part of the background assumption from paragraph 18 from Dr. Kronenberger's declaration. So, he makes the assertion about hyperarousal of the amygdala, and that's in the context of if you're exposed to some kind of violent information, in principle you should get hyperarousal.

In Dr. Cronin's (phonetic) study, they used the violence-related words as a proxy for violent presentation. One presumes that if watching a violent video game in this study activated the amygdala, they would have been quite happy to report it, but they didn't.

Q Now, Dr. Kronenberger testified yesterday that the Wang study showed bilateral activation in the middle frontal gyrus for the control group, whereas in the Mathews study it showed bilateral activation for that same area in the DBD group. Is that consistent with Dr. Kronenberger's claim of a deficit in the prefrontal cortex?

A Well, it's a little confusing. So, the standard model of a [386] deficit is a stroke. In a stroke a part of the brain dies. That part of the brain can't respond. If you believe that a part of your brain is unresponsive because of habitual behavior of some kind, it should just be unresponsive.

Now, I know Dr. Kronenberger has argued that it's a different task, and so there's different demands on it, and I agree with that, but in respect of the model of deficit, if the brain is deficit, it should be deficit in both cases. The fact that it responds in one case and doesn't respond in another case doesn't signal a deficit. It signals a difference in strategy. I think people were just approaching this task slightly differently than the other task, neither of which has to do with behavioral control or self-regulation.

Q And does this study show an impairment of executive functioning for teens with high media violence exposure?

A This study?

Q Yes.

A There's no measure that I'm aware of of executive functioning in this study. That would be a behavioral claim. In fact, this study didn't give us any behavioral data. I didn't know until late in the game that people were doing anything. I did not see a clear measure of a task of pressing buttons, and given that people were pressing buttons, you might want to know how much agreement there was in the places the buttons were pressed, are people perceiving these videos the [387] same way, are they equally quick. There are a lot of questions you could ask about the behavioral data, but none of it's given.

Q As when you mean you didn't see it 'til late in the game, it wasn't in that Wang slide presentation?

A I didn't see it in the Wang study. I saw it described either in the deposition for Dr. Kronenberger or his declaration.

Q Now, you already mentioned the Kalnin study, and that's phase two of Dr. Kronenberger's research, as he testified.

Now, Dr. Kronenberger has described this study as using a, quote, emotionally provocative, end quote, neurocognitive task. Do you agree with that description?

A No. Well, I suppose it depends on what he really means by emotionally provocative, but in the vernacular of something that's emotionally provocative, very few people really get upset when they see the word hit or kill. They might have a judgment about that word, but they don't really get agitated. So, I don't consider it emotionally provocative. We do emotionally provocative Stroop tasks, too, and all that really means is that subjects can decide whether a word is positive or negative.

In this particular study, they actually didn't collect valence ratings. So, we don't know if there were effects on people's mood. You could collect what's called a profile of [388] mood states or a panus (phonetic), which is another measure of how you're feeling. So, these people saw these words. You could ask them essentially by the appropriate measures, are you feeling anxious, upset, agitated, or something, depressed, sad. They didn't ask them anything.

So, there's no evidence from the behavioral aspect of this that it's emotionally provocative at all.

[389] Q Is it possible that you would have the same kind of response to a word like "hit" or "kill" and to a word like "love" or "happy"?

A In behavioral terms or in fMRI terms?

Q In terms of responding more slowly to those terms.

A Oh, absolutely. In our emotional Stroop test where we use things like "happy" and "sad," people are slowed down both to the "happy," the positive and the negative words.

There is no way to know in this study because they didn't include the positive control words.

Q Now, based on the slide presentation which is attached as the first exhibit to Defendants' Exhibit 1, the Kalnin study, do you believe that this study shows that the DBD subjects with high media violence exposure were slower to respond to the, quote, "violent" words than the DBD group with low media violence exposure?

A No, no.

Looking at the reaction time data, if anything, it's the opposite. I was a little bit surprised to see this presentation of data. Typically, if you want to make an argument about a Stroop effect, you would take, as I mentioned before, a difference between those two conditions, violent and nonviolent words, and plot the magnitude of the interference effect across the groups.

They didn't do that. But they presented the data from [390] the two separate groups in separate graphs. So you can't even easily compare them, and then they put the graphs on different scales. So it's a little bit misleading.

I mean, the top of both graphs is the same, but the bottom of the two graphs is different.

And then I was actually a little bit surprised to hear Dr. Kronenberger say that you can't – in response to a question from you, Ms. Fallow, that you can't compare those reaction times because you don't have the variances.

Well, he didn't put the error bars on. Standard scientific presentation of these kinds of data would be to put both figures on the same reaction time graph, so you could compare them directly, and then to plot around each point a small bar that would indicate the 95 percent confidence interval.

That would tell you, simply by looking, whether or not they are different. That would be sort of the standard in most scientific presentations. So it is a little bit disturbing the way this data has been presented.

No, you can't draw a conclusion of that sort at all.

Q What about the assertion that they may have been – that the DBD subjects with high media violence may have been, just as an absolute number, slower to respond to the violent words than the DBD subject with low media violence?

A Well, the DBD subjects with high media exposure are slow [391] kids. If you look at the nonviolent words, they are the slowest kids. If you look at the violent words, they are the slowest kids.

Not only that, even though they are matched on IQ, they have the lowest accuracy on both sets of words of both groups.

So there is clearly something different about these kids than all the other groups.

Q Now, on page – I am sorry.

Dr. Kronenberger has stated in paragraph 33 of his declaration, the second and third bullet points, that the Kalnin study shows more activation in certain areas of the brain when responding to the violent as opposed to the nonviolent words.

Based on your review of the presentation, did the fMRI images in this slide's presentation represent the subject's response to the emotional versus the nonemotional words or the violent versus the nonviolent?

A There is no evidence of that. I mean, it could very well be the case that they calculated those subtractions and never put it into the presentation.

But when I read the presentation, I was very confused by it because it looked like they were taking the violent words and the nonviolent words and simply looking at contrasts between the groups. There didn't seem to be any evidence that [392] they were actually taking a difference between the two types of words and then a double subtraction of the two groups.

It is not particularly difficult to do that, but there is no evidence in the presentation that they did it.

Q Okay. Now, putting that aside, assuming whether Dr. Kalnin separated out the reaction to the two sets of words, Dr. Kronenberger cites the study as showing greater activation in the amygdala and the parahippocampal gyrus for both the DBD group and the high media violence exposure group.

Now, you have already talked a little bit about the amygdala. Is the amygdala associated with feelings of fear?

A Well, in the research on the amygdala, the amygdala is one of the target areas people study in what is called fear conditioning. And what fear conditioning is about is your anticipation of potential harm following a particular stimulus.

However, in the research on conditioning, it also follows that you get amygdala activation when you anticipate a reward or pleasure. The amygdala is more active when you see a happy face. It's also more active when you see a disgusted face and a fearful face.

So it is not entirely clear to me that it is the seat of emotional experience, as one might infer, but it certainly is involved in lots of cases where there is uncertainty in learning and uncertainty in outcomes.

It's even active if you are listening to two different [393] syllables, one to each ear. So I don't think you could necessarily state that because that area of the brain is active that it reflects fear on the part of the subjects.

MS. FALLOW: Thank you very much. I have no further questions.

THE COURT: Cross-examination.

CROSS EXAMINATION

BY MS. LIU:

Q Good afternoon, Dr. Nusbaum.

You are not a neuroanatomist, are you?

A No, I am not a neuroanatomist.

Q You don't design fMRI studies independently?

A Independently of?

Q You design them yourself?

A Yes.

Q Do you require a radiologist or a neuroradiologist?

A In order to design a study, no.

Q For the fMRI technique or any of the specific calibrations for the fMRI?

A I actually have not done any of the published studies with a radiologist. The published studies were done with a neurologist.

In both those cases I designed – I certainly designed entirely the first study. I designed significant aspects of the second study that is published. That was collaborative [394] work, but I did design the studies.

Q You designed the actual testing but not the actual – the fMRI coordinates or how the graphs are going to read?

A The data analysis in both those studies was relatively parochial, but, in fact, I directed all the data analysis in the cognitive neuroscience paper.

Q Now, you have never done any fMRI studies firsthand or designed or collaborated, have you, with respect to any relationships between adolescent behavior and destructive disorders?

A Correct.

Q What about adolescent behavior in ADHD?

A No.

Q Have you performed firsthand or designed any studies including fMRI or just neurocognitive testing to measure fear or aggression?

A No. I guess I should qualify that, though. I am currently working on a study of loneliness where people are looking at emotionally disturbing pictures, and there are inferences being made about the subjects based on a lot of research that is done with John Caccioppo that suggests not that they feel fear or aggression, but they certainly are in what might be called a threat appraisal mode; that is, they are wary when they see some of these images.

Q Are you using any kind of a hypothesis or methodology that [395] is analogous to what you would test for adolescent disruptive behavior disorders?

A I would not particularly test for disruptive behavior disorder.

Q You don't even treat any adolescents or children with disruptive behavior disorders, do you?

A That is correct. I don't treat anyone.

[sic] You don't evaluate them?

A Hmm?

Q You do not evaluate them?

A I do not evaluate them, no.

Q You don't treat or diagnose any children with attention deficit disorders either?

A No, I don't, although I have talked about collaborations with various people having to do with attention deficit disorder; that is, I have consulted with them.

Q You identified earlier in your testimony several published studies that you cited to Ms. Fallow regarding attention and fMRI studies as well as testing on brain activity with respect to attentional capacity, et cetera; do you remember?

A Yes.

Q And is it your testimony now that those articles are relevant to any of the opinions in your declaration?

A Only as background to my understanding of cortical function and fMRI research and the relationship to behavior.

[396] Q You have never conducted any firsthand research, experimental, correlational, longitudinal, on the effects of violent video games, have you?

A Yes.

Q What in particular?

A We have carried out a study that involves people learning to play violent individual games and the effects of sleep on consolidating that learning.

Q Was this this particular study where you recruited the students over 18?

A Yes.

Q And there was no fMRI testing in this, correct?

A No.

Q And did this involve a violent video game as you described to involve computer robots?

A Yes.

Q There was no human-like depictions in there?

A Well, it's very similar to Marathon 2 which Dr. Anderson was talking about. The games that we used were Unreal Tournament and Quake 3. There are human like depictions, but they don't look like normal humans.

Q You are describing them as human because they have a head and two arms and two legs and that's it?

A Well, they have a face.

Q Would you mistake them for a human?

[397] A They wear clothes.

I am sorry?

Q Would you or a 13-year-old mistake them for a human?

A I don't think anybody would mistake anybody in a video game for a real human, 13 or not.

If you asked, looking at one of these images, is this one a person and is this one a robot, they would probably say that one is a person.

Q Particularly subjects over the age of 18, correct?

A Probably subjects under the age of 13, certainly the 13-year-olds that I have met that play these games.

Q But you didn't test those 13-year-olds in this particular experiment?

A No, I did not.

Q You are still not using fMRI testing in this particular experiment?

A Correct.

Q Have you designed or conducted any firsthand research or experimentation on any type of media violence other than violent video games?

A I suppose you could consider the IAPS pictures that we are using in the loneliness study – that is International Affective Picture System.

The IAPS pictures have pictures of car crashes, dismembered human beings, babies with tumors, as well as nice [398] couples sitting on a park bench, good sunsets, and baby seals not being clubbed.

So it has pictures that are violent in it, and people are not happy about those pictures, and that is an fMRI study, but it was not carried out as a study of media violence per se.

Q So you are not trying to measure any type of relationship in that study with media violence or affect or disorder or mood?

A In our research we don't ask questions about media violence.

What we are asking is a question about emotional responses in humans with a role of attention in those emotional responses and, in this particular study, how loneliness plays a role.

Q You were referring to studies that have shown sometimes decreased activity in the dorsolateral prefrontal area may actually implicate an expertise or an effect called automaticity.

Do you remember that?

A Yes.

Q Are you referring specifically to any literature publication in support of that?

A Certainly at least the Poldrack study.

Q In the Poldrack study, are you referring to the neural correlates –

[399] THE COURT: Spell that.

THE WITNESS: Poldrack, P-o-l-d-r-a-c-k.

BY MS. LIU:

Q This is the neural correlates of motor skill automaticity article 2005?

A Yes.

Q In this particular case, how old were the subjects, do you recall?

A I am sure they were at least college students. I didn't I check their ages.

Q What was the hypothesis?

Were they trying to measure anything related to media violence?

A No.

Q Did they use certain regions of interest?

In other words, did they hypothesize that there were going to be certain areas of the brain that may or may not be activated during tasks?

A Absolutely.

Q So is there –

Is it fair to make an assumption that there are certain areas of the brain or regions including systems of the brain that a scientist can make an a priori assumption about potential activity when they are designing a study to go look for that activity in the scanning results?

[400] A Sure, as long as you don't make the additional interpretation that that area is controlling the behavior that you are investigating.

I don't think in the Poldrack study they are ever arguing that any of those regions is controlling particular behavior, but they are looking at decreases in activity in certain regions as a result of automaticity or learning.

Q But just because one particular brain region is being recruited during a certain task or a mental process, even if it's your opinion that that is not the sole exclusive neural activity correlate, it is possible that you can't rule out that particular brain activetion as being associated, can you?

A Oh, no. By definition it would be associated.

The word "associated" means correlated with. And so in that respect, that activity is certainly part of the package.

But what its role is is unclear. So I think in one of our principles in the Journal of Personality and Social Psychology article, you mentioned something about the light that goes on in your heater when the heater turns on, and that light goes on every time your heater turns on, but it is not producing any heat.

That can happen to the brain, too; that is, you can see activity in regions that's correlated with a function, but it is not clear just from that alone what role that plays in [401] the function. You have to do other research.

Q It's not your opinion –

THE COURT: Can we take a break for just a second? I just need to take a short break.

(Brief recess.)

[402] (Brief recess.)

BY MS. LIU:

Q Dr. Nusbaum, one of your criticisms also regarding Dr. Kronenberger's methodology is the use of a self-report; is that correct?

A Yes.

Q Isn't it true, though, one of the studies that you rely upon heavily, the Green and Bavelier study with respect to I think it was the acquisition of skill increased efficiency study, they also rely upon self-report?

A Correct, but one of the things that's nice about that study is they formed a hypothesis from the reports of people's game-playing, and they found group difference, significant group difference based on that, but then they experimentally tested it by training randomly assigned subjects either to a Tetris group or to a Medal of Honor or Call of Duty group. So, they were able to test the hypothesis that came from the first study in an experimental setting and replicate their findings.

Q Well, even in this particular study that you rely upon, isn't it true that they didn't account for gender in four out of the five studies, four out of the five tests that they applied to the subjects in the Green and Bavelier study?

A Yes.

Q In fact, the first four tests was all male subjects?

A Correct.

[403] Q It wasn't until the last experiment in which they included the training session they decided to add the females?

A Yes.

Q And is it your opinion that the gender has nothing to do with a person's ability with respect to this relationship that the study was trying to prove with visual perception, motor skills, etc.?

A Well, in the last study they showed that females got the effect, as well. So, whether it has an effect, I don't think they went on to test that. So, I can't really say whether it does or doesn't have an effect.

Q Well, both these studies, the Poldrack study and the Green and Duvalier study, which you're citing in support of your proposition that video games and, in fact, action video games may increase perception, visual attention, and motor skills, don't they both also involve sessions of training in which the subjects are actually trained?

A Yes.

Q So, that's a little different than putting a kid in the scanner, having them perform Stroop tasks that aren't particularly interesting; isn't that correct?

A Well, in the Poldrack study, the training that they provide on the tasks is I'm taking that as a proxy for video game experience. I'm taking that as a proxy in light of the fact that in the Green and Duvalier study if people come in having [404] played video games, they showed this expertise on tasks of visual attention.

So, it's true nobody has done the study that links up both of those things. It's an inference. But then I'm only making this inference as an alternative possible interpretation of what Dr. Kronenberger is claiming. So, it's not my argument that we should advocate the playing of these games in order to improve everyone's attention skills. It's only that there's no clear evidence that the reduction in cortical activity necessarily reflects a deficit in Dr. Kronenberger's study.

Q Now, isn't it your opinion that the Stroop task that was used by Dr. Kronenberger's team in their research is, in fact, relevant to any kind of cognitive process that may require focus attention?

A It's relevant to many, not to all.

Q Well, can't the Stroop task performance be used to measure schoolwork and performance in schoolwork, and isn't it, in fact, used?

A Not often that I'm aware of.

Q You're not aware of it being used often or –

A I'm not aware that it is typically used as a proxy to measure schoolwork performance.

Q Are you involved in any type of diagnosis or evaluation of kids with learning disabilities in schoolwork?

A No.

[405] Q When you –

A But I can tell you, for example, that some studies find that Stroop interference is unrelated to age, for example.

Q Isn't it related – color-word test specifically, isn't that related to reading?

A It can be related to reading, yes. There's a study that I found that showed that reading skill relates to it, but not always. So, it's only one of those kinds of tasks that you have to, as in Dr. Anderson's work, perhaps regress out a lot of effects to see. However, it's also not specifically related to age. So, the Stroop color-word interference doesn't really increase a lot over age. It does change with IQ, though.

Q Now, you're not disputing that the areas that Dr. Kronenberger's team found during their fMRI studies in the neurocognitive testing, namely, the prefrontal cortex region, the anterior cingulate, and parts of the limbic system, could have been, in fact, activated comparatively during these studies, are you?

A I wouldn't say that those were found as active in neurocognitive testing. I would say there was active in fMRI studies, according to their report. And I'm not disputing that the areas that they say are active are active when they say they're active.

Q Is it true or isn't it true that the anterior cingulate activation is generally associated with executive attention?

[406] A With? I'm sorry.

Q Executive attention.

A I'm not quite sure what executive attention means. It's certainly involved in a lot of attentional tasks, some of which have to do with focus of attention, some of which have to do with monitoring yourself for making errors, say, when you're taking a test and you make an error, encoding in memory, and some aspects of monitoring attention, but I wouldn't say executive attention because I'm not quite sure what that means.

Q Well, if I explain to you does it include areas of task-switching or inhibitory control?

A Task-switching, absolutely.

Q Conflict resolution?

A Conflict resolution where conflict is between a propensity to make two responses, not a conflict where you're having an argument with somebody.

Q Correct. Not a conflict in an affective way as a behavioral response.

A Correct.

Q What about planning and allocation of attentional resources?

A There's a little more controversy about that, but personally I think it's involved.

Q So, these areas of executive functioning, would you agree they include self-control – in the cognitive sense, not the [407] behavioral way. Self-control, attention, concentration, self-monitoring. Are those areas that would be included in executive functioning, as you know it?

A Well, you've slipped in a lot of terms that are not really part of the literature of cognitive processing. So, concentration, for example, is more of a vernacular term. Self-control, more of a vernacular term. They may be relevant in clinical settings, but in cognitive research on the anterior cingulate that's scientific, trying to figure out what it's really used for, those wouldn't be the functions that people would be talking about. But in something like task-switching, for example, yes, there's evidence that it's involved.

However, I should point out the anterior cingulate has a lot of little parts, and not all the same parts are doing the same things at different points in time. And so, in some studies on emotional Stroop, for example, let's say the rostral portion, that is, the lower portion, of the anterior cingulate is active, where cognitive Stroop, a more dorsal or higher up portion might be more active. Some parts are involved in motor control. And so, it's not just one undifferentiated object.

Q Now, would you dispute a finding that tasks involving inhibitory responses or impulse control would result in activation in the dorsolateral prefrontal cortex area?

A Not all tasks involving inhibitory control. Some.

Q But there are tasks?

[408] A If by inhibitory control we're referring to something like the Stroop, obviously, yes.

Q Yes. Correct. I'm sorry. Like the Stroop interference where you have to inhibit one possible response in order to select the second.

A Yes.

Q Have you found any literature or studies critiquing Dr. Kronenberger and his team's research or findings?

A No. I haven't found anybody who's cited them at all.

Q Have you heard of anectdotally [sic] or seen any literature or in-press articles or new studies showing fMRI activation with respect to violent video games?

A I saw a press release for a Michigan State study which showed one sagittal slice. Hard to know what that means, hard to know what the conditions are about. But that's the only study that I've seen.

Q What do you know about that study, just anectdotally? [sic]

A What do I know about it? I can't remember much about it.

Q Are you aware that it involved violent video games?

A Yes.

Q And that the subjects were scanned in an fMRI?

A Yes.

Q And isn't it correct that that would be an article that may or may not affect your opinions in this case?

A When it appears in January and I read it, I'll be [409] interested to see what they say and what they did.

Q So, isn't it correct that your opinions can be summed up by saying that you don't believe that the conclusions are supported by the research, but you don't have any contradictory research or findings that can unequivocally say that Dr. Kronenberger's results are wrong?

A That's correct.

Q And you don't dispute the fact that the DLPFC and the ACC, as well as part of the amygdala, may be implicated during the conditions that were tested in Dr. Kronenberger's tests?

A The amygdala, I think, is only active in one of the four different – three fMRI studies that he reports.

Q That was in the Kalnin study; is that correct?

A In the Kalnin study, correct.

Q And the Wang study and the Kalnin study, the articles that you – I'm sorry. Not the articles. The documents or the presentations you reviewed, those were papers, correct? They were power points, but they were not actually published articles?

A Correct.

Q So, you don't know the underlying data that went into the picture that was presented in the paper or the power point, do you?

A Absolutely. I'm kind of surprised that anyone would take that as evidence, given the lack of supporting detail.

[410] Q Well, if you were a team member and you consulted with the other team members, wouldn't it be reasonable to infer that you would, in fact, know the underlying data?

A I would, but whether anybody else in the world would necessarily treat as evidentiary that presentation seems highly questionable, especially given the way some of the data are presented.

MS. LIU: No further questions.

THE COURT: Any questions?

MS. FALLOW: No. I'm sorry.

THE COURT: You're excused. Thank you.

(Witness excused.)

THE COURT: Okay. In terms of other evidence that people want to give me, I take it do people want to give me copies of the depositions of some or all the people? Tell me what you're going to give me.

MR. SMITH: We're going to certainly give you — I guess the declaration of Professor Goldstein is already —

THE COURT: The declarations we're considering already in evidence.

MR. DEADY: We have the transcript from Dr. Goldstein's deposition that we have today.

THE COURT: Dr. Goldstein. And are you going to give me – wasn't there one person on the plaintiffs' side that didn't get called?

[411] MR. SMITH: That was Dr. Goldstein.

THE COURT: I'm sorry. On the defendants' side that didn't get called. Do you have his or her deposition?

MR. DEADY: They didn't take their deposition.

THE COURT: Didn't take it. Okay. So, the only additional evidence I'm going to get is Dr. Goldstein's deposition.

MR. DEADY: That's correct.

THE COURT: And you have that here?

MR. DEADY: Yes.

THE COURT: Oh, perfect. Okay.

All right. So, neither side has – other than that, neither side has any other evidence that you want to present; is that right?

MR. SMITH: That's correct, your Honor.

MR. KASPER: Correct, your Honor.

MR. DRYJANSKI: That's correct.

THE COURT: Everybody says yes. All right.

Okay. In terms of argument, you tell me what you have in mind in terms of length. You have to talk first.

MR. SMITH: I have to talk first.

THE COURT: Yes.

MR. SMITH: You have to give me a second to think.

THE COURT: And I get to talk last, which is the advantage. So, you have to show yours before I show mine, in [412] other words.

MR. SMITH: Twenty minutes, half an hour.

THE COURT: Oh, you can have a half an hour.

MR. DEADY: I think a half an hour is fine.

THE COURT: Is it just you guys that are going to argue?

MR. KASPER: Actually, your Honor, as you may recall, a couple weeks ago I mentioned my upcoming honeymoon. Well, the time is upon us. So, Mr. Deady and Mr. Dryjanski are going to argue for us.

THE COURT: Okay.

MR. KASPER: Actually, I'm leaving as soon as we're done.

THE COURT: Oh, okay. Well, have a good time.

MR. KASPER: Well, thank you.

MR. DEADY: And we were just going to – Judge, I was just going to handle the violent video, and then Mr. Dryjanski was going to handle the sexually explicit.

THE COURT: Okay. So, if I give you a half hour altogether, is that enough? Do you think it's not enough or –

MR. DEADY: I would think probably enough, Judge, but it depends on what the questions are.

THE COURT: Okay. Well, I'm not necessarily going to give people a hook at 30 minutes and one second. So, I probably will have some questions.

[413] But let's see. Why don't we say 10:00 o'clock, and I ought to be done before 10:00 tomorrow, unlike today. And depending on how you want to break yours up, I mean, if you want to save some time for rebuttal, that's fine.

MR. SMITH: I'm sure I'll save a little time.

THE COURT: And I'd like to get it done in the morning session. So, that means 10:00 o'clock to 12:30. So, I'll probably end up giving you a little bit more time beyond a half an hour, but don't plan on it because if you plan on a half hour, then you'll end up taking an hour.

MR. SMITH: The other motion that's outstanding is the standing motion that was –

THE COURT: I'm aware of that, and I know that I didn't deal with that earlier, and I will try to – if I don't deal with that tomorrow, I'll deal with it in the ruling, but for purposes of the argument tomorrow assume that that motion is going to be denied, as well. But be prepared to answer questions about it because I'm going to look over it again tonight, and if there's something to ask on either side, I'll let you know tomorrow. Okay. Any other questions? Anything anybody needs to bring up?

MR. KASPER: No, your Honor.

THE COURT: Very good. Thanks a lot.

(Whereupon, the within trial was adjourned to Wednesday, November 16, 2005, at 10:00 o'clock a.m.)

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UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, in his official capacity as	CASE NO. C 05-4188 RMW (RS) DECLARATION OF **DMITRI WILLIAMS**

Governor of the State of
California; **BILL LOCKYER**,
in his official capacity as
Attorney General of the State
of California; **GEORGE
KENNEDY**, in his official
capacity as Santa Clara
County District Attorney,
RICHARD DOYLE, in his
official capacity as City
Attorney for the City of San
Jose, and **ANN MILLER
RAVEL**, in her official
capacity as County Counsel
for the County of Santa Clara,

Defendants.

I, Dmitri Williams, hereby declare as follows:

Pursuant to 28 U.S.C. § 1746, I, Dmitri Williams, under penalty of perjury state as follows:

Background

1. This document is my expert opinion in this case, and involves my review of the scientific literature to date regarding media violence and that literature's more recent foray into video game violence, as well as my review of the subset of items that constitute the State's Legislative Bibliography. This report was requested by the law firm of Jenner and Block, Washington, D.C. My expert opinion is based on accepted principles in social psychology,

communication and sociology, my understanding and use of the various standard research methods, and my time spent in contact with game players and game developers. My CV is attached to this Declaration (Exhibit A).

2. I received my Ph.D. in Communication Studies from the University of Michigan where I trained in both qualitative and quantitative research methods. I consider myself a social psychology experimentalist, but also believe in the importance of understanding the social context of my subjects. Thus, I usually involve a series of interviews and participant observation steps. This approach is more time consuming and difficult, but is crucial to understanding the depth and setting of most communication related issues. I am currently an Assistant Professor at the University of Illinois at Urbana-Champaign in the Department of Speech Communication. My department is ranked in the top six nationally according to the National Communication Association Annual Survey, and number two in my research area of technology and communication. I also served as an expert witness in the case of *Entertainment Software Association v. Blagojevich*, the Illinois video games case decided this past December.

3. I have published several articles and book chapters on the topic of video game uses, effects, industrial practices, economics and social history. My work has used a wide range of research methods including content analysis, field and lab-based experimentation, interviews, industrial organization

modeling and others. Like most social scientists, I am familiar with the tools: ANOVA, factor analysis, structural equations modeling, multiple regression, meta analysis, etc. My work has appeared in my field's top journals including the *Journal of Communication,* the *Journal of Broadcasting and Electronic Media, Information, Communication & Society, Journal of Computer Mediated Communication, Communication Monographs,* the *International Journal on Media Management,* and in the game-specific journals *Games & Culture* and *Simulation and Gaming.* I regularly present on gaming research issues at the major communication and Internet research conferences, the game-specific research conferences, and at the Games Developer Conference. With my co author, I am the only person in the world to have published a field-based, i.e. non-laboratory and real-life, study of video game effects that tests the exposure of violent game imagery for longer than 75 minutes. As someone who has completed a test with this method, I am in a relatively strong position to understand and comment on long-term effects in gaming. Yet, as this document will illustrate, I have simply uncovered more that we have yet to learn about this medium before I or anyone else can make strong claims.

4. This document will outline the case that the research on video games and violence has not yet met the basic conditions for strong causal claims. I am aware of Professor Craig Anderson's work and will be commenting on his conclusions, as well as conclusions from my own research. This research is generally

concerned with creating violent adolescents because of the harm they might conceivably inflict on others, and so touches on a number of cultural and social tensions (Williams, 2006, in press). Thus, research articles are typically framed around spectacular well-covered incidents of youth violence such as the Columbine massacre (Anderson, 2004; Anderson et al., 2004). I will agree with much of what Prof. Anderson suggests about the television literature, but disagree with many key premises and conclusions when he and his colleagues import their approach to the study of a new and much more complex medium like video games. The major argument herein is that the research to date has fulfilled necessary, but not sufficient conditions to warrant the strength of Anderson's conclusions. In layman's terms, the work so far is suggestive, but not enough to support such strong claims.

The Media Violence Issue and Causality

5. Let me begin by laying out some of the common ground. Like Anderson, I am concerned with the potentially negative impacts of playing violent video games. This is an area worth studying, and Prof. Anderson is well respected in it. And there is indeed a long history of media effects work on violence, chiefly focused on television's effects. I believe that this research generally points to the susceptibility of children to experience effects at a greater rate than adults when watching television (Paik & Comstock, 1994). These effects are indeed most likely to materialize in the acquisition of scripts about

violence, emotional desensitization and in potentially aggressive behaviors. I note with some irony that the evidence on television as creating a "mean world" effect has been almost entirely discredited (Gerbner, Gross, Morgan, & Signorielli, 1980, 1981; Hirsch, 1980, 1981), whereas I think this effect is much more likely to occur in games (Williams, in press, 2006). Yet my research strongly suggests that these effects are very specific and likely do not yield the kind of priming-based spreading activation that lies at the heart of the hostile attribution approach. I have also found that some games can isolate players and potentially make them more lonely. This should signpost that I have found and published negative effects from gaming and am not particularly interested in defending them. However, this declaration will show that my read of how games work is different than Anderson's.

6. I further agree with Anderson that media is only one of several variables in the mix of risk factors for children.

7. I agree that theoretically driven models are the best way to test for effects and to advance understanding. And I agree that experiments, cross-sectional studies, longitudinal studies and meta analyses are all important tools for advancing understanding. I have no issue with the standard measures used in the research, and have used many of them myself (e.g. scales, word-completion tasks, etc.). Our chief goal is to understand causation: what causes what. In this case, the hypothesis worth

testing is that the use and observation of violent video games causes violent behaviors, feelings, beliefs and cognitions.

8. Lastly, I would like to spell out exactly how causality works in the social sciences by stating a model that I know every responsible social scientist takes to heart. Causality is an extraordinarily difficult condition to prove (Popper, 1959). All of us who practice the social sciences hope to reach that level, but we are usually conservative in our claims because of the very difficult conditions which we much satisfy. Based on the generally accepted work of John Stuart Mill some 150 years ago, we all accept these three conditions for proving causality:

> 1) Concomitant variation, i.e. correlation, or "when one thing moves, the other also moves."
>
> 2) Time-order control, i.e. one thing must precede the other.
>
> 3) Elimination of plausible alternative hypotheses, i.e. every other reasonable explanation must be ruled out.

9. When these three conditions have all been met, we typically accept statements about causality. Where Anderson and I part ways is in our interpretation of the literature to date and how it meets these three conditions. It is clear to me that the literature to date satisfies the first two conditions. It is equally clear to me that the literature to date does *not* satisfy the third condition. There are a range of

plausible, and some even likely, explanations for other causal models to be at work in the realm of video game violence.

Methods and Examples of Violent Video Game Research

10. There are three major methods appropriate for the study of video games and aggression: experimental designs, cross-sectional designs and longitudinal designs. Each has a different set of strengths and weaknesses that address different portions of Mill's three conditions for causality. In reviewing the research, it is my opinion that the use of each method to date falls short of the three conditions, but I think that Anderson's most recent unpublished work and my own recent published paper on aggression attempt to address these shortcomings, albeit in different ways. Moreover, I also believe that the guiding theoretical model – the GAM proposed by Anderson, Bushman and Dill (Anderson & Bushman, 2001; Anderson & Dill, 2000) – needs further development before it can be properly operationalized for testing video games.

Experimental Evidence

11. Experiments are the social scientist's best tool for establishing causality because, when they are designed well, they automatically address the first two conditions that Mill gave us. A well-run experiment can measure correlations through standard

survey measures and observational data and can firmly establish time order because the experimenter controls the procedure. Experiments can also rule out the problem of a testing effect because the presence of a control group allows the examination of whether simply being tested causes an effect. Experiments can rarely address all possible alternative explanations, but they remain our best tool short of controlled longitudinal designs.

12. The main shortcomings of the experiments to date are threefold. Number one, they measure events that may not occur outside of a lab. Many critics decry the artificial setting of the laboratory, but I think that a control group at least partially addresses this when done well. Additionally, most well-trained researchers are careful to make the lab settings at least resemble a home environment. A more apparent problem is that experiments typically have people play alone when the majority of game play is a social experience. This presents a significant validity challenge for the game effects work to date (Sherry, 2001), and the most prominent names in aggression research (including Anderson) have noted that the research still needs these factors included but has yet to do so (Anderson et al., 2003). The prior literature on arcades, home settings and the opinion and survey data over the past 25 years shows that game players have played with other game players almost whenever possible (Williams, 2006, in press). Thus, if experimenters measure people playing solo,

it is not clear how useful any findings might be (see below for a theoretical impact of social play).

13. The second problem is one advanced by a plausible alternative hypothesis: the effects derived were not a result of playing the game, but were simply the result of being excited, i.e. what was measured was the result of excitement, not aggression. Critics can easily suggest that the same effects would occur if the subjects were running or playing Frisbee. Much of the early game research was subject to this flaw. It was Anderson who recognized this flaw and sought to address it by including a second video game as a control condition (Anderson & Dill, 2000). I will address this study because it is the most cited, and therefore the most influential in the literature.[1] As he correctly noted, the violent and non-violent video games under study "should be made as equivalent as possible on theoretically relevant characteristics." In this case, to defuse the argument that the effect is excitement and not aggression, the researcher would want a control game with a matching level of excitement-inducing characteristics. If the control game is equally exciting, frustrating and fast-paced, the difference between the two is only the violent

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[1] This is based on use of the ISI Web of Knowledge, which tracks how many times a paper in a given topic area is cited. Based on the topic "video game" this paper is the most cited paper on effects, with 70 citations. The second-most cited, and therefore nextmost influential study, is the Anderson and Bushman 2001 study discussed on the next page.

content and the effects test is a strong one. The problem is that the researchers in this best short-term experiment to date picked two games which did not meet this test, but they were apparently unaware of this. In the study cited here, the hyperkinetic violent game *Wolfenstein 3D* was paired with the non-violent game *Myst*, and the researchers prudently pre-tested them to make sure that they were equivalent on the dimensions cited above. There are two problems here. The first is that simply on their face, these two games are radically different in terms of excitement. I have played both many times and am confident in making this claim. *Wolfenstein 3D* is an exciting, fastpaced, twitch-based shooter game in which the player is hunter and hunted and usually feels intense fear and tension throughout play. The music builds anxiety and the sense of imminent threat is palpable. In contrast, *Myst* is a deliberate, slow-paced cerebral puzzle and logic game set in an ethereal, beautiful locale with no motion. The music is symphonic and relaxing. The player does not run or experience speed. As the player moves from area to area, the screen loads the new image without the sensation of the most basic motion. It can safely be described as tranquil. Yet Anderson's test found it equivalent with *Wolfenstein 3D* in "action speed." This is a problem. On simple face validity, these two games would not be described by any game player or game researcher as equivalent in terms of action. They are, even to the untrained eye, the equivalent of heavy metal and classical music. The second issue is that a pre-test that found them equivalent must have some significant validity problems. The researchers simply picked the wrong games, and unfortunately also demonstrated to game-specific researchers that they could not have been particularly familiar with general game content. Moreover, the peer-reviewers who approved the paper could not have been familiar with game content either or red flags would have been raised about the choice of the control game. This is no small point. Many researchers outside of communication appear to be unfamiliar with gamers, game culture and game content.

14. The third problem relates to the duration of effects. Let us ignore the preceding issues and assume for the moment that every test to date had occurred with perfect control and validity, and that the evidence showed that there was aggressive behavior after and because of violent game play. One question is whether these effects persist. Would the same players be aggressive an hour later, a week later or five years later? The typical stimulus time for a game experiment is 10 to 30 minutes, often interrupted by questions. Two studies of the same game offer a test of this hypothesis. Both Ballard & Weist (1995) and Hoffman (1995) ran studies of the aggression effects of *Mortal Kombat* on the same type of subjects. Ballard and Weist tested for 10 minutes and concluded that there was an aggression effect. Hoffinan kept testing for 75 minutes. She found that the effect had dissipated almost entirely by the end of the play session. This comparison lends strength to the explanation that the effects are either short-term

only, or are simply excitation and not true aggression, which is a possibility raised by Sherry in his meta analysis (2001).

15. This drop off in duration in the Sherry analysis was a point of contention in my deposition in the Illinois case and during the hearing. The State implied that Sherry was wrong. This left me wondering if Sherry had used the wrong data and if I was incorrect by extension. So, to be safe, I contacted Professor Sherry and we walked through the Hoffman study page by page over two hours to double check Sherry's numbers. When we went through it more carefully, Professor Sherry found that he had actually included too many of the data points and had overestimated the effects based on the correct criteria. Thus, the correct number should have been .04 rather than .05. This would be an even smaller effect than he had reported in his article, making the time-dissipation argument actually stronger than before. At the same time, we noticed something incorrect in Anderson's interpretation. In the trial transcript from the Illinois case, Professor Anderson stated that Sherry had used the wrong data because he had included people watching games and not only playing them. That is incorrect, and we checked Professor Sherry's notes carefully to be sure. Professor Sherry used only data from those who played. Moreover, Professor Anderson stated at the hearing that the actual numbers should have been .28 or .36, and not .05. When Professor Sherry and I reviewed the study carefully, we found that there were several series of

measures used, most of which yielded 0 or tiny scores. However, there were two scores of .27 and .36 on two of the seven "vignette" measures. But in order to use those numbers, the meta-analyst would have had to not only ignore the other series of standard relevant measures (the Buss Durkee scale) that he cited at the hearing (most of which were near zero), but would have had to ignore the other five vignettes as well, all of which were 0. In other words, to use those higher numbers and argue for large effects, he would have had to cherry pick only the high numbers and ignore the others altogether.

16. Incorrect numbers aside, this idea of duration is an important one. It is where I find myself most confused by Anderson's strong claims about long-term causal effects. Since there are no truly long-term studies of game-based aggression, how can we take the short-term findings and make claims about what will happen in X weeks, months or years? What data are these claims based on? In Anderson's words "longitudinal research is badly needed" (Anderson & Bushman, 2001) (p. 359). Yet this begs the question: If the findings to date are so conclusive, why would we need long-term research?

17. The reason, as all of us know, is that if you want to make long-term claims, you need long-term studies. And unlike the television literature, these do not exist for games. A longitudinal design follows a group of people over a longer time period than a lab experiment will allow. The reason to do this is to provide a more realistic real-world exposure and

to allow for long-term conclusions. If we truly want to know effects over a day, week, month or several years, then that is how long we must observe and measure. 30 minute studies cannot suffice to make lifespan-long claims. And given the two *Mortal Kombat* studies mentioned above, we have strong reasons to be suspicious of long-term claims of more than 30 minutes, let alone many years.

Longitudinal Designs

18. The television research has the benefit of having a well-known, truly longitudinal design, albeit one without a control condition (Huesmann, 1999). This research, although hotly disputed by some for a lack of rigor and unwarranted claims (Moeller, 2005), is generally accepted by most communication and psychology researchers. The central claims are that exposure to large amounts of televised violence causes short-term and probably long-term increases in aggressive behaviors, thoughts and cognitions. The problem is that we do not have this kind of data for video game play. According to one well-respected game effects researcher in his meta analysis, longitudinal designs are "conspicuously absent" (Sherry, 2001) (p. 426). The longest published study to date is my own (Williams & Skoric, 2005), which followed gainers [sic] playing a violent game for one month. The average exposure time was 56 hours, which offers a much more powerful possible causal model than the typical 10 to 30 minute studies which preceded it (Hoffman's

study, i.e. the one where the effects nearly disappeared, was the previous longest exposure time at 75 minutes). The study also had the benefit of being conducted in people's homes (i.e., not in a lab) and, unlike most long-term research, maintained a control group for the duration of the study. There were no aggression effects in the data.

19. I will make a few observations about this study as it compares to prior studies. Given that no effects materialized after 56 hours of play, it lends credibility to the hypothesis that the short-term studies are either flawed in their settings or are subject to the excitement explanation. Nevertheless, my single study does *not* disprove that games cause violence. As Anderson has noted, one month isn't a very long design, at least compared to the Huesmann work, although my own has the important advantage of a control group. Then again, I don't make claims for what will happen after my study's time window, whereas many researchers do this regularly. I would also add that my own study, like the others before it, was a study of only one game. I will not make the case that studying one game proves what all games do. Games are simply more varied and complex than prior broadcast media and the same rules of generalizability do not apply. The research community lacks even a basic typology of content and play variables to aid such a claim. It is an error to collapse multiple games into one variable and expect a coherent result. Nevertheless, reporters have pressed me to state that my findings prove that "games" don't cause violence,

but that strength of claim is not warranted by my data. One game and one month is not sufficient to make that claim. But if, as Anderson states, one month is not long enough to make longitudinal claims, how can 10 or 30 minutes be?

20. Unbeknownst to most effects researchers, there actually *are* a handful of long-term game effects papers out there. Indeed, there have been three very in-depth studies of arcades and youth habits, and all of them concluded that games were not having negative impacts on children's aggression (Garer, 1991; Meadows, 1985; Ofstein, 1991). Actually, the studies all concluded that the social milieu of the arcade provided strong peer-based sanctions *against* physical violence and aggressive behaviors. Why? One of the basic appeals of video games for youth is that they are meritocratic: they are a safe play space independent of social status, physical strength, etc. (Herz, 1997). Indeed, many were havens from physical violence. This is an example of why social context, typically missing in lab experiments, is so important. Additionally, there are two now-dated studies of games, families and homes (Mitchell, 1985; Murphy, 1984), and these also concluded that games did not lead to aggression. In all five studies, the researchers took pains to note that the likelihood of aggressive behavior was inevitably related to parenting variables rather than the amount of game play. Murphy and Mitchell also noted that game play typically lead to more active family time because it tended to cut

into television viewing, a finding I have also found in my own statistically based work (Williams, 2004).

21. As part of the Illinois case, I was given Anderson et al's unpublished longitudinal study to review. I believe it may represent something new in the research area. He and his colleagues have tested 3ra [sic], 4th and 5th graders to see how much playing violent video games impacts aggression over the course of a two- to six-month period. And the findings as presented appear to support the hypotheses that more violent game play at time one leads to more aggressive behavior at time two. There are a few potential problems with the design, but we must keep in mind that this is an unpublished, nonpeer-reviewed paper and isn't ready for publication yet. By the same token, it is not ready to inform policy at this point. As it stands, I do not believe that it supports the findings at issue in this case. One issue is that the measure of violent media at time one seems to have a lot of noise because it was collected by asking non-experts (the students themselves) to evaluate the level of violence in their favorite games. Students might systematically under- or overestimate violent content. If I were a reviewer, I would question that measure because of how it was collected and would not be surprised by its low reliability score of .68. My guess is that there is a fair amount of statistical noise in that measure in addition to the possible systematic error from the self-reports. Generally, scores over .80 are deemed acceptable, although scores as low as .70 are sometimes allowed with a compelling reason. Variables in media

research with scores under .70 are typically dropped from analysis as unreliable (Frey, Botan, & Kreps, 2000) (p. 112-115). Given that it is the study's key variable, this is cause for concern in the manuscript's current state. In my one-month study, I tested only one game precisely because I was concerned that the noise and variety among a diverse group of complex and different games would prevent rigorous testing. This approach gave me less ability to talk about the effect of "games," but far more confidence in knowing exactly what game had been played, precisely what was in it, and how the players thought about that content (by interviewing them).

22. The large and flexible time window for data collection (the time window varies from two to six months) is also a potential problem in terms of data collection and control. This time window allows for the intrusion of life events and historical events, i.e. the same people might respond differently at different times of the year based on their personal lives, seasonal changes in schools and households, and impactful events like 9/11. 9/11 unfortunately occurred within the study's timeframe. This is notable because many of the measures involved perceptions of how threatened the adolescent felt by daily events, which could conceivably have been impacted by the terrorist attack. This open time window issue is a particularly important one with young children, who experience so much developmental change. If I were a reviewer, I would like to hear how that traumatic event might impact findings about threats other than simply

adding in a variable for it. Another item that would normally be addressed is the 70% consent rate. As Huesmann has noted, it is crucial to show that those left out are no different than those left in so that the findings are representative. (I'd further want to know that if anyone dropped out, they weren't different either, but perhaps these authors had a 100% retention rate. This isn't clear.)

23. Also, the test is of 3rd, 4th and 5th graders, yet we are not told how the effects might vary between grades (i.e. for age). The accepted theory in television effects work suggests that younger minds are more vulnerable, so I'd expect to see the 3rd graders more affected than the 5th graders. So, are the effects uniform across these three grades? Is there a drop off in effects between grades? Why wasn't age included in the crucial destructive tests in Table 13? Given that the law in dispute is about 16-year-olds and younger, it would be very important to know if the level of risk starts to tail off at say, age 8 or age 13, or if it defies our theories and remains constant. I'm left thinking that there might be an effect in there, but I'm not sure how large or for whom or with what trend.

24. However, the main problem I have with the study is that the authors seem eager to present their data in a way to prove that there is a large effect rather than laying out a dispassionate empirical case for readers. Table 13 shows how the various outside explainers make the actual impact much smaller, i.e. they partial out things that help explain the effect

like parental involvement and gender (yet they include total screen time but not a measure of violent TV content, which would be a much better control variable). Table 13 is the key to the whole study and it is an important contribution to the literature that I will accept if the authors can address the criticisms I have raised – but even so, it's just not clear how big the results are. The controlled results make for a very small final set of outcomes from the noisy game violence variable: 2%, 1% and 3.6% of the overall change that occurred for the three major variables (hostile attribution, verbal aggression and physical aggression respectively) can be explained by playing violent games. This is *not* the same thing as saying that aggression increased by those percentages. It is saying that 2%, 1% and 3.6% of the overall changes can be attributed to violent game play. We are not given the actual totals, so we are left asking: *2% of what? 100* more fights on average? 2 fights? It is impossible to know how big this impact is without means and standard deviations for the overall changes. If there was a small change and this small percentage of it can be explained by violent play, the true impact maybe negligible.

25. Is this a case of something that is statistically significant but substantively negligible? In their conclusions (p. 114), they present the larger, uncontrolled number of 4.8% of variance explained, rather than the smaller, controlled, and more accurate number. To the untrained observer this might imply that there is a 4.8% increase in aggression,

which is not the case. The authors never present the actual amount of aggression with means and standard deviations of the measures. This is a major omission. Presenting means and deviations is a standard practice, yet the authors give only correlations. Correlations are helpful, but they only describe relationship strength, not absolute size, which is what we are really interested in. A regression model with standardized (i.e. comparable) coefficients would be very helpful in answering these questions. Or a hierarchical regression would do the same and allow for both destructive tests and comparisons. They could also have presented the destructive models in Table 13 in different orders to see the comparative levels of effect for each remaining factor. For instance, the destructive analysis in Table 13 and the correlations presented in Table 14 suggest that parental involvement might be a large factor in the effects (this is what the communications research consistently shows and so is reasonable to consider). Yet this possible moderation is not presented in the path analyses in Figures 10 and 11. Instead, the hostile attribution path is modeled, likely because the GAM predicts it.

26. Yet my recent research suggests that this kind of broad "mean world" effect in fact does not work that way in long-term video game exposure (Williams, 2006). Anderson's model assumes that scary game content will lead students to think that people in the real world are out to get them, but my findings show that this is not how video games work.

It is far more likely that this sort of cultivation "mean world" effect is specific to particular in-game incidents, and would not spread to unrelated "mean world" events. For example, if a student were to play a game in which people shot guns a lot, they will be more likely to think that more people in the real world use guns than actually do. Yet it does not mean that a student playing this game will now become suspicious of all others, or that they would spread that suspicion to people in other unrelated contexts like a school hallway. The effect I found is context-specific and did not spread when it easily could have. Again, this sort of spreading mean-world cultivation approach is discredited in media research circles because the spreading mechanism does not hold up under the noise of diverse media (Potter, 1994; Potter & Chang, 1990; Shrum, 2001, 2002). "TV" is not a good enough variable because of the variety in it, and it's not surprising that "violent games" would be a problem as well.

27. In the end, I am left thinking that they might establish causal direction and violent game effects in their sample – which could be a new and important finding – but I am not sure if those effects are moderate or miniscule and how they truly compare with other factors, including other media. In the mean time, their conclusions (e.g. effects are "sizeable," p. 104) are too strong and in some cases do not match the data they themselves present (e.g. they report a "negative effect of video game violence on prosocial behavior," p. 108, despite the data in Table

13 showing that this effect disappears entirely with controls). Perhaps sensing this, they defend the notion that any effect, no matter how small, is crucial because there are so many possible things that affect our behavior. I find this logic unpersuasive considering how much time is devoted to comparing theorized game effects to well-known and accepted risk factors such as smoking for cancer, etc. In the end, there is still a need to do more research to answer the key questions. Even if this study eventually works out its problems and does establish effects, it will not be in the same state as the television literature, which includes measures of actual crime years down the road.

Cross-sectional Studies

28. There have been a number of cross-sectional studies on games and aggression, games and grades, truancy, etc. Many of these have been offered as proof of game effects, yet this is inappropriate. As every statistics student learns, correlation is not the same as causation. Showing that two things are related is very different than proving that one thing causes another. For example, the number of churches and liquor stores are nearly always correlated, but it would be incorrect to then state that going to church leads to drinking or vice-versa. Such thinking obfuscates the possibility that there is some actual third variable that drives both (population). Likewise, correlational video game studies have been used to "prove" the harmful effects of games since the early

1980s by showing relationships between games and poor grades, aggressive behavior, truancy, etc. Yet it is equally likely that students with poor grades and aggressive behavior are more likely to play (likely due to a lack of parental involvement and oversight) and that there is no causal relationship.

29. These studies are certainly important for theory building and for establishing the need for future research. They are also useful for ruling out some alternative explanations. But since correlations are only one of the three conditions needed for causal proof, these studies provide necessary, but not sufficient evidence of a causal relationship. Thus, a cross-sectional survey can be used as an inexpensive tool to pave the way for a more involved and expensive experiment or longitudinal design. But they simply do not prove cause and should not take up space in any discussion of causal effects.

Meta-analyses

30. Meta-analyses are tests which use previous studies as individual data points to look at big-picture outcomes. They are important and useful tools for making sense of a large body of research, but they must be based on solid studies. Given the criticisms laid out in this document, it is my opinion that the source studies used in game meta-analyses are not safe to use. Anderson has attempted to separate the wheat from the chaff in the literature, which is a welcome step. However, he has also possibly used

high numbers from one study and ignored low ones, if his testimony about the Hoffman dissertation was correct. Using a number like .38 rather than a .06 is obviously going to make effects look larger than they are. Unlike Sherry's meta-analysis, Andersons' several versions have not shown the actual numbers used, so his work cannot be reviewed.

31. Dill and Dill sought to engage in a meta-analysis but chose a narrative review instead "because of the dearth of experimental findings" (Dill & Dill, 1998) (p. 407). Their narrative review of the literature concluded that there was reason for concern, while another literature review in the same journal stated that "the question of whether video games promote aggressiveness cannot be answered at present because the available literature is relatively sparse and conflicting, and there are many types of video games which probably have different effects" (Griffiths, 1999) (p. 211). Lastly, Sherry's more recent meta-analysis found small overall effects, but as noted above, found a negative relationship between the amount of play time and aggression, i.e. across the various studies to date, more playing time has lead to *less* aggression (Sherry, 2001). Taken together, the effects picture is anything but clear right now.

Theoretical Models

32. Lastly, and on the same task of examining the plausible alternative hypotheses, I would like to review the GAM model that guides the bulk of the

psychologists' experimentation. The model was developed for testing the effects of watching violent television, but it is not clear that it can be used on an entirely different medium without significant modification. The two basic problems are the use of behavioral modeling and the level of active cognition that the model assumes.

33. By behavioral modeling, I am referring to the foundational work by Bandura (1994), in which children watching a violent act repeat that act after exposure, i.e. the children observe the behavior and then copy it. For anyone with a child, this kind of mimicry is common sense, and it is not a large leap to worry that a child watching TV will imitate an undesired behavior. Children "model" behaviors and then consider trying them. The problem with exporting this approach to video games is that it is not clear exactly what is being "modeled." With television, the experience is generally assumed to be passive. The viewer on the couch is observing the characters on the screen and is not thinking very actively. They have the potential to model the televised characters. Yet in video games it is far more complex; there are several possible objects that might be modeled, rather than assuming passive observation. First, the player's character on the screen might be mimicked, even though *it is not clear that this is truly mimicry if the player is the one directing the action*. Secondly, the computer-directed characters might be the things observed and modeled. These are sometimes aggressive and sometimes not. Third, the other player-controlled characters might be being modeled. These

are sometimes working against the player aggressively and sometimes are helping the player. Fourth, the other people present live in the room might be modeled for behaviors. This might include other players, other viewers or parents. Any one of these figures might be a source of modeled behavior, and they might cause effects in different directions. For example, seeing a fellow player on a couch become aggressive might help the first player become even more aggressive than they would as compared to TV. Or, seeing a parent disapprove of some action might make the player less likely to internalize the behavior or even to classify it as an unacceptable real-life choice. There are a wide range of possibilities here and some might lead to better or worse outcomes. The point is that the work to date either wholly ignores these possible sources of modeling by having players play games by themselves (the problem noted above by Sherry), or simply collapses all of these potentially different effects into one source. In social science, we say that the model is not nuanced enough to account for the actual variables that exist in real-life settings. I would note here that this is no defense of gaming; it could equally mean that effects are not present or are even worse than Anderson thinks. The problem is that we simply don't know and it is inappropriate to make strong claims in the face of this potential issue.

34. Secondly, there is an issue with the level of active cognitions that occur during game play. Our generally accepted models of cognition include one route for very active thinking ("central processing") and another for relatively inattentive thinking

("peripheral processing") (Chaiken, Liberman, & Eagly, 1989; Petty & Cacioppo, 1981). The television research has always assumed a fairly inactive viewer, who is thought to use this more inattentive peripheral mode of thinking. Yet the assumption has shifted with video games to move the viewer into the more active, centrally processing group. It is not clear that this is the case, and it is even less clear when a game player might be more active or more passive. Mood management theory (Zillmann, 1988) suggests that this level of attention might vary between gamers, games or even play session. One hypothesis I have been considering is the extent to which a truly active cognitive state might either lead to especially stronger or weaker aggression effects. Consider the youth playing a violent shooter game. Is that youth actively considering the violent content? If so, is he/she going to be thinking "yes, this is exactly how I want to behave" or is he/she going to be thinking "this is a game and this is not how I behave when the game is turned off." This latter possibility is the one found by Holm Sorensen and Jessen (2000), who, when studying very young children, found that they were highly aware of the non-real nature of the games and made separate rule sets for behaviors inside and out of playmuch like children do in nearly every other form of play. Yet this kind of filtering is not included in the current approaches. Similarly, if the player is in a more passive mode, are they more or less likely to acquire these negative scripts? This is a hypothesis that has not been incorporated into the research and might make a tremendous difference. Given this possibility, I do not accept the simple statement that game players are more likely to become violent because they are playing the game rather than watching it. I find the medium more complicated than that and would need to see this hypothesis systematically tested before accepting such a claim. I find it worrisome that some researchers accept the claim without proof.

On Consensus

35. I would like to end by referring to the statements made by the APA and other groups (California Psychiatric Association, NAACP, Girl Scouts, etc.). I read through their support letters and it is clear that they are all drawing their conclusions and talking points from the same body of research that Anderson endorses and that I have taken issue with here. They repeat the correlational/causal errors, and use the in-press study of 3d-5th graders and the untested concept of interactivity as a strengthener of effects. They conflate the television research with game research, and they are clearly unaware of the arousal confound in the game research. These are all good organizations (many of which I personally support), clearly trying to do the right thing, but they are uninformed and should not be involved in the policy process until they are aware of the scientific disputes. Meanwhile, other academic organizations take wholly different stands. I attended the Digital Games Research Association (DiGRA) conference last year in Vancouver and the violence issue was, as always, at

hand. The difference is that that association, comprised of people who do *only* games-related research, was virulently opposed to the APA statement. I heard this very clearly in the general assembly and see this consistently on the research listserv discussions. Professor Anderson has stated in several briefs that the evidence is now conclusive and that there is no longer any serious debate about these issues by "true experts." With due respect, that is both dismissive and inaccurate. It ignores entire branches of the academy.

36. This brings me to a note about consensus. If the APA says something, that doesn't make it true. If DiGRA says something (e.g. games never cause effects), it doesn't make that true either. The fact is that we simply do not have the data to support any of the several strong claims I regularly hear about this issue. This is not a case of an ideologue denying the existence of global warming. It is a case of a social scientist being appropriately conservative in the face of scarce data.

37. A more appropriate attitude can be found in communication research circles. I am a member of the International Communication Association, the premier international body in communications research. Many communications researchers are trained as social psychologists, but we all specialized in understanding the use, content and reception of media. Unlike some disciplines, this is not a facet of our research. It is our only research focus. Communication researchers are well-positioned to understand the content and

context, use and effects of media simply because it *is* our entire field. This community has recently formed a games research interest group and is being lead by our field's senior scholars, including people convinced of the link between television violence and aggression. A recent event serves to show what kind of consensus there is about game effects: there was a proposal for a debate on the video game aggression issue for this year's conference in June. I was invited to take the "games do not cause aggression" approach, but declined because – even including my own long-term study – I think that the evidence does not support any strong position yet, including any kind of "defense." Yet the notable outcome was that no one (out of 50 social scientists doing games-related work in communication) has volunteered to take the "games cause aggression" position. Everyone who expressed an interest in the session wanted to take some more nuanced approach because they did not feel that the data warrants strong claims on either side.

38. This leads me to ask, Why are some people so *certain* then? The answer, I think, lies in how we as a society react to new technologies. The history of communication shows quite clearly that the advent of every major medium has been greeted with utopian dreams of democracy, but also with tales and visions of woe and social disorder (Czitrom, 1982; Neuman, 1991). The reactions themselves even follow a set pattern in every case (Wartella & Reeves, 1985). This pattern has been consistent and has maintained itself dating from the telegraph (Standage, 1999), and

persisting through nickelodeons (Gabler, 1999), the telephone (Fischer, 1992), newspapers, (Ray, 1999), movies (Lowery & DeFluer, 1995), radio (Douglas, 1999), television (Schiffer, 1991), and now with both video games and the Internet. As generations age, we tend to fear the things that are new and not understood. Typically, this lets us avoid thinking about thornier issues that are personally uncomfortable to us (Glassner, 1999). In the case of video games, much of the angst is related to how well we treat our children, and we are looking for explanations or outlets for our concerns. In the case of electronic media, the real source of tension comes from the dramatic shift in the role of women over the past three decades. As more women have left the home to pursue jobs and income, our society is grappling with a large shift toward child care rather than parental care. The unease is palpable. We worry that electronic media are babysitters doing our jobs for us and we don't feel good about it. Thus, there is a heady dose of collective guilt over how we treat children and we, and our news media (Williams, 2003), are looking to external sources of blame rather than to look at ourselves (Williams, 2006, in press). Thus, video games, the Internet, television and music have born extra scrutiny over the past thirty years. In this sense, video games are simply the latest in a long series of contested media, an old wine in a new bottle fulfilling the same social function.

39. Lastly, I have reviewed the state's legislative bibliography of academic works and I'm struck

by the fact that they've excluded several major articles and points of view. It appears that they have only included the papers that they might interpret to support the law. That is politics, not science. In science we look specifically for the points of disagreement because we want to learn more, even if it upends our starting position. If 10 papers say black and 10 papers say white, there's usually a good reason why, and finding it is how we advance understanding. But if we ignore the papers that don't support our presumptions, we are only working with half of the facts. This is a dumb way to conduct science and a dangerous way to set policy, especially if it's a policy that purports to be based on a comprehensive review of the literature.

40. I have read the articles on both sides of the issue and considered them carefully. My conclusion, which I hope I have laid out here, is that there are many unanswered questions and that we should know the answers with certainty and precision before we make any strong claims about what games do or don't do.

Conclusion

41. The findings and statements above are, in my opinion, based on a reasonable degree of scientific certainty. Therefore, I disagree with the claim that "minors who play violent video games are more likely to exhibit violent, asocial, or aggressive behavior and/or experience feelings of aggression." I do not

think the claim is well supported by existing theory or data.

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I declare under the penalty of perjury that the foregoing is true and correct.

Dated this 29 day of March,

/s/ Dmitri Williams
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VIDEO SOFTWARE DEALERS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION

UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, in	CASE NO. C 05-4188 RMW (RS) DECLARATION OF HOWARD C. NUSBAUM

his official capacity as
Governor of the State of
California; BILL LOCKYER,
in his official capacity as
Attorney General of the
State of California;
GEORGE KENNEDY, in
his official capacity as
Santa Clara County
District Attorney, RICHARD
DOYLE, in his official
capacity as City Attorney
for the City of San Jose,
and ANN MILLER RAVEL,
in her official capacity as
County Counsel for the
County of Santa Clara,

Defendants.

I, Howard C. Nusbaum, hereby declare as follows:

Pursuant to 28 U.S.C. § 1746, I, Howard C. Nusbaum under penalty of perjury state as follows:

1. I received my B.A. with a major in Psychology from Brandeis University in Waltham, Massachusetts, in 1976, and my Ph.D. in cognitive psychology from the State University of New York at Buffalo in 1981. I was an NIH Postdoctoral Fellow in Speech, Hearing, and Sensory Communication in the Department of Psychology from 1981 to 1984 and an Assistant Research Scientist in the Speech Research Laboratory in the Department of Psychology at Indiana University from 1984 until 1986.

2. I joined the faculty in the Department of Psychology at the University of Chicago in 1986 as an Assistant Professor in the Committee on Cognition and Communication. In 1989, I was promoted to Associate Professor with tenure in the Department of Psychology and became a member of the Committee on Biopsychology. I was promoted to Full Professor in the Department of Psychology in 2001.

3. I became the Chair of the Department of Psychology in 1997 and I continue to serve in that capacity in my third term. I am currently on the editorial board of the journal *Brain and Language*, a journal that focuses on understanding brain mechanisms of language use, and I serve as a reviewer for a wide range of journals including but not limited to the *Journal of Cognitive Neuroscience, Cerebral Cortex, Cognitive, Affective and Behavioral Neuroscience, Psychological Science,* and *NeuroImage*. I am a member of the Committee on Computational Neuroscience at the University of Chicago, which grants Ph.D.s in neuroscience, and the Center for Integrative Neuroscience and Neuroengineering. I also serve on the Advisory Board for the Brain Research Imaging Center at the University of Chicago, and I am Co-Director of the University of Chicago Center for Cognitive and Social Neuroscience.

4. My research is in the area of cognitive psychology and cognitive and social neuroscience. This research examines the psychological and neural mechanisms that are important in learning, categorization, and attention and working memory (characterized

sometimes as "executive function"). This work has included a study of the role of sleep in learning perceptual skills published in *Nature* (Fenn, Nusbaum & Margoliash, 2003), the role of attention in perceptual learning (e.g., Francis & Nusbaum, 2002), the role of working memory in communication (e.g., Goldin-Meadow, Nusbaum, Kelly, & Wagner, 2001), as well as experiments using functional Magnetic Resonance Imaging (fMRJ) on the role of attention in understanding different speakers (Wong, Nusbaum, & Small, 2004), and the role of the motor system in face-to-face communication (Skipper, Nusbaum, & Small, 2005).

5. I started carrying out fMRI research in 1998 and have published three papers concerning the use of fMRI in understanding behavior and psychology. Although there has been a dramatic increase in the amount of fMRI research published in recent years, interpreting the results of fMRI studies can be extremely difficult. Measures of neural activity, such as fMRI provides, are only correlations with behavior and cannot be taken on face value as evidence of causality unless alternative explanations are ruled out. Moreover, behavior and brain activity do not relate in a simple, direct, and unique way. One of my papers, published in the *Proceedings of the National Academy of Science* (Cacioppo & Nusbaum, 2003) addressed problems in interpreting fMRI data regarding the brain mechanisms involved in making risky decisions under uncertainty. A second paper (Small & Nusbaum, 2004) addressed the problems of using

fMRI to understand complex behavior that is sensitive to context. The third paper (Cacioppo, Berntson, Lorig, Norris, Rickett, & Nusbaum, 2003) provided guidance to social psychologists interested in using neurophysiological measures such as fMRI to understand complex social and emotional behavior. A copy of my CV is attached as Ex. A.

Purpose

6. I have been asked by counsel for Plaintiffs in this case to evaluate and comment on specific published research reports that have been used to support claims regarding the impact of violent video games on brain function. These reports represent the known research published on neurophysiological responses to exposure to violent video games and thus provide the putative basis for assertions in California State bill AB 1179.

7. I have reviewed specific parts of California State bill AB 1179, which regulates the sale of "violent" video games. I have been asked to give my opinion on the Legislature's "finding" in SECTION 1 that "(a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior. (b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video

games. (c) The state has a compelling interest in preventing violent, aggressive, and antisocial behavior, and in preventing psychological or neurological harm to minors who play violent video games."

Background on Effects of Video Game Exposure

8. To date, published research on the effects of playing violent video games starts with the specific assumption that playing video games with violent content leads to aggressive behavior, thoughts, and feelings. This assumption relies to a great extent on research by Dr. Anderson and colleagues (Anderson & Bushman, 2001; Anderson & Dill, 2000) examining aggression and the effects of media and video game exposure. Research on neural effects of violent video game playing generally assumes a causal relationship between exposure to violent media and aggressive behavior, thoughts, and feelings, and then sets out to show the brain activation that underlies this causal relationship. However, this underlying research has critical problems that mitigate any possible strong conclusions regarding the relationship between playing video games with violent content and aggressive behavior, thoughts and feelings, as well as any conclusions about the causal role of changes in brain activity in this relationship.

Video Game Exposure and Neurophysiology

Background Assumptions About Brain Functioning.

9. To my knowledge, the current research on the effects of violent video game exposure on neurophysiology consists of three published studies (Bartholow et al., 2006; Mathews et al., 2005; Weber et al., 2006) and two unpublished conference presentations (Kalnin et al., 2005; Wang et al., 2002). Three of these (Mathews et al., 2005; Kalnin et., 2005; Wang et al., 2002) reflect work carried out in collaboration as a research team with Dr. Kronenberger (see Kronenberger et al., 2005a, also). There are some common assumptions among these studies that are questionable at best and simply incorrect at worst.

10. Kronenberger et al., (2005a) and Weber et al. (2006) take as a starting assumption (and Mathews et al., 2005 refer to) a neural model of aggression and violent behavior proposed by Davidson et al. (2002). In simple terms, this model assumes that there are two broad sets of brain regions that are important in violent and aggressive behavior: (1) the limbic system (including the amygdala), and (2) a set of prefrontal and frontal cortical systems associated with a variety of functions including attention, motor behavior, and executive function. This model, which is an untested theory, proposes that increased sensitivity in the amygdala (the first region) and decreased responsiveness in the orbitofrontal and vemtromedial [sic] prefrontal regions (the second set of regions) may lead

to aggressive behavior. It is important to note that this model is similar in terms of its proposed patterns of brain activity to another model proposed by Davidson et al. (2002) to explain depression *without* aggressive symptoms.

11. A common assumption among many of these studies is that reductions in brain activity (e.g., as seen in Mathews, et al., (2005) (fMRI study), or Bartholow et al., (2006) (brain electrical activity)) reflects a kind of neural deficit. This is simply wrong. Reductions in brain activity can occur for a number of other reasons, including expertise in a skill (Poldrack et al., 2005).

12. Another common assumption is that there is a causal relationship between brain activity and behavior such that showing a change in brain activity in any particular study may predict future aggressive behavior (e.g., Bartholow et al., 2006; Mathews et al., 2005; Weber et al., 2006). In fact, brain activity is only correlated with behavior. Any particular measure may reflect other kinds of thoughts or unexamined physiological changes.

13. There is an assumption made by Mathews et al. (2005) and Weber et al. (2006) that gross psychological functions can be traced to single brain areas. For example, the assertion of an effect of video game violence on executive cognitive function (Kronenberger et al., 2005a) leads to a prediction that there should be effects of video game violence on frontal cortex (Mathews et al., 2005; Weber et al., 2006).

Based on this kind of assumption, changes in neural activity within a brain region are assumed to predict specifically changes in the psychological function. Thus, under this theory, if dorsolateral prefrontal cortex ("DLPFC") were assumed to be the area responsible for self-regulation, a change in processing within that area should reflect a change in the psychological process of self-regulation. That claim is problematic. For example, one classic example of the problems underlying this kind of assumption comes from fMRI research arguing that our psychological expertise in face perception (as demonstrated in various behavioral studies, e.g., Yin, 1969) is mediated by a single brain region called the "fusiform face area" (Kanwisher, McDermott, & Chun, 1997). The claim of this research is that this area of the brain responds uniquely to information about faces and provides no information about other visual patterns (claim one) and that this area is the part of the brain responsible for perception of faces and no other area of the brain has the necessary information (claim two). But in a more sophisticated analysis, researchers using fMRI demonstrated (Haxby, Gonbini, Furey, Ishai, Schouten, & Pietini, 2001) that the fusiform area of the brain conveys sufficient information to distinguish among objects besides faces, such as houses, cats, and chairs (contrary to claim one) and that many other parts of the brain outside the fusiform area have sufficient information to classify faces (contrary to claim two). Any particular part of the brain may be and typically is (as demonstrated by scientific research) associated with a wide range of psychological functions.

14. Dr. Kronenberger and his colleagues have argued that exposure to video games with violent content leads to aggressive thoughts and behavior because video game exposure has an adverse impact on neural mechanisms related to self-control and executive functioning (e.g., Kronenberger et al., 2005a; Mathews et al., 2005). There is no evidence to support this argument. The research presented by Dr. Kronenberger' research team addressing "executive functioning" cannot be used to this conclusion for several reasons.

15. First, there is no clear evidence in Kronenberger et al. (2005a), Kalnin et al. (2005), or Mathews et al. (2005)[1] that exposure to violent media has a reliable adverse effect on self-control or, for that matter, performance on the Stroop task (a cognitive test used by Kronenberger and his co-authors).

16. Second, there is a fundamental flaw in the logic of all the brain imaging studies that are discussed by Dr. Kronenberger's group (including Kalnin et al., 2005, Mathews et al., 2005; Wang et al., 2002). The logic of these studies assumes that a particular pattern of brain activity is a unique and specific predictor of violent or aggressive behavior. While a pattern of brain activity might be associated with a

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[1] My citations to Wang et al. (2002, Kronenberger et al (2002a), Kronenberger et al. (2005), Kalnin et al. (2005), and Mathews et al. (2005) refer to a series of studies conducted by Dr. Williams Kronenberger and his colleagues.

pattern of aggressive behavior, that same pattern might be associated with many other patterns of behavior. As a result, a pattern of brain activity does not cause or uniquely predict a single pattern of behavior.

17. Third, Kronenberger and his colleagues looked at the effects of violent media generally – television and video games – and thus their research does not support any conclusions about the effects of video games in particular. Kronenberger et al. (2005b) nevertheless suggests that his research on the effects of violent media generally can be applied to ascertain the effect of exposure to video games specifically. The rationale for this appears to be a correlation they have reported that shows that exposure to violence in video games is correlated with exposure to violence in other media. The implication is that because exposure to one form of entertainment is associated with exposure to both, total exposure can be treated as a proxy for the specific causal effects of exposure to video games. However, to the extent that there is concern specifically with the effect of video game exposure, this assumption represents a serious confound that makes valid scientific inferences impossible. Since there is no research that establishes that video game exposure has exactly the same effects as exposure to violence in television or movies, they cannot be treated as equivalent in their effects, even if some children would tend to be exposed to all such media. Measures such as the Media Exposure Measure (e.g., as used in Kronenberger et al., 2005b)

aggregate both television and video game exposure. As a result, any research based on such measures cannot provide evidence regarding the specific effect of video game exposure.

Interpretations of fMRI Activity and Other Measurements

18. Mathews et al. (2005) state that activation of certain regions in the frontal lobes occurs during emotional regulation, attention, and inhibitory control. However, emotional regulation, attention, and inhibitory control are complex functions distributed over a broad set of brain areas that involve aspects of the frontal lobes as well as other brain regions. For example, while the DLPFC is active during tasks that involve visual attention (e.g., looking for your car in the parking lot), it is not specifically or uniquely implicated in emotional control or self-regulation – contrary to statements about the DLPFC made in Mathews et al., 2005 (*see* Davidson et al., 2000). The frontal lobes have a lot of neurons and different cortical areas (e.g., different parts such as sulci and gyri) and represent a very broad range of functions that also include motor control and planning, and encoding of information into memory (e.g., for remembering what you had for breakfast this morning). Also, many of the functions that are specifically attributed to only the frontal lobes, e.g., attention, involve a broad network of brain areas outside the frontal lobes (e.g., superior parietal cortex and the thalamus). Although different parts of the frontal

lobes may be involved in different psychological functions, few, if any, carry out only a single function and few, if any represent the only brain areas involved in that function. Mathews et al. (2005) and Weber et al., (2006), argue that reduced activation of certain brain areas may be associated with a wide range of problems, including difficulties in attention, self-monitoring, and impulse control, among others. This is presented so that it implies a causal relationship (explicitly stated by Weber et al.), between the reduced activity in these brain areas and these behavioral or psychological problems, but that causal relationship cannot be inferred (e.g., see Uttal, 2001), for several reasons.

19. First, reduced activity in specific brain regions is not a clear, unique and specific "marker" of psychological or behavioral problems. Activity in "these regions" can decrease as a result of expertise in attention (e.g., Poldrack, Sabb, Foerde, Tom, Asarnow, Bookheimer, & Knowlton, 2005) as well as deficits in attention.

20. Second, reduced activity in some regions of the brain may be accompanied by increased activity in other regions, reflecting a change in the distribution of brain activity, but not necessarily a deficit of any kind. For example, in a comparison of younger and older adults who perform comparably on certain tasks involving memory, the younger adults show less activation than the older adults in some of the brain areas (Reuter-Lorenz, 2002) referred to by Wang et al. (2002) and Mathews et al. (2005). The younger adults

are typically thought of as performing better at these tasks, and they show a change in the distribution of brain activity that is similar to that noted by Mathews et al. (2005) as reflecting the effects of violent media exposure. In the case of younger adults, the reduction has nothing to do with violent media, but rather probably shows increased brain *efficiency*. Thus, changes in brain activity level downward or upward cannot be interpreted in a single, simple way. Moreover, changing the relative distribution of brain activity cannot be interpreted in any simple way.

21. Bartholow et al., (2006), Weber et al. (2006), and Dr. Kronenberger's group (Mathews et al., 2005; Kalnin et al., 2005; Wang et al., 2002) suggest that reduced brain activity reflects some kind of neurological deficit. Moreover, based on the Davidson et al. (2002) model, the appearance of reduced neural activity in the frontal lobes coupled with increased activity in the amygdala is treated as a diagnostic pattern of risk for aggression. But Weber et al. (2006) report evidence that rejects this prediction, showing some increases in anterior cingulate activity and decreases in amygdala activity while playing violent video games – exactly the opposite of the results reported by Dr. Kronenberger's research group. Furthermore, just as decreases in activity in a brain region does not have a unique interpretation (e.g., "functional deficit"), increases in brain activity in particular regions do not have a unique interpretation. As noted previously, patterns of fMRI data simply correlate with patterns

of behavior and causality cannot be inferred from this association of measurements.

22. Moreover, I am relatively certain that I could design a task that in normal participants would produce the pattern of brain activity described by Dr. Kronenberger's group without any risk of producing aggressive behavior. For example, presenting listeners with recorded speech with emotional content can increase, over some baseline resting level, the fMRI measured response in the amygdala and temporal lobes. If one group of subjects (a memory group) had to hold certain words in memory from sentence to sentence, and another group (a passive listening group) only had to listen and understand, the memory group would show more prefrontal cortical activity and in the amygdala and temporal lobes and, relatively speaking, the passive listening group would show less activity in prefrontal cortex than the memory group. But this would certainly not cause them to have aggressive thoughts or behaviors.

23. It is also important to note that the amygdala can show patterns of activation in situations without any threat or negative emotion whatsoever. For example, in a listening task with different sounds in both ears, the amygdala is activated (Pollmann et al., 2004), and in making choices under statistical uncertainty the amygdala is activated (Fukui et al., 2005).

24. There is often an impression from research reports that brain images from fMRI are direct

reflections of neural activity. It is therefore tempting to infer that reductions in these measurements demonstrate reductions in brain activity. However, these neurophysiological measures do not actually directly depict neural activity. Real neural activity (as measured by post-synaptic potentials or firing rates some of which are grossly measured by scalp electrodes) increases metabolic activity (which is measured by "positron emission tomography" (PET) neuroimaging). Increased metabolic activity increases the "blood oxygen-level dependent" (BOLD) response in the brain. fMRI measures the BOLD response and therefore does not directly measure brain activity, but instead measures a change in the oxygenation of blood due to the metabolic activity that is a consequence of brain activity. Moreover, sometimes in fMRI studies what appears to be a sign of neural activity is instead simply a major supply of blood or a consequence of poor analysis and what appears to be an electrical neural signal may be a motor artifact.

25. It is also very important to understand that the analysis of fMRI and ERP (event-related brain electrical potentials measured from scalp electrodes) data depends on mathematical models chosen by the researcher. The data that are presented in tables or in colored displays imposed on gray scale images of the brain are highly abstracted statistical models of the fMRI measurements and not the actual brain or BOLD measurements themselves. Thus, the results that are reported in any particular fMRI study depend entirely on the analytic assumptions of the

underlying model chosen by the researcher. The impression that these images from fMRI are direct depictions of neural activity in the brain is incorrect. For example, group data (e.g., as shown in Kalnin et al., 2005; or Mathews et al., 2005) can indicate activity in one area of the brain, even when no single participant actually shows activity in that area (e.g., due to spatial averaging of activity across subjects).

26. In addition to fMRI, Kronenberger has made claims about the effects of violent media using certain "neurocognitive" tests. Neurocognitive tests are behavioral tests used primarily by clinical neuropsychologists and neurologists to make diagnoses of organic behavioral dysfunctions (without making any accurate claims about the specific brain location of the dysfunction). However, these are not scientific research tools closely calibrated to reflect, in their results, an accurate picture of brain activity, as implied by research in Dr. Kronenberger's group (e.g., Kronenberger et al., 2005a). While it is true, in fact tautological, to say that behavior reflects brain activity, and vice versa, it is not true that brain dysfunction such as damage from stroke can be accurately (say to the measurement accuracy of fMRI on the order of millimeters or even centimeters) located in the brain from neurocognitive tests.

Claims About Activation Of Regions Dealing With "Emotion"

27. Some researchers have claimed an ability to measure a person's "emotional" response to violent media through fMRI. These researchers posit that increases in neural activation in the amygdala and other areas signal an increase in emotional responses that could lead to aggression. For example, Murray (2001) reported a study, which is *not* about video game experience or exposure, in which brain activity was measured for children viewing boxing scenes from a *Rocky* movie compared to a movie of animals at play or about children's literacy. This study demonstrated neural activation in areas (such as the amygdala and hippocampus) that are claimed to reflect negative emotional responses such as fear (e.g., Murray, 2001; Weber et al., 2006). Murray suggests that the study shows that violent media causes an increase in "negative" emotions. That conclusion is incorrect for a number of reasons.

28. First, it is important to note the amygdala has been associated with brain functions that have nothing to do with aggression or threat. For example, researchers have observed that similar activation in the amygdala is consistent with judging unpleasant words (Maddock, Garrett, & Buonocore, 2003), negative facial expressions (Phillips, Young, et al., 1997), or body expressions (Hadjikhni & de Gelder, 2003), decisions with uncertainty (Fukui et al., 2005), and when pairs of different sounds are presented to both ears (Pollmann et al., 2004). In all of these instances,

no violence or threat or stress or emotional experience for the viewer is involved. This amygdala activity may reflect understanding of an emotional scene in the *Rocky* movie, just as the activity in the hippocampus (another part of the "frontal lobes" referred to by Drs. Kronenberger and Murray) may reflect recognition of faces or places seen earlier in the movie (Dezel, Habib, et al., 2003), and the posterior cingulate may be active due to remembering things the actors had said previously in the movie (Fujii et al., 2002). The frontal lobe regions referred to by Murray (2001) as being active while watching *Rocky* include areas that are also used to understand another person's physical actions (cf. Farrer & Frith, 2002). Thus, this collection of brain areas may also reflect a higher level of engagement in trying to follow a movie with a plot, actors talking, and physical action (some of which is emotional or has emotional consequences), rather than anything specific to the effects of violence.

29. Mathews et al. (2005) and Weber et al. (2006) and Kalnin et al., (2005) cite a theoretical review by Davidson, Putnam, & Larson (2000) for the proposition that a pattern of reduced brain activity in the frontal cortex and increased activity in the amygdala in "emotionally provocative tasks" is found in people with greater amounts of aggressive behavior. It may be relatively easy to produce this same pattern in normal subjects simply by presenting the right kind of stimuli and tasks without any change in aggressiveness at all. In any event, ithis [sic] same

pattern of reduced frontal activity and increased amygdala activity also is found in another population not mentioned in these studies – people with clinical depression (Davidson, Pizzagalli, Nitschke, and Putnam, 2002). Clinical depression also produces the same kind of brain pattern, but clinically depressed patients are the least likely clinical population to display aggressive behavior. It should be noted that whereas the prediction of the model is that violent games should increase amygdala sensitivity, and Kalnin et al. (2005) report this, Weber et al. (2006) report exactly the opposite findings – reduced amygdala activity in response to violent video game exposure.

30. Further undermining the claims made by these researchers, the handful of studies in this area have yielded conflicting results and, importantly, have not even studied the area of the brain that *would* be most associated with "behavioral control" (though for the reasons already discussed, this is a problematic and unsubstantiated theory). For instance, the findings of brain activity for Disruptive Behavior Disorder adolescents reported in Kalnin et al. (2005) and Wang et al. (2002) (in unpublished and unreviewed studies) do not seem to correspond to the model that has been cited by the same group of researchers in a later study, Mathews et al. (2005). First, the pattern described in that model of aggressive and violent behavior (by Davidson et al. (2000)) depends on a brain region called orbitofrontal (and associated ventromedial prefrontal) cortex. But none of the studies reported by Kronenberger and his

colleagues looked at that area of the brain. Indeed, the 2005 study published by Kronenberger and his colleagues, Mathews et al. (2005), explicitly state that they did not have the technical ability or capability to image brain activity in the orbitofrontal cortex. Likewise, the Wang et al. (2002) study examines brain regions more closely associated with cognitive processes such as working memory and attention (e.g., Badre & Wagner, 2004; Kondo et al., 2004), rather than impulse control. The Kalnin et al. (2005) study does not explicitly identify (as would be standard in most scientific brain imaging) the brain regions that are investigated. Thus it appears that the technical limitations on the research carried out by Dr. Kronenberger's group cannot investigate the brain regions that were identified by Davidson, et al. (2000) as relevant for aggressive behavior – but which in any event are also relevant to depression (Davidson et al., 2002).

Methodological Biases In Measures of "Aggression" and "Media Exposure"

31. Another problem with the methodology used in Dr. Kronenberger's research group is how they measured "aggression." The participants are described in the studies as adolescents with Disruptive Behavior Disorder (DBD). In studies such as Mathews et al. (2005), subjects can be classified as DBD simply by breaking rules and challenging authority. Although Dr. Kronenberger's research team found that each subject had at least one incident of "aggression" in

the 6 months prior to the study, the subject's aggressive behavior (which can include verbal aggression) was based solely on the report of a caregiver. In other words, there is no objective evidence of aggressive behavior in these subjects and it is entirely possible that adolescents who defy the authority of their caregiver may be reported as displaying overt aggression due to reporting bias.

32. As noted previously, the measure of violent media exposure employed by Dr. Kronenberger's team did not separate out exposure to "violent" video games from "violent" television. It is therefore not possible to draw any conclusions from research using this measure regarding the exposure to video games containing violence. A correlation in exposure among the different types of media cannot mitigate this criticism. Furthermore, it is important to note that, contrary to the guidelines of the best standards of evidence-based medicine, this measure of exposure is based solely on self-report and parent reports, which are subject to reporting biases and are not substantiated by objective measurements of actual video game exposure. The detailed nature of the reports cannot substitute for objective measures of observed exposure; retrospective self-report measures, are subject to recall error among other biases.

Measuring "Executive Functioning"

33. In Kronenberger et al. (2005a) it is claimed that the "executive functioning" of adolescents is

impaired for those with higher exposure to media violence and this has been associated with differences in patterns of brain activity in the "frontal lobes" (Mathews et al., 2005; Wang et al., 2002). The discussion of "executive functioning" is at best incomplete. The frontal lobes are, relatively speaking, large and complex neural networks. While cortical activity in parts of these regions is associated with decision-making, behavioral control, attention, and other cognitive functions, it is incorrect to treat these regions as homogeneous or undifferentiated either anatomically or with respect to their functions, as this research appears to do.

34. For example, the neurocognitive tasks used by Dr. Kronenberger's team are not directly relevant to aspects of frontal cortex activity in service of behavioral or emotional control. Mathews et al., (2005) and Kronenberger et al. (2005a) used variants of a task called the "Stroop task." This is a response-selection task in which subjects have to ignore one property of a stimulus (e.g., the word RED) and name (or press a button to classify) the color of the ink in which it is printed (e.g., green). Since reading the word (i.e., RED) and naming the color of the ink (i.e., GREEN) are both responses in terms of color names, and because reading is a highly practiced skill and ink color naming is not, the response based on the printed word interferes with naming the color. Subjects have to filter out one response and focus on the other. Other forms of the Stroop task such as the Counting Stroop (as in Mathews et al., 2005) present

a possible response conflict in the number of items (to be named) and the numbers that make up the items. For example, if presented with 3333, the correct response of the number of items (i.e., 4) is in conflict with the name of the items themselves (i.e., 3).

35. It is important to note that "response conflict" in the context of a Stroop task only means that there are two possible responses (e.g., in Color Word Stroop, the word RED and the ink color green) and only one is correct (i.e., the ink color green). It does not imply "conflict" as in conflict between people, and response selection, in this situation has nothing to do with behavioral regulation or control. In addition, Kronenberger et al. (2005) used a vigilance task called the continuous performance task (CPT). These tasks do not involve impulse control or self-control.

36. The Wang et al. (2002) study, which looked at fMRI results of adolescents who watched a filmed clip of video game play, is not published and does not (as a PowerPoint presentation) provide sufficient data to support its conclusions. It does appear, however, that the Wang et al. (2002) study examined brain activity without any kind of "executive function" task. Thus, the changes in frontal lobe activity reported cannot be interpreted specifically about executive functioning within this task. The comparison of observing a James Bond game (but not playing the game) and a car racing game is more akin to watching a movie than to an actual task that specifically requires explicit decisions and responses.

37. Group differences of the type used in all the studies reported by Dr. Kronenberger's team cannot serve as the basis for drawing any causal conclusions about the relationship between media exposure and executive functioning. Two groups such as DBD and Control subjects may differ in a number of ways that they are not matched on, and these differences may be responsible for any measured differences in performance on a test. Moreover, assignment to the groups is not done by the standards of evidence-based medicine, making it impossible to draw any strong conclusions regarding these differences.

38. For example, Kronenberger et al. (2005) report that the DBD and Control subjects were matched on IQ. However, there are many cognitive functions that can vary among individuals that do not specifically correlate with IQ. Among other things, it is possible that there are working memory differences between the groups such that Controls have greater working memory ability. Working memory refers to the ability to hold information in mind while using it for some purpose (e.g., Baddeley, 1986). Or there may be differences in reading ability between the groups, or math ability, or some other cognitive skill or function that has not been assessed. If so, the difference between these groups in performance of a task such as Stroop may be entirely due to these uncontrolled differences, rather than the claimed difference of aggressive or disruptive behavior.

39. Similarly, two groups that differ in reports of exposure to violent media could differ for a number

of reasons beyond this exposure, which could be similar to the DBD vs. Control group difference. For example, DBD kids may not read as much as Control kids, and kids with high exposure to media with violent content may read less than those with low exposure to media with violent content because this content is more exciting (Anderson & Dill, 2000). In the Wang et al. (2002) study comparing a James Bond "violent" video game and a "non-violent" car racing game, control subjects appear to have rated the James Bond game more exciting, interesting, fun, and requiring attention than car racing (although this difference may not be significant and the scales have been manipulated so the difference in the numbers is not readily visually apparent). Therefore, ratings of violent media exposure might be predicted by reading ability and interest, such that poor readers play more video games that are fun, exciting, and interesting (and have violent content) that than good readers who spend more time reading. And poor readers might show more Stroop interference than good readers (cf. Johnson et al., 2003). There is no way to draw any conclusion from this study regarding the causal role of violent media exposure and certainly there is no basis for concluding anything regarding the effects of exposure to video game violence (because the researchers did not differentiate between television and video game violence).

Two Additional Research Reports

40. A recent study reported by Weber et al. (2006) is the first study in which participants actually play a violent video game during fMRI neuroimaging. However, the report is published in *Media Psychology*, a non-peer-reviewed journal, and gives very little technical information about the data analyses or the basic methods of the study. It is important to note, however, that the results reported by Weber et al. are not consistent with the previous findings reported by Dr. Kronenberger's group. The Weber study only reports neural activity from three cortical regions – two parts of the anterior cingulate (dorsal and rostral portions) and the amygdala The decreased amygdala activation and the interpretation of the rostral anterior cingulate activation is inconsistent with the Davidson et al. (2002) model used by Dr. Kronenberger's research team and the results for the amygdala and dorsal anterior cingulate directly contradict the findings of Kalnin et al. (2005). Although Weber et al. argue for a causal relationship between violent video game playing and the patterns of brain responses reported, there is no evidence of causality. First, neuroimaging measurements are simply correlational measures (see Uttal, 2001). Second, the authors have only carried out cross-correlational analyses of the relationships among three different brain areas, These can certainly show that there are reliable associations but cannot rule out other factors from playing a causal role.

41. A second study by Bartholow et al. (2006) makes extremely strong, but unsupported, claims that exposure to violent video games results in a neural deficit in processing violent images that leads to aggressive behavior. In this study, participants with more or less experience playing violent video games were shown a series of pictures, some violent and some not. Brain electrical activity was measured using scalp electrodes, focusing on the "P300 component." One of the components of brain electrical activity occurs 300 msec after a stimulus and typically is thought to reflect the recognition of the stimulus. This measurement is known as the "P300 component." In the Bartholow et al. study, the P300 was smaller with regard to violent images for participants with more experience playing violent video games, but was not reliably different for neutral or non-violent but negative images. There is no specific or unique psychological interpretation of this difference, nor is there any specific or unique behavioral prediction that follows from this. The neural mechanisms underlying the size of the P300 response are not understood. Thus one cannot draw any strong conclusion from this finding.

42. In addition, participants in the Bartholow study played a competitive game in which they presented a noise to their competitor whenever the participant won a round. Although Anderson and Bushman (2001) have called the adjustment of the noise an aggressive behavior, in my opinion there is no evidence that noise adjustment is anything more

than a competitive behavior. In their 2005 study, Bartholow et al. showed that participants with more experience playing violent video games also presented longer or louder noises (there is no clear report of how much longer or louder the noise was). Since the P300 has no specific relationship to aggressive behavior or self control (it is a measure of perceptual categorization), and the competitive game behavior is not specifically aggressive, there is no evidence in this study about the effects of violent video game exposure on anything related to aggressive behavior or neurological deficits.

Evidence that Video Games Improve Cognitive Function

43. It is interesting to note that another set of researchers, Green and Bavelier (2003), showed that extensive experience playing games with violent content such as *Grand Theft Auto 3*, *Half-Life*, and *Halo* produce substantial *improvements* in cognitive function in visual attention tasks that involve selection and control of processing. Moreover, this paper showed that these improvement [sic] are specifically obtained as a result of experience with video games with violent content and not for video games without violent content. Green and Bavelier gave non-game playing subjects experience playing either *Medal of Honor: Allied Assault*, which has "violent" content, or Tetris, which has no violent content but engages eye-hand coordination and interest. Subjects trained on the first-person shooter game showed significant

improvements in visual information processing and attentional control compared to subjects trained on the non-violent puzzle game. The researchers do not attribute these benefits to the violence but to the way these games engage the player. (The Green and Bavelier (2003) study is one of the few studies that selected subjects based on specific video game experience to examine using performance tests the psychological consequences of this experience, and then tested the conclusion by specifically providing that experience to novices and administering the same tests.) It is extremely important to note that these improvements in behavior would likely be accompanied by reductions in fMRI measures of brain activity in the DLPFC and ACC since these areas are involved in attention (LaBerge, 1995). Indeed, Poldrack et al. (2005) found just such reductions in cortical activity after attentional training.

Conclusion

44. In summary, there is no evidence any of the research on neuroimaging or brain electrical activity that playing violent video games produces any kind of neurological deficit. Nor do these neuroimaging studies show that playing violent video games reduces neural activity in the frontal lobes of game players. Furthermore, there is no evidence that playing violent video games has a negative effect on executive function or self control.

45. The California State Legislature's "finding" that minors who play video games with violent content are more likely (1) to engage in violence or aggression, (2) to experience feelings of aggression, and (3) to experience a reduction in brain activity in the frontal lobes is not supported by the existing research. As noted previously, there is no strong scientific evidence supporting the first two of these assertions that playing video games with violent content causes aggressive behavior and thoughts. And as I have explained above, the research put forth to support the third proposition is seriously flawed. However, even if the third contention were correct, given all the qualifications and concerns already raised previously, it is not clear that it has any significance regarding the first two claims. Reductions in frontal lobe activity, as reported in the research reviewed here, are not in areas that have been most closely identified with problems of behavior or aggression control, namely orbitofrontal or ventromedial cortex. Instead, the areas that are demonstrated to show reductions, dorsolateral prefrontal cortex and anterior cingulate, are areas of the brain more closely associated with attention. The assumption that such reductions reflect deficits in brain function is not warranted, given that extensive experience with video games leads to improvements in attentional function and that studies that examine brain activity following improvements in attention function reveal reductions in these areas.

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I declare under the penalty of perjury that the foregoing is true and correct.

Dated this 27th day of March,

/s/ Howard C. Nusbaum
Howard C. Nusbaum

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UNITED STATES DISTRICT COURT FOR

THE NORTHERN DISTRICT OF CALIFORNIA

VIDEO SOFTWARE DEALERS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION, Plaintiffs, vs. ARNOLD SCHWARZENEGGER, in his official capacity as	CASE NO. C 05-4188 RMW (RS) **DECLARATION OF JEFFREY H. GOLDSTEIN**

Governor of the State of
California; BILL LOCKYER, in
his official capacity as Attorney
General of the State of
California; GEORGE KENNEDY,
in his official capacity as Santa
Clara County District Attorney,
RICHARD DOYLE, in his official
capacity as City Attorney for the
City of San Jose, and ANN
MILLER RAVEL, in her official
capacity as County Counsel for
the County of Santa Clara,

Defendants.

1. This document was prepared at the request of the plaintiffs in *Video Software Dealers Association v. Schwarzenegger*. In addition to my professional knowledge of video games research, I reviewed the following documents: the State of California Violent Video Game Bibliography, State Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, and the State Order Granting Plaintiffs' Motion for a Preliminary Injunction.

Biographical Information

2. I received a PhD in psychology from Ohio State University, following which I was professor of psychology at Temple University (Philadelphia) from 1969 to 1992. Since 1992 I have been with the

Department of Social and Organizational Psychology at Utrecht University, the Netherlands. In January 2006 I took early retirement but will continue to teach a course at Utrecht University. Among the books I have written or edited are *Aggression and Crimes of Violence* (Oxford University Press), *Toys, Play and Child Development* (Cambridge University Press), *Why We Watch: The Attractions of Violent Entertainment* (Oxford University Press), and the *Handbook of Computer Game Studies* (2005, MIT Press), for which I wrote a chapter on violent video games. My CV is attached to this Declaration.

3. I am a Fellow of both the American Psychological Association and the American Psychological Society. I serve on advisory committees of the Netherlands Institute for the Classification of Audiovisual Media, responsible for rating films and television programs, and PEGI, the European video game rating system. I was coorganizer of the first international Digital Games Research Association congress in 2003 (www.digra.org). As a consultant, I summarize psychological research about play and media for clients.

4. In 2000 I submitted a document about violent video games to the United States Senate Commerce Committee and submitted written testimony in connection with *Entertainment Software Association v. Blagojevich* (Illinois) in 2005.

5. My research on aggression and entertainment tends to be conducted, not in an experimental laboratory with college students as participants, but

in natural settings – in schools (Jukes & Goldstein, 1993), at movie theaters (Goldstein, Rosnow, Raday, Silverman, & Gaskell, 1975), at sports arenas (Russell & Goldstein, 1995), in prisons (Cooke & Goldstein, 1989), hospitals (Goldstein, Mantell, Derks & Pope, 1989), and a home for the elderly (Goldstein, Cajko, et al., 1997). This reflects my belief that entertainment cannot readily be studied in the experimental laboratory.

6. If one looks carefully at the body of research on violent video games, there is little that is consistent or convincing. There is no compelling evidence that violent video games cause aggressive behavior. Many reviews concur that inconsistencies and ambiguities in the research prevent any sound conclusions about the effects of violent video games on aggression (Bensley & van Eenwyk, 2001; Cumberbatch, 2001; Federal Trade Commission, 2000; Goldstein, 2005; Griffiths, 1999; Gunter, 1998; Lager & Bremberg, 2005; Newman, 2004; Olson, 2004; Schechter, 2005; Unsworth & Ward, 2001; van Feilitzen, 2000).

7. Many publications are highly selective in the literature they cite, often ignoring studies with null or inconsistent results. For example, the State Bibliography is also highly selective. Missing are articles that fail to find effects of violent video games, for example, Baldaro et al. (2004), Ballard & Lineberger (1999), Fleming & Rickwood (2001), Graybill et al (1987), Scott (1995), Williams & Skoric (2005).

8. It is not the purpose of this statement to provide a comprehensive overview of research on violent video games. Rather, a number of studies and literature reviews are presented that cast doubt on the reliability, validity, and applicability of this research. Weak and inconsistent results, dubious assumptions, questionable methods, and overgeneralizations from the data are noted in the psychological research.

9. Research on violent video games tends to suffer from inadequate samples, questionable measures of aggresion [sic] (such as noise blasts) and aggressive thoughts/cognition (such as word completion tasks), the confusion of aggressive play with aggressive behavior, a focus on immediate short-term effects, and participants who may not be unaware of the purpose of the experiment. No evidence has been produced to suggest that video games are more influential than other media, such as film and television, despite the often-repeated claim that their interactivity and growing realism make them so. I am aware of no evidence that video games are more influential in youth delinquency and crime than other factors such as poverty, inadequate parenting, the availability of firearms, alcohol and drug abuse.

Problems of definition – violence and "violence"

10. When people refer to 'violent video games' or 'violence in the media' they rarely distinguish

between real violence – people hurting one another as in war or a slap in the face – and symbolic or fantasy violence, in which characters engage in mock battle. Psychologists define violence or aggression as the intentional injury of another person. However, there is neither intent to injure nor a living victim in a video game. The notion that players rehearse and are rewarded for committing violent acts is not literally true. No crimes are committed, there is no literal killing, only fantasy play. Aggressive themes have always been part of play and entertainment (Guttmann, 1998; Twitchell, 1989; Schechter, 2005), and even preschool children who enjoy them seem to be aware of the difference between real aggression and fantasy violence (Holm Sorensen & Jessen 2000, Holmes & Pellegrini 2005, Kirsh, 2006).

11. Studies of elementary school children often fail to distinguish between *aggressive play* and *aggressive behavior* (for example, Irwin & Gross, 1995). After playing a martial arts video game, children, especially boys, are likely to engage in martial arts play-fighting. To some adult observers, the children appear to be acting aggressively when in fact they are playing, with no intent to injure anyone. An experiment by Cooper and Mackie (1986) of Princeton University found that, although violent video games influenced the post-game *play* of 10-11 year olds, the video games had *no effect on interpersonal aggression*. In their review of research on video games, Lager & Bremberg (2005) conclude that playing video games increases preference for aggressive toys, but has no

effect on aggressive thoughts and no consistent effect on aggressive behavior.

How we know it is "violence" and not violence

12. The same features that inhibit an opera audience from rushing the stage to prevent 'murder' are also present in video games. There are physical cues to the unreality of the violence before you, including the willing suspension of disbelief, and the knowledge that you have control over events, by pausing or stopping play altogether. In video games, there are sound effects, scorekeeping, a joystick or keypad in your hand, and often playmates commenting on the performance. Without background music, special effects, or fantasy characters, bloody images lose their appeal (McCauley, 1998). As with other forms of entertainment, such as film and literature, the violence in a video game is embedded in a fantasy narrative. However, in laboratory experiments violent images are removed from the story context, and games are played for only a few minutes, thus depriving them of a key play element.

How is aggression measured?

13. It is not possible to observe real aggression in the laboratory, so researchers must improvise indirect indicators of potential aggressive behavior. For example, the following have been used in video

game research as measures of aggressive cognition or aggressive behavior:

- hitting an inflatable 'bobo doll' (Schulte & others 1988)
- coding children's interpretations of ambiguous stories (Kirsh 1998)
- completing partial words: e.g. K I_ _[1] (Carnagey & Anderson 2005)
- listing aggressive thoughts and feelings (Calvert & Tan 1994)
- administering blasts of white noise to an unseen person, in a reaction time task[2] (Anderson & Dill 2000; Bartholow & Anderson 2002; Bartholow, Bushman & Sestir, 2006 in press).

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[1] This measure of aggressive cognition asks the participant to complete words, such as 'K I_ _.' Words like 'Kill' or 'Kick' would be regarded as an aggressive cognition, while 'Kiss' or 'Kind' would not be. But immediately after playing a violent video game, violence-related words would be more salient to players. If after playing an auto racing game the subjects had to complete the word 'C A –', they would probably be more likely to write 'CAR' than 'CAT' or 'CAP'. Calling this task a measure of 'aggressive thinking' or 'aggressive cognition' is unwarranted.

[2] In the 'competitive reaction-time task' (CRT) the research participant competes with an unseen 'opponent' and can set the level of noise the opponent will receive should he or she lose the competition. The CRT resembles a violent video game, so it would not be surprising that those who play violent video games would also play this 'game' more aggressively. For further criticisms of these methods see Tedeschi & Quigley (1996) and Ritter & Eslea (2005).

- withholding money from another (Winkel, Novak & Hopson 1987)
- 'killing' characters in a video game (Anderson & Morrow 1995; Ask, Autoustinos & Winefield
- time elapsed to recognize aggressive words (Anderson & Dill 2000)

In my opinion these are inadequate measures of aggressive behavior or aggressive cognitions or beliefs.

14. According to Freedman (2001), it is difficult to do adequate experimental research on violent video games. It is difficult to find two video games that are equal in all respects except one of them contains violence and the other does not. Only then could we be sure that, if they have different effects, this is due to the violent content and not to some other feature of the games, such as their level of excitement, involvement, activity, or sound effects. Furthermore,

> *"when experimenters choose a violent game, they may be giving the message that they approve of such games and might therefore approve of or even expect the subjects to behave violently. . . . The possibility of [experimenter] demand causing the results is not unlikely or far-fetched. It is a well-known phenomenon in experimental research and a continual almost ubiquitous source of problems in interpretation . . . This leaves almost all of the results open to the alternative and uninteresting interpretation that they are caused by demand factors rather than the*

variable of interest, namely the direct effect of violence in the video game" (Freedman, 2001).[3]

Selected reviews of research on violent video games

15. Statements about the consistency of research data and consensus within the scientific community about the effects of media violence are incorrect.

16. Many reviews of research on violent video games have concluded that the evidence of a causal connection between violent video games and aggressive behavior is weak or non-existent: Bensley & van Eenwyk, 2001; Cumberbatch, 2001; Federal Trade Commission, 2000; Goldstein, 2005; Griffiths, 1999; Gunter, 1998; Lager & Bremberg, 2005; Newman, 2004; Olson, 2004; Schechter, 2005; Unsworth & Ward; 2001; van Feilitzen, 2000.

Following (¶17-31) are selected comments by reviewers.

17. Anderson & Dill (2000) review published studies on video games and aggressive behavior and note that every study suffers from flaws in methodology,

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[3] It is possible to do videogame research of a high standard. One excellent example is the series of correlational and experimental studies by Green & Bavelier (2003) on violent video games and visual skills.

ambiguous definitions, is open to alternative explanations, or reports inconsistent findings.

18. Washington State epidemiologists Bensley & van Eenwyk (2001) note: "*At present, it may be concluded that the research evidence is not supportive of a major public health concern that violent video games lead to real-life violence.*" Because of mixed results, the research indicates that at this time "*it is not known whether video game play affects aggression or hostility in this age group.*"

19. Cumberbatch (2001) reviewed research on violent video games for the (British) Video Standards Council (www.videostandards.org.uk). He writes that it is "*difficult to attach much value to studies that have failed to control for demographic differences such as age, social class and ethnicity, which are related to both video habits and to delinquency patterns.*"

> "*The real puzzle is that anyone looking at the research evidence in this field could draw any conclusions about the pattern, let alone argue with such confidence and even passion that it demonstrates the harm of violence on television, in film and in video games. While tests of statistical significance are a vital tool of the social sciences, they seem to have been used more often in this field as instruments of torture on the data until it confesses something to justify a publication in a scientific journal. If one conclusion is possible, it is that the jury is not still out. It's never been in. Media violence has been subjected to lynch*

> *mob mentality with almost any evidence used to prove guilt."*

20. The Federal Trade Commission (2000) report, *Marketing violent entertainment to children*, contained a review of research on the impact of violence in entertainment media. Concerning violent video games, the FTC concludes:

> *"Most researchers are reluctant to make definitive judgments at this point in time about the impact of violent electronic games on youth because of the limited amount of empirical analysis that has so far taken place. Although some surveys of the literature lean toward seeing a detrimental effect from playing violent video games, others are more skeptical."*

21. Griffiths (1999, pp. 209-210) concludes, "*The majority of studies on very young children tend to show that children become more aggressive after playing or watching a violent video game, but* ***these were all based on the observation of free play****.*" [emphasis added]

22. In his overview of video game research, Gunter (1998, p. 109) concludes, "*Even with experimental studies, there are problems of validity that derive from the fact that they do not measure 'real aggression' but rather simulated or pretend aggression.*"

23. Child clinical psychologist and crime novelist Jonathan Kellerman calls media violence "the

scapegoat we love to hate." Concerning juvenile crime he writes, "*If increased public safety is our goal, efficiency also dictates that we cease pouring money into research and clinical activities that have little direct impact upon rates of child criminality. A prime example of such diminished returns is the flood of studies conducted on the factor most often blamed for childhood criminality: media violence*" (1999, p. 71).

24. An editorial in the British medical journal *The Lancet* (1999, p. 525) commented:

> "*It is inaccurate to imply that the published work strongly indicates a causal link between virtual and actual violence. Experts are divided on the subject. . . . The American Academy of Pediatrics' concerns seem woefully misplaced. . . . While future research may prove the danger of the media to children, we know already the harm that poverty, abuse, and weapons can have. Forced to choose between facing a teenager holding a firearm or his classmate clutching a video of a Quentin Tarantino movie we would all opt for the latter.*"

25. A review of video game research by the Swedish Public Health Institute (Lager & Bremberg, 2005, www.fhi.se) examines research consisting of controlled experiments and prospective longitudinal studies. The following were studied in at least three experiments: spatial abilities, reaction time, aggressive play, aggressive thoughts/interpretations, aggressive feelings and aggressive behavior. The studies of

spatial abilities and reaction time were of high quality and consistently showed positive effects. The studies give limited support for video game playing leading to a choice of aggressive toys, but it is unclear how to best interpret this since *the studies do not lend support for links between the players and aggressive feelings, thoughts or behaviors although many studies on this subject have been conducted*. In addition to toy selection, three aspects of aggression were studied: aggressive feelings, aggressive thoughts and aggressive behaviors. In these studies the experimental group has generally played a violent computer game in a laboratory for 10-45 minutes, and afterwards the participants answered questions from standardized questionnaires or were placed in a situation where the researchers have been able to study their behavior towards another person. The subjects frequently had to punish the other person, for example, by playing loud sounds in his/her headphones.

> "*These studies show expected effects only in studies where initial measurements have not been taken . . . An opposite effect has been shown on aggressive thoughts, i.e., a decrease in occurrences of aggressive thoughts in the group who played computer games*" (*p. 13*)

> "*This implies, all in all, limited support that video and computer game playing cause children to choose more aggressive toys afterwards – but no support for links between computer game playing and aggressive feelings, thoughts or behaviors although these outcomes are well studied. The fact that the*

> *choice of toys is affected, points to the fact that the contents of the games are not passing by unnoticed by the children, but whether the choice of toys in the studies primarily should be interpreted as an expression of aggressiveness could perhaps, in the light of the other studies, be discussed"* (p.14).

26. Newman (2004) writes that attempts to link video games with horrific events such as shootings is political, as is the use of 'addiction' as a metaphor for repeated play. Newman notes the "inconclusive and often contradictory" findings of research, and the fact that "methodological flaws blight many of the studies," for example, there is no consistency in the definitions of violence and aggression. "*Glib statements relating aggression to game playing, whether appearing in the mass media or scientific journals, seem totally unwarranted*" (pp.67-68). The problem with research on violent video games, says Newman, is the idea that you can understand the effects of a video game from a superficial glance at its violent content (p. 69).

27. Olson (2004), of Harvard Medical School, challenges statements about the relation between violent video games and real-life violence. She notes that between 1994 and 2001 there was a broad decline in juvenile arrest rates for violent crimes. "*There is no indication that violence rose in lockstep with the spread of violent games*" (p. 146).

> "*Several academic studies (primarily experiments) have received broad coverage in*

the popular media and are cited by the press and some advocacy groups as evidence that video games create dangerous, aggressive thoughts, feelings, and behaviors. Local, state, and federal legislation, including criminal penalties for selling or renting certain games to minors, have been introduced based on these studies" (p. 146).

"*Here are some of the* ***limitations of current studies as a basis for policy making . . .***

- ***Vague definitions of aggression***. "*Aggressive play that follows exposure to games or cartoons containing violence is not distinguished from aggressive behavior intended to harm (Irwin & Gross, 1995; Silvern & Williamson, 1987). Aggressive thoughts, feelings, and behaviors may be presented as equivalent in importance and treated as valid surrogates for real-life violence, with the assumption that reducing these factors will reduce harm*" (*p.* 146).
- "***Use of violent media is not put into context with other known contributors to aggression or violence. . . .*** *According to public health and juvenile justice research, the strongest childhood predictors of violence are involvement in crime, male gender, illegal substance use, physical aggressiveness, family poverty, and antisocial parents*" (*p.* 147). Another problem is that "*most children who*

are aggressive or engage in antisocial behavior do not grow up to be violent adolescents or adults" (p. 147).

- "***Test conditions that are difficult to generalize to the real world***" Subjects may have only 10 minutes to play a game in an experiment. Young people commonly play games with others. (p. 147)
- "***Small, nonrandom, nonrepresentative samples***" (p. 147). Experiments that rely on college students as participants may be unable to tell us much about the effects of video games on those who typically play them, or their effects on youth. Experiments with college students may be uninformative about the effects of video games on young people under the age of 18. [The heavy reliance on college students as subjects in experiments is regarded by some psychologists as a weakness of psychological research that limits its generalizability (Jaffe, 2005).]
- ***Potentially "moderating factors, such as age or developmental stage, are often not considered"*** (p. 147).
- "***Study findings are combined in ways not appropriate for policy use***" (*p.* 147). Given the different populations, measures, and exposures, it is inadvisable to combine them in a single meta-analysis.

Olson speculates that violent video games may have indirect effects on more subtle forms of antisocial behavior, such as bullying. But this has not been studied. "*We might take a lesson from America's history of media hysteria. . . . As with the entertainment media of earlier generations, we may look back on some of today's games with nostalgia, and our grandchildren may wonder what the fuss was about*" (p. 149).

28. Rhodes (2000) asks,

> *"Is there really a link between entertainment and violent behavior? The American Medical Association, the American Academy of Pediatrics, and the National Institute of Mental Health all say yes. They base their claims on social science research that has been sharply criticized and disputed within the social science profession, especially outside the United States. In fact, no direct, causal link between exposure to mock violence in the media and subsequent violent behavior has ever been demonstrated, and the few claims of modest correlation have been contradicted by other findings, sometimes in the same studies. . . . If we want to reduce (violence) even further, protecting children from real violence in their lives – not the pale shadow of mock violence – is the place to begin" (Rhodes, 2000).*

29. Schechter (2005) in his history of violent entertainment notes, "*Nearly all the studies that purport to show a link between*

exposure to media violence and aggressive behavior are afflicted with significant problems, ranging from methodological flaws to bizarre assumptions about the way the human imagination processes and makes use of fantasy. To begin with, they tend to be conducted under highly artificial conditions that bear no resemblance to a child's actual day-to-day experience. . . . There is an enormous difference between real aggression that is meant to inflict harm on another person and the kind of rough-and-tumble horseplay that young males have gleefully engaged in from the inception of the species" (pp. 151-152).

30. Southwell & Doyle (2004) write,

"*When pundits – and some researchers – proclaim electronic games either altogether good or altogether bad for society, they often miss theoretical subtleties that if considered would allow us to see both the boon and the burden of the emerging technology and point to important future possibilities. Most important, these critics often fail to recognize that variability exists at different levels of analysis and in the interactions: between players, between games, between contexts, and so forth*" (*p.* 391).

"*Are there unique aspects of electronic game use that negatively affect school performance? . . . As is often the case with media studies, the causeeffect link is tenuous. Are there certain aspects of games themselves, or* *of some categories of games, that can affect cognitive functioning? Consideration of this question yields some surprising answers: There is reason to believe that interaction with electronic games actually might offer some positive benefits'* (*p.* 393).

"*What about violence? Several exhaustive reviews of available games literature reach somewhat different conclusions. Anderson & Dill (2000) and Anderson & Bushman (2001) highlighted a distinct role for electronic games in promoting violence. Anderson and Bushman's meta-analysis suggests that available experimental evidence supports the conclusion that violent video games encourage aggression. But the Federal Trade Commission (2000), Bensley & Van Eenwyk (2001), and others were more tentative in their conclusions, often arguing that the evidence is insufficient for either a yea or nay conclusion. Moreover, we should be mindful of the possibility that available literature is biased by the historical reticence of some journals to publish null findings'* (*p.* 394).

31. Unsworth and Ward (2001) conclude,

"*The inconsistencies in the findings of a vast body of research and the rate of advancement in video game technology make it difficult to draw any firm conclusions about the relationship between exposure to video game violence and aggressive behavior.*"

Weak, null and inconsistent data

32. Many correlational studies have failed to find statistically significant relationships between frequency of playing video games and emotional or behavioral problems (Colwell & Payne, 2000; Gibb, et al., 1983; Kestenbaum & Weinstein, 1985; McClure & Mears, 1986; Winkel, et al., 1987), or no significant relationship between the amount of time children spent playing video games and aggressive behavior (Funk, Hagan, et al., 2002; van Schie & Wiegman 1997).

33. Experiments that fail to find any effects of violent video games on aggressive behavior or aggressive cognition include Ballard & Lineberger (1999); Graybill, Strawniak, Hunter & O'Leary (1987); Kirsh (1998); Winkel, et al. (1987); and Williams & Skoric (2005). [Only one of these, Kirsh 1998, is included in the State Bibliography. See ¶7.]

34. Even research said to support a link between violent video games and aggressive behavior is not as convincing as is sometimes portrayed (for example in Anderson, Berkowitz, et al., 2003). For example, in the study by Irwin & Gross (1995), boys played a violent or nonviolent video game for 20 minutes and were then observed during play with another boy. Physical aggression was defined as hitting, shoving, punching, pulling at clothes, kicking, pulling hair, and throwing or smashing objects. Verbal aggression included threats of physically aggressive acts. These were indeed greater after boys

played a violent video game. However, it is not clear whether aggressive play, in which boys pretend to kick and threaten, was distinguished from genuine threats and aggression. Nor did they examine the various aggressive acts separately, so we do not know whether there was any hitting, shoving, punching, kicking, or hair pulling with intent to injure. Irwin & Gross (p. 347) write, "*Although specific forms of physical aggression were not measured, review of the video tapes suggested that many of these physically aggressive acts were direct imitations of the behavior modeled by the video game characters. Subjects often engaged in fantasy play, assuming the role of one of the video game characters and pretending to physically harm an evil villain or formidable opponent.*" About the increase in verbal aggression, they write (p. 348) "*apparently much of the verbal aggression toward the confederate during free play was related to fantasy play.*" In other words, the boys were playing, not fighting.

35. The Anderson & Dill (2000) studies are also cited as evidence of the effects of violent video games (for example in Anderson, Berkowitz et al. 2003). Anderson & Dill (2000) examined both the correlates of playing violent video games, and conducted an experiment on the effects of violent video games. In their correlational study, a significant relationship was found between self-reported aggression and exposure to violent video games. This does not mean that video games cause aggression. It may be that aggressive individuals are drawn to violent video

games, or that some unknown factor is responsible for both aggressive behavior and attraction to violent video games.

36. In the experiment by Anderson & Dill, college students played a violent video game (*Wolfenstein 3D*), or a nonviolent game (*Myst*). Women and men played each assigned video game 3 times for 15 minutes per time. The researchers' measure of 'aggressive thoughts' was the time it took to recognize aggressive words (for example, 'murder') flashed on a computer screen. Aggressive thoughts were not measured directly in this experiment, only reaction time to words flashed on a screen.

37. The average reaction time to aggressive words was faster among those who had played the violent video game. Anderson & Dill interpret this to mean that "*the violent video game primed* ***aggressive thoughts****. This result suggests one potential way in which playing violent video games might increase aggressive behavior, by priming* ***aggressive knowledge structures***" (*p.* 786). Calling the recognition of aggression-related words 'aggressive thoughts' and aggressive 'knowledge structures' does not mean that there is any connection with aggressive beliefs, intentions or behaviors.

38. Participants who had played *Wolfenstein* 3D delivered significantly *longer* noise blasts after losing trials than those who played the nonviolent game *Myst*. There was *no effect on the intensity of noise blasts* delivered to the 'opponent.' Yet Anderson & Dill

conclude, "*Playing a violent video game increased the aggressiveness of participants after they had been provoked by their opponent's noise blast*" (*p.* 786). Anderson & Dill focus exclusively on the trivial finding that people who played the violent video game depressed a noise button longer than those who played *Myst*, and they ignore the fact that there was no difference in the intensity of noise delivered to the opponent.[4] This is hardly convincing evidence that violent video games cause aggressive behavior.

39. Experiments that measure hostility and a 'hostile attribution bias' after playing violent video games sometimes find no effects (e.g., Anderson & Ford, 1986; Baldaro et al. 2004; Scott, 1995; Sheese & Graziano, 2005). Anderson & Ford (1986) did not find that university students who played a 'highly aggressive' video game were more hostile than a group that played a less aggressive game. Scott (1995) measured the aggressiveness of university students with the Buss-Durkee Hostility Inventory and the Eysenck Personality Questionnaire. No significant differences

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[4] In contrast, a study by Bartholow & Anderson (2002) using a similar research design found significant effects for *intensity* of noise blasts *but not for duration*. In both studies the researchers conclude that violent video games affected aggressive behavior, but they could just as easily have concluded the opposite, since in each study one of these two measures was significant while in the other it was not. In a study by Bartholow, Bushman & Sestir (2006), a *combined* noise intensity and duration measure was used, but intensity and duration are not reported separately.

in aggressiveness were found between students after playing a nonaggressive, a moderately or a highly aggressive video game. Scott concludes that there is a "*general lack of support for the commonly held view that playing aggressive computer games causes an individual to feel more aggressive.*" Baldaro et al. (2004) failed to find an increase in hostility following play of a violent video game.

40. Some studies find an *inverse relationship* between violent video games and aggressive behavior. For example, a study in Japan found that a preference for aggressive video games was associated with *lower* aggression scores, "*and this raises questions for the causal hypothesis*" (Colwell & Kato 2003).

41. In a meta-analysis Sherry (2001) reports an inverse relationship between the amount of time spent playing violent video games and aggressive behavior – the *more time spent playing violent video games, the less aggression*. Sherry writes, "*The results suggest that playing even the most violent of games for extended times may not increase aggression. . . . Parents' intuitive reaction to limit playing time may actually be counterproductive, pulling the child from the game at a time when the largest aggressive effects are likely.*" If allowed to continue playing, Sherry implies, the aggression would subside.

42. If violent video games are a cause of aggressive behavior, there should be a dose response relationship between exposure to violent video games and their aggressive effects, with greater exposure

resulting in more aggressive behavior. However, in the Sherry (2001) meta-analysis, playing time was a negative predictor of aggression (r = -.19). That is, the more one played violent video games, the weaker the relation to aggressive behavior. In studies by Ballard & Lineberger (1999), Scott (1995), and Winkel et al. (1987), the level of aggressive content in video games bore no relation to the level of subjects' aggressive behavior afterwards.

43. In a study by Funk, Buchman and others (2003), playing a violent versus a non-violent game did not affect aggression in a group of 5 to 12 year old boys and girls. Those children who played a violent video game did not differ in either aggression or empathy scores from children who played a non-violent video game. Neither was longterm exposure to violent video games associated with aggressive responses to story vignettes.

44. In an Australian experiment (Fleming & Rickwood 2001), boys and girls age 8 to 12 years played a violent or a nonviolent video game for 4 minutes. Measures of arousal, heart rate, and aggressive mood were assessed. According to the researchers, the results "*offer no support for the hypothesis that children will report more aggressive mood after playing violent video games. There is also no statistical evidence to support the hypothesis that this effect would be stronger for boys than for girls.*" In fact, they found that "*mood was significantly more positive after playing the violent game than after the paper-and-pencil game.*"

45. A longitudinal study of violent video games by Williams & Skoric (2005), enlisted more than 200 people from 14 to 68 years old who had not previously played online multiplayer role-playing games. Some of them were randomly assigned to play a violent computer game for at least 5 hours a week for one month. Pre- and post-play measures included normative beliefs in aggression, and questions about aggressive social interactions (getting into a serious argument). Based on Anderson's General Aggression Model, the researchers predicted increases in aggressive beliefs and aggressive behavior following one month of play. "*Despite a robust exposure that averaged 56 hours over the month of the study, the results did not support the hypotheses. Simple correlations between hours played and the three dependent variables were non-significant . . . Game play - controlling for gender, age, and time1 aggression scores – was not a significant predictor of aggressive cognitions. Compared to the control group, participants after the experiment were not statistically different in their normative beliefs on aggression than they were before playing the game. Similarly, game play was also not a predictor of aggressive behaviors*" (*p.* 226).

Comparisons of the effect of video games to other media

46. According to the State there is "*substantial evidence*" that the interactive nature of video games "*poses a special risk of harm to minors beyond the*

passive viewing of television or movies." It is argued that violent video game exposure could have a stronger impact on the player than violent television or movie exposure because of the active involvement of the player, identification with violent characters, and reinforcement of violent actions (American Psychological Association, 2005, http://www.psychologymatters.org/videogames.html). But there is no evidence to support these contentions. In Sherry's (2001) meta-analysis, the effect of violent video games on aggression was smaller than that of televised violence.

47. According to Schechter (2005, p. 156), one "*charge commonly made against video games – that they are far more insidious than oldfashioned juvenile pastimes because they are more 'interactive' – holds little water. Nothing was more interactive than the 'violent' play of my own 1950s boyhood, when our targets were not animated pixels but live human beings who would shoot back at us with cap pistols, dart guns, ping-pong-ball rifles, and rubber-tipped arrows.*"

48. Holm Sorensen & Jessen (2000, pp. 120-121) write,

> "*[Interactivity], which is usually described as a problem in relation to violent computer games – the fact that the player himself must conduct violent deeds – actually makes children aware that their actions take place in a fictitious universe. For children, computer games are in fact 'games' with their own rules. From an early age, they are aware*

> *that these rules do not apply outside the realm of the game, with the exception that children can include elements and rules from the games in their play."*

49. As a unique medium, video games differ from television and film not only in their interactivity, but also in the nature of their stories, their open-endedness, the control and choices afforded players, and in their ability to satisfy different needs of their users.

Thus there are compelling theoretical reasons to believe that video games may have less emotional impact on players because, in a video game, the player has control over the action and in many cases over the story line. This sense of control may mitigate any negative effects that video game content might have.

Control as a moderator of videogame effects

50. Video games begin, pause and end at the will of the player (with the exception of experiments in which people are compelled to play them). One of the attractions of video games is the control afforded to players (Grodal, 2000). Control moderates the reactions associated with task performance under stressful conditions (Peters, Godaert, et al., 1998; Weinstein, Quigley & Mordkoff, 2002).

51. In describing the magnitude of media violence effects, they are sometimes compared to health

hazards like smoking and cancer.[6] But more relevant would be the comparison of exposure to media violence and other factors known to affect youth violence – harsh and inconsistent parenting, peer rejection, antisocial peers, the availability of firearms . . . (Ferguson, 2002; Leary et al. 2003; Pettit 2004).

What's missing from experiments on video games?

52. Criticisms of the methods used in laboratory experiments of aggression have been made many times (Freedman, 2002; Gauntlett, 2001; Olson, 2004; Ritter & Eslea, 2005; Tedeschi & Quigley, 1996). For example, the cover stories given to participants about the nature of the experiment and the justifications for exposing them to violent media could lead participants to give more shock or noise blasts for prosocial reasons (to help the experimenter, for example), and not in order to cause harm. Ritter & Eslea (2005) suggest that future laboratory aggression researchers should consider: The perceptions and motivations of the aggressor; the apparent distance between the aggressor and the target; the availability of nonaggressive response options; the problems of demand characteristics and permissive cues.

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[6] A critique of the smoking-cancer:media violence analogy is presented by Ferguson (2002, p. *446*): "*Comparing media violence research with that on smoking is a powerful polemic.*

Play

53. Play is a voluntary, self-directed activity (Garvey 1991), an experience that probably cannot be duplicated in a laboratory experiment. In video game research, the duration of play is too short for anything like the play experience to be replicated. Being required to play a violent video game on demand for ten or twenty minutes is not 'playing.' Experimental research does not recognize the fact that people who play violent video games freely engage in play, and are always free to pause or stop. They enter an imaginary world with a playful frame of mind, something entirely missing from laboratory studies of video games. One of the pleasures of play is this very suspension of reality (see ¶58 below, Jansz). Laboratory experiments cannot tell us the effects of playing video games because there is no sense in which participants in these experiments are playing.[6]

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[6] *However, it is not clear that research on media violence has reached the no-reasonable-doubt point that was reached by cigarette research. . . . [I]s media violence a necessary and sufficient cause of violent behavior? . . . 1. Humans are by nature a violent species and may demand violence in their entertainment. Violent media, then, are not a necessary precursor to violent behavior. 2. Unlike lung cancer, which is rare outside of individuals not exposed to cigarette smoke or other inhaled carcinogens, violent behavior is common in the absence of violent media, whereas many who are exposed to violent media demonstrate no violent behavior. Violent media, then, are not sufficient to cause violent behavior. 3. The effect sizes of media violence research are small. They account for only a small fraction of the variance in violent behavior.*" Furthermore, medical research tends to use a

(Continued on following page)

Intention to harm

54. Researchers define aggression as the intention to harm another, but we do not know the intentions of subjects in laboratory experiments (because no one asks them). In observational studies of children's play (e.g., Irwin & Gross, 1995), it is unclear whether the verbal or physical aggression observed has an injurious intent or whether it is merely play fighting.

The social character of video games

55. People play video and computer games in groups, and they tend to talk about games with their friends. Many boys play violent video games because it is expected of them by their peers, just as many adult men follow sports because it is socially useful to do so. In Video Kids, Provenzo (1991, p. 58) notes, "Pool, *pinball, or video games allow a means by which to establish hierarchies of skill and ability, and ultimately leadership*." But participants in experiments are treated as individuals divorced from their social world.

56. Why aren't researchers themselves affected by their long-term cumulative exposure to media violence? I believe they can tolerate media violence because their exposure serves a higher purpose,

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double-blind procedure, where the researchers collecting the data are unaware of the study's hypotheses. There is a rejoinder to this comment by Anderson & Bushman, 2002.

namely, the advancement of science. Young people who play violent video games may also have a higher purpose – to learn about a game because their peers talk about it, to become expert in a peer-valued activity, to experience excitement, to distract themselves from pain and suffering. I believe people use violent entertainment for their own purposes, and that these vary from person to person.

Might violent video games help children cope with anger?

57. Olson (2004) and Salonius-Pastenak and Gelfond (2005) note the need for research on potential benefits of violent games for some children and adults. For everyone who may be influenced negatively by violent video games, there may be an equal number of people who use video games to distract themselves from anger, in the same way that an active sport, or counting to 10, can help a person cope with anger or other unpleasant emotions (van Salisch & Bretz, 2003).

58. Jansz (2005) writes that violent video games are "private laboratories in which an adolescent can experiment safely with the uncertainty of his identity and emotions. . . . He can choose to experience a wide range of emotions by confronting himself with emotional game situations. . . . Playing a violent video game also enables an adolescent to experience emotions that are problematic for him in ordinary life and allows him to come to terms with uncertainties about

his identity" (p. 231). Violent video games enhance "the gamer's potential to cope with the inevitable insecurities of adolescence" (p. 237).

Additional comments on documents in this case

59. According to the State "*automatic aggressiveness, increased aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance, reduced activity in the frontal lobes of the brain – each causes distinct harm to the developing minds of minors. And prevailing social science points directly to violent video games as a* ***major*** *culprit*" (emphasis added). But we do not know whether video games are a 'major' culprit compared to other factors, such as poverty, diet, and so on, involved in poor school performance and aggressiveness.

60. The State notes that the California Psychological Association advised that research "*points overwhelmingly to a causal connection between media violence and aggressive behavior* ***in some children*** . . . " (emphasis added). Just which children may be at risk is unclear from the existing research. Who is most at risk, males or females, young or old, novice or experienced players, those with high IQ or low?

61. The State refers to a 2004 meta-analysis by Anderson, in which studies with 'best practices' are distinguished from others with weaker methodologies. However, what Anderson refers to as the better

studies in terms of method still contain significant flaws. People cannot play on demand. Using a video game not of your choosing for 10 or 20 minutes, in an unfamiliar environment has little to do with playing video games. Whatever it is that experiments are studying it is not 'playing video games.' Games that are equated on excitement or interest may still differ on other crucial dimensions, such as their storyline, interactivity, or controllability. In laboratory experiments, even when the purported target of aggression is another human, the validity of the measures is still questionable.

62. The State notes that since video games are 'exemplary teachers' they must also be exemplary teachers of violence. I do not believe that video games teach or reinforce aggressive behavior because there is no actual aggressive behavior that takes place. Players are not acting aggressively, they are not rehearsing aggressive behavior, they are playing a game with violence as a theme: They might learn scripts from the way these games are played, but there is no indication that they are motivated to act them out except in play or fantasy.

Conclusion

63. Existing research on violent video games is inconsistent, ambiguous, and insufficient to allow one to draw conclusions concerning the effects of violent video games on the aggressive behavior of young people. I remain unconvinced that the evidence to

date points to the conclusion that violent video games cause aggressive behavior, and doubt whether the research tools available to social psychologists are capable of providing an answer. The continued controversy over the effects of media violence in the scientific community attests to the fact that the data are not conclusive.

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I declare that the foregoing statement is true and correct.

March 6, 2006

/s/ **Jeffrey H. Goldstein**
Jeffrey H. Goldstein

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VIDEO SOFTWARE DEALERS
ASSOCIATION AND ENTERTAINMENT SOFTWARE
ASSOCIATION,

PLAINTIFFS,

VS.

ARNOLD SCHWARZENEGGER,
IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE
STATE OF CALIFORNIA;
BILL LOCKYER, IN HIS
OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA;
GEORGE KENNEDY, IN HIS
OFFICIAL CAPACITY AS
SANTA CLARA COUNTY
DISTRICT ATTORNEY;
RICHARD DOYLE, IN HIS
OFFICIAL CAPACITY AS
CITY ATTORNEY FOR THE
CITY OF SAN JOSE; AND
ANN MILLER RAVEL, IN HER
OFFICIAL CAPACITY AS
COUNTY COUNSEL FOR THE
COUNTY OF SANTA CLARA,

DEFENDANTS.

C-05-04188 RMW

SAN JOSE,
CALIFORNIA

DECEMBER 9, 2005

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

OFFICIAL COURT REPORTER:
LEE-ANNE SHORTRIDGE,
CSR, CRR
CERTIFICATE NUMBER 9595

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[3] SAN JOSE, CALIFORNIA DECEMBER 9, 2005

PROCEEDINGS

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: NEXT MATTER, C-05-04188, VIDEO SOFTWARE DEALERS ASSOCIATION, ET AL, VERSUS ARNOLD SCHWARZENEGGER, ON FOR PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION.

COUNSEL, STATE YOUR NAME FOR THE RECORD, PLEASE.

MR. LYON: GOOD MORNING, YOUR HONOR. MARK LYON FOR THE PLAINTIFFS, GIBSON, DUNN & CRUTCHER.

WITH ME TODAY ARE PAUL SMITH AND KATHERINE FALLOW OF JENNER & BLOCK.

MR. MORAZZINI: GOOD MORNING, YOUR HONOR. ZACKERY MORAZZINI, DEPUTY ATTORNEY GENERAL FOR THE GOVERNOR AND ATTORNEY GENERAL.

MR. ROLLO: GOOD MORNING, YOUR HONOR. DAVID ROLLO, DEPUTY COUNTY COUNSEL APPEARING FOR DEFENDANT SANTA CLARA COUNTY DISTRICT ATTORNEY, GEORGE KENNEDY, AND COUNTY COUNSEL FOR THE COUNTY OF SANTA CLARA, ANN MILLER RAVEL.

MR. FABELA: GOOD MORNING, YOUR HONOR. ROBERT FABELA ON BEHALF OF INDUSTRY ATTORNEY ROBERT [4] DOYLE.

WE FILED AN ORAL OPPOSITION BUT DON'T INTEND TO MAKE ORAL ARGUMENT.

THE COURT: ALL RIGHT. HAVE YOU SEEN THE QUESTIONS THAT I POSTED?

MR. MORAZZINI: I HAVE, YOUR HONOR.

MR. LYON: YES, YOUR HONOR.

MR. ROLLO: YES, YOUR HONOR.

THE COURT: OKAY. I GUESS THE VIDEO SOFTWARE DEALERS ARE THE MOVING PARTY, SO LET ME HEAR FROM THEM FIRST.

MR. LYON: GOOD MORNING, YOUR HONOR. I THOUGHT I WOULD START WITH THE ISSUE OF THE MERITS AND OUR LIKELIHOOD OF SUCCESS, IN PARTICULAR WITH THE QUESTION THE COURT RAISED ABOUT THE APPLICABLE STANDARD OF REVIEW UNDER THE FIRST AMENDMENT BECAUSE I THINK THAT IS LARGELY DISPOSITIVE HERE.

WE'RE DEALING WITH A LAW WHICH SINGLES OUT A PARTICULAR SET OF EXPRESSIVE WORKS AND SAYS THEY CAN'T BE DISTRIBUTED TO A LARGE GROUP OF PEOPLE BECAUSE THE STATE HAS DECIDED THAT THEIR CONTENT IS HARMFUL FOR THAT GROUP OF PEOPLE.

THE CONTENT WHICH HAS BEEN SINGLED OUT FOR CENSORSHIP BY THE STATE OF CALIFORNIA IS VIOLENCE OF ONE SORT OR ANOTHER. THERE'S A [5] COMPLICATED AND, I THINK, VERY CONFUSING SET OF CRITERIA, BUT IT IS VIOLENCE.

THE COURT: RIGHT.

MR. LYON: BECAUSE THERE IS NO EXCEPTION TO THE FIRST AMENDMENT FOR VIOLENT CONTENT, WHEN THE STATE SETS OUT TO TRY TO SUPPRESS THE DISTRIBUTION OF THAT CONTENT, IT HAS TO SATISFY A STRICT SCRUTINY UNDER THE FIRST AMENDMENT.

THE DEFENDANTS MAKE A KIND OF HALF-HEARTED, I WOULD SAY, EFFORT TO ARGUE –

THE COURT: LET'S ASSUME FOR THE MOMENT THAT STRICT SCRUTINY APPLIES. I'D LIKE YOU TO GO FROM THERE.

MR. LYON: WELL, THEN, YOU HAVE TO BASICALLY SATISFY THE TRADITIONAL STRICT SCRUTINY TEST, WHICH HAS TO SATISFY A

LEGITIMATE AND COMPELLING STATE INTEREST IN THE LEAST RESTRICTIVE POSSIBLE WAY AND DIRECTLY ADVANCE THAT STATE INTEREST, AND THAT'S NO MEAN FEAT.

THE FACT OF THE MATTER IS THERE ISN'T ANY EXAMPLE IN OUR JURISPRUDENCE OF A LAW THAT SINGLES OUT CONTENT FOR BANNING AND TO WHICH STRICT SCRUTINY APPLIES IN WHICH THE COURTS HAVE FOUND THAT THE STRICT SCRUTINY HAS BEEN SATISFIED, IN ANY CASE.

[6] THE COURT: SO BASICALLY YOU'RE SAYING THAT THE BOTTOM LINE OF YOUR ARGUMENT IS THAT NO MATTER HOW GRUESOME, GROSS, OFFENSIVE, WHATEVER TERM YOU WANT TO USE, THAT VIDEO VIOLENCE IS, THAT THE STATE CANNOT DO ANYTHING ABOUT THE DISTRIBUTION OF THAT TO CHILDREN, EITHER LABEL OR PROHIBIT DISTRIBUTION? THEY CAN"T DO IT?

MR. LYON: IT CERTAINLY CAN"T PROHIBIT DISTRIBUTION, YOUR HONOR.

THERE IS – THERE IS A BASIC PRINCIPLE UNDER THE FIRST AMENDMENT THAT THE GOVERNMENT SHOULDN"T GO AROUND DECIDING WHICH KIND OF SPEECH IT APPROVES OF OR THINKS ARE OFFENSIVE OR NOT OFFENSIVE.

OBVIOUSLY THERE ARE PLENTY OF PEOPLE THAT WOULD THINK THAT SOME OF THE GAMES THAT THEY HAVE INCLUDED IN THEIR TAPE ARE UNPLEASANT OR OFFENSIVE, BUT IT'S NOT UP TO THE STATE OF CALIFORNIA TO DECIDE THAT.

THE COURT: OKAY. THE ANSWER TO MY QUESTION IS SIMPLE THEN: THAT THE STATE CANNOT BAN DISTRIBUTION OF ANY SORT OF VIOLENT VIDEO TO CHILDREN?

MR. LYON: YES, YOUR HONOR, THAT'S CORRECT.

[7] THE – THE – FOR A NUMBER OF DIFFERENT REASONS, ONE OF WHICH IS THAT STRICT SCRUTINY APPLIES AND THEY HAVE TO TRY TO MEET THAT STANDARD, AND THEY HAVEN'T EVEN COME CLOSE TO MEETING THAT STANDARD HERE TO SHOW –

THE COURT: OKAY. BUT LET'S ASSUME – YOU'RE SAYING THEY CAN'T – THAT IT'S IMPOSSIBLE UNDER ANY CIRCUMSTANCES FOR THE STATE TO MEET A STRICT SCRUTINY STANDARD THAT WOULD BAN THE DISTRIBUTION OF VIOLENT VIDEOS TO KIDS?

MR. LYON: YES, YOUR HONOR, BECAUSE TO THE EXTENT THAT THE JUSTIFICATION IS "WE THINK THAT THIS WILL HAVE BAD EFFECTS ON THE PEOPLE WHO VIEW IT," THE BASIC FIRST AMENDMENT PRINCIPLE IS THAT

IT'S THE PEOPLE WHO DECIDE WHAT EXPRESSION THEY WANT TO CONSUME. IT'S NOT UP TO THE STATE TO DECIDE.

AND IN THIS AREA, IT'S UP TO THE PARENTS OF FAMILIES OF MINORS TO DECIDE WHAT GAMES THEY'RE GOING TO BE PLAYING AND TO SET THE FAMILY STANDARDS USING THE INFORMATION THAT HAS BEEN PROVIDED TO THEM.

THESE GAMES ARE VERY WELL MARKED WITH DETAILED INFORMATION ABOUT WHAT THEIR CONTENT ARE AND WHAT THE RECOMMENDATIONS –

[8] THE COURT: OKAY. YOUR ARGUMENT IS ESSENTIALLY, EVEN IF THEY WEREN'T, IT DOESN'T MAKE ANY DIFFERENCE, THE STATE CAN'T STOP THE DISTRIBUTION?

MR. LYON: CERTAINLY CAN'T BAN THEM, YOUR HONOR.

THE COURT: OKAY. LET'S TALK ABOUT LABELLING.

MR. LYON: YOUR HONOR, IF THERE WERE NO LABELLING ALREADY IN EXISTENCE AND THE STATE TRIED TO COME UP WITH SOME SORT OF SCHEME THAT SAYS "WE NEED TO TELL CONSUMERS ABOUT THE CONTENT OF THESE GAMES," I CAN IMAGINE A SCENARIO UNDER WHICH WE WOULD HAVE A

CLOSE CONSTITUTIONAL QUESTION ABOUT THAT.

HERE THE LABELLING THAT IS SUPPLIED BY THE INDUSTRY IS VASTLY MORE DETAILED THAN THIS TWO-INCH "18" LABEL THAT THEY WANT TO HAVE PASTED ON THE GAME.

CLEARLY IF THE BAN IS UNCONSTITUTIONAL, THE LABEL HAS TO BE UNCONSTITUTIONAL BECAUSE WHAT IT IS EFFECTIVELY COMMUNICATING IS THAT YOU CAN'T BUY IT IF YOU'RE UNDER 18, THAT'S ALL IT COMMUNICATES, WHICH IS, IN FACT, FALSE IF THE REST OF THE LAW IS UNCONSTITUTIONAL.

[9] IT DOESN'T PROVIDE ANY INFORMATION ABOUT CONTENT BEYOND THAT. IT'S JUST AS IF THE STATE WERE TO GO TO A BOOK STORE AND PUT A LABEL ON EVERY BOOK THAT THEY THOUGHT WAS INAPPROPRIATE FOR CHILDREN TO READ.

THAT'S NOT SOMETHING THAT, THAT SAYS, "18. DON'T READ THIS IF YOU'RE UNDER 18."

IF THEY'RE NOT ALLOWED TO MAKE THAT CENSORSHIP, THEN THEY'RE CERTAINLY NOT ALLOWED TO GO AROUND PASTING A LABEL ON WHICH PURPORTS TO BE CENSORING AND PURPORTS TO TELL YOU YOU CAN'T BUY IT.

THE COURT: ISN'T THERE A DIFFERENCE? ONE IS SAYING YOU SHOULDN'T AND THE OTHER IS SAYING YOU CAN'T.

MR. LYON: I THINK THE LABEL ASSIGNED IN THIS CASE SAY YOU CAN'T. IT DOESN'T SAY "WE THINK YOU MIGHT WANT TO LOOK HARD AT PLAYING THIS GAME IF YOU'RE UNDER 18."

IT SAYS "18," JUST "18." IT MEANS YOU CAN'T BUY IT.

IT'S AS IF THEY WERE ADULT VIDEOS OR SOMETHING LIKE THAT. IT'S NOT LIKE THERE'S ANY REAL SUBTLETY ABOUT THE NATURE OF THE EXPRESSION TO SUGGEST THAT IT'S ONLY A SUGGESTION, THAT IT'S NOT [10] A BAN.

THE COURT: WE DO HAVE, UNFORTUNATELY, PARENTS THAT AREN'T VERY GOOD.

I TAKE IT, FROM YOUR STANDPOINT, IT'S A PARENTAL ISSUE, ALONG WITH A WARNING BY THE DISTRIBUTOR OR SELLER, AND THAT'S AS FAR AS THINGS CAN GO?

MR. LYON: THAT, YOUR HONOR, I THINK IS THE WAY OUR SYSTEM WORKS.

AND THE REASON FOR THAT IS THAT IF YOU ALLOW THE GOVERNMENT TO START DECIDING WHAT IT WANTS TO SANITIZE AND PREVENT KIDS FROM HAVING ACCESS TO, THERE'S NO STOPPING POINT.

THE COURT: WELL, THEY HAVE WITH RESPECT TO PORNOGRAPHY; RIGHT?

MR. LYON: BUT – BUT THAT'S A VERY NARROWLY CABINED AREA, OBSCENITY, NOT JUST PORNOGRAPHY.

AND THE SUPREME COURT HAS SAID ANY NUMBER OF TIMES THAT THE OBSCENITY CATEGORY CAN'T BE EXPANDED OUTSIDE THE CONTEXT OF EXPLICIT SEXUAL MATERIAL.

AND ANY NUMBER OF CASES THAT WE'VE CITED HERE SAID, IN THE VIDEO GAME CONTEXT IN PARTICULAR, WE'RE NOT GOING TO ALLOW THIS *GINSBERG* CONCEPT TO [11] SLIDE OVER INTO VIOLENCE BECAUSE VIOLENT CONTENT IS EVERYWHERE. IT'S IN ALL KINDS OF CHILDREN'S LITERATURE. IT'S IN ALL KINDS OF WORKS OF ONE SORT OR ANOTHER.

THE COURT: THEY'VE MADE AN ATTEMPT, WHETHER IT'S AN EFFECTIVE ONE OR NOT, TO DEFINE VIOLENCE IN A VERY NARROW WAY THAT WOULD NOT INCLUDE A LOT OF THE STUFF THAT IS VIOLENT IN KIDS MATERIALS.

MR. LYON: WELL, YES, YOUR HONOR.

BUT THAT ATTEMPT HAS SEVERAL FLAWS IN IT. ONE, IT'S VERY CONFUSING. IT'S VERY HARD TO FIGURE OUT WHERE THE LINE WOULD BE WITH ALL OF THIS MULTI-STEP TEST AND ALL OF THE TERMS LIKE IS THE PLAYER ACTING WITH CRUELTY OR INDIFFERENCE AND THAT SORT OF THING.

THE COURT: WELL, IT SEEMS TO ME WHAT THEY TRIED TO DO WAS TO TAKE THE DEFINITION OF AN OBSCENITY AND USE IT TO TRY AND DEFINE SIMILARLY FOR VIOLENCE, AND THEN TAKE WHAT THE COURT HAS SAID IS DEFINITE ENOUGH FOR THE PURPOSES OF THE DEATH PENALTY AND TRIED TO FIT THAT IN AND COME UP WITH SOME NARROW DEFINITION OF THE TYPE OF VIOLENCE THAT'S BEING DIRECTED AT BY THIS STATUTE.

MR. LYON: WELL, IT'S NOT AS NARROW AS IT [12] MIGHT SEEM BECAUSE IT'S IN THE ALTERNATIVE. IT COULD BE EITHER ONE OR THE OTHER.

THE COURT: RIGHT.

MR. LYON: AND AS TO THE FORMER, ANY NUMBER OF COURTS – THE SEVENTH CIRCUIT AND THE EIGHTH CIRCUIT HAVE REJECTED THIS NOTION THAT YOU CAN KIND OF ENGRAFT THE GINSBERG THREE-STEP STANDARD AND TURN IT INTO A VIOLENCE RESTRICTION.

THE USE OF THE DEATH PENALTY INSTRUCTIONS, I ADMIT, IS A NOVELTY AND IT'S THE FIRST TIME I'VE SEEN IT.

BUT THE FACT THAT IT IS SUFFICIENTLY CLEAR TO USE IN INSTRUCTIONS TO THE JURY WHEN IT'S DECIDING WHETHER TO IMPOSE THE DEATH PENALTY DOESN'T MEAN THAT

IT'S SUFFICIENTLY CLEAR WHEN USED AS A BASIS FOR DECIDING THAT SOME VIOLENT VIDEO GAMES ARE GOING TO BE PERMITTED IN THE STATE OF CALIFORNIA TO BE SOLD AND SOME AREN'T, BECAUSE IF YOU LOOK AT THOSE STANDARDS AND THEN YOU LOOK AT THE GAMES AND TRY TO DECIDE WHICH ONES HAVE VICTIMS WHICH ARE SUFFICIENTLY HUMANLIKE, WHICH ONES – IN WHICH ONES ARE THE KILLINGS THAT ARE GOING ON TOO CRUEL OR TOO ATROCIOUS, HOW ARE WE SUPPOSED TO KNOW WHICH ONES STEP OVER THE LINE?

THERE'S A WHOLE RANGE OF VIOLENCE IN [13] THESE GAMES. AS I THINK THE MATERIALS IN THE RECORD ILLUSTRATE, EXACTLY WHERE THAT LINE IS IS VERY DIFFICULT TO TELL.

NOW, THE OTHER POINT I WANTED TO MAKE ABOUT THIS EFFORT TO NARROW THE CATEGORY IS THAT IT BEARS NO RELATIONSHIP WHATSOEVER TO THE RESEARCH THAT THEY PURPORT TO BE RELYING ON.

THE RESEARCH DOESN'T SAY ONLY THE MOST HEINOUS AND ATROCIOUS AND CRUEL GAMES ARE THE ONES THAT CAUSE THIS SUPPOSED PSYCHOLOGICAL HARM.

THE PSYCHOLOGISTS THAT ARE IN THEIR CAMP AND SUPPORT THESE LAWS SAY THAT CARTOONISH GAMES, ONES THAT – THAT ARE THE VIDEO GAME EQUIVALENT OF BUGS

BUNNY CAUSE THE SAME HARM AS THE MORE REALISTIC GAMES, AND THEY SAY IT DOESN'T MAKE A DIFFERENCE WHETHER IT'S A HUMAN VICTIM OR AN ALIEN.

THAT'S IN THE ARTICLES THAT THEY PUT IN THE RECORD. I REALIZE IT'S IMPOSSIBLE FOR THE COURT TO HAVE DIGESTED ALL OF THE PSYCHOLOGICAL LITERATURE THAT THEY'VE DUMPED IN THE RECORD HERE, BUT THERE ISN'T ANY CONNECTION, ANY FIT TO THE EXTENT OF WHAT THEY'VE BANNED, OR TO THE EXTENT THAT YOU CAN DISCERN EXACTLY WHAT THEY'VE BANNED, AND WHAT THE LITERATURE SAYS IS THE PROBLEM.

THE COURT: LET'S ASSUME THE LEGISLATURE [14] MAKES A FINDING THAT VIDEO GAMES WITH A CERTAIN – THAT FALL WITHIN A CERTAIN DEFINITION OF VIOLENCE HAVE – AND JUST ASSUME FOR THE MOMENT YOU COULD CARVE OUT SOME DEFINITION WHERE EVERYBODY WOULD LOOK AT IT AND SAY "THAT'S GOT NO SOCIALLY REDEEMING VALUE. THAT'S PERVERSE. THAT'S JUST AWFUL. IT'S ATROCIOUS."

AND THE LEGISLATURE FOUND, BASED ON THE PSYCHOLOGICAL STUDY, THAT THAT TYPE OF VIDEOTAPE ENHANCED THE – OR INCREASED THE PROBABILITY THAT A CHILD THAT SAW IT WOULD BE VIOLENT AS HE GREW UP.

COULD YOU COME IN AND CHALLENGE THAT FINDING ON THE BASIS THAT THERE WERE FIVE OTHER STUDIES THAT WERE MUCH BETTER THAT SHOWED OTHERWISE?

MR. LYON: CERTAINLY, YOUR HONOR. THE – UNDER STRICT SCRUTINY –

THE COURT: ISN'T THAT UP TO THE LEGISLATURE TO CHOOSE AS LONG AS IT'S A RATIONAL DECISION?

MR. LYON: NOT UNDER THE FIRST AMENDMENT WHEN YOU'RE APPLYING STRICT SCRUTINY.

THE LEGISLATURE CAN'T BOOTSTRAP ITSELF INTO THE ABILITY TO CENSOR SPEECH TO MAKE SOME LEGISLATIVE FINDING AND NOT HAVE TO ANSWER IN COURT [15] TO WHAT THE REAL EVIDENCE IS.

SO THERE'S CASE AFTER CASE OUT THERE RECOGNIZING WHEN YOU'RE GOING TO HAVE HEIGHTENED SCRUTINY, THEY HAVE TO COME IN AND PROVE TO THE JUDICIARY THAT THE FINDINGS THAT THEY PURPORT TO RELY ON ARE, IN FACT, TRUE.

THE OTHER POINT I'D MAKE ABOUT THAT FINDING IS THAT IT – LEAVING ASIDE ITS TRUTH OR FALSEHOOD, IT DOES NOT QUALIFY AS A JUSTIFICATION FOR CENSORSHIP AS A MATTER OF LAW BECAUSE A – EVEN IF IT WERE ASSUMED TO BE TRUE, AS YOU JUST

ASKED ME TO ASSUME, THAT THESE MATERIALS – THAT THIS CATEGORY OF MATERIALS CAUSES – MAKES IT MORE LIKELY THAT SOME PEOPLE OVER TIME WILL BE VIOLENT, UNDER THE *BRANDENBERG* LINE OF CASES, WHICH IS CONTROLLING LAW, THE ONLY TIME IN WHICH YOU CAN BAN SPEECH IN ORDER TO PREVENT THE VIOLENT BEHAVIOR OF THE RECIPIENTS IS IN SITUATIONS WHERE IT'S IMMINENT LAWLESSNESS, INCITEMENT LIKE A MOB.

WHAT THE SIXTH CIRCUIT IN *JAMES* CALLED GLACIAL PERSONALITY EFFECTS JUST DON'T JUSTIFY CENSORSHIP UNDER THE FIRST AMENDMENT, EVEN IF YOU ASSUME THAT, IN FACT, THE PSYCHOLOGICAL LITERATURE DOES SHOW SUCH EFFECTS.

THE COURT: LET'S TALK A LITTLE MORE [16] ABOUT LABELLING. ASSUMING THAT THE STATE COULD COME UP WITH A DEFINITION OF VIOLENCE THAT WASN'T VAGUE, OR AWFUL VIOLENCE THAT WASN'T VAGUE, AND WANTED TO REGULATE – AND THE INDUSTRY HAD NO REGULATION ON – OR NO PRACTICE WITH RESPECT TO LABELLING VIDEOS. THE LEGISLATURE COULD COME UP WITH A STATUTE THAT SAYS – AND MEET FIRST AMENDMENT STRICT SCRUTINY REQUIREMENTS, THAT THIS, THIS VIDEO SHOULD NOT BE SEEN BY CHILDREN UNDER THE AGE OF 18.

MR. LYON: WELL, YOUR HONOR, A LABEL WHICH DISCLOSED CONTENT WOULD AT LEAST BE ARGUABLE. I THINK THERE'S A SERIOUS PROBLEM WITH THAT, BUT IT'S ARGUABLE.

A LABEL THAT REQUIRES YOU TO PUT ON YOUR PRODUCT THAT THE STATE OF CALIFORNIA DOESN'T THINK PEOPLE SHOULD BUY IT IF THEY'RE UNDER 18, THAT'S GOT TO BE UNCONSTITUTIONAL FOR THE SAME REASON THAT THE BAN IS UNCONSTITUTIONAL.

IF THE STATE HAS NO CONSTITUTIONAL BASIS FOR SAYING THIS MATERIAL SHOULDN'T BE DISTRIBUTED TO PEOPLE AND BANNING IT, YOU CAN'T REQUIRE THE SPEAKER TO PUT ON HIS EXPRESSIVE WORK, "THE STATE OF CALIFORNIA RECOMMENDS THAT THIS NOT BE BOUGHT BY PEOPLE IN A CERTAIN CATEGORY."

[17] THE COURT: SO THE STATE SHOULD PUT ON A LABEL THAT SAYS, "WARNING: THIS VIDEO CONTAINS GRAPHIC VIOLENCE"?

MR. LYON: I THINK WE'D HAVE TO HAVE AN ARGUMENT ABOUT WHETHER OR NOT THE STATE CAN DO THAT AND THE STANDARDS TO BE APPLIED AND WHO'S DECIDING WHERE THE LINE IS. ALL OF THOSE WOULD BE PROBLEMS, SERIOUS PROBLEMS.

AND CERTAINLY HERE WHERE YOU HAVE A MUCH BETTER SYSTEM THAN THAT AND WHERE THE LABEL THAT THEY'RE ATTEMPTING TO IMPOSE WOULD CAREFULLY COVER UP THE PACKAGING IN WHICH THE INFORMATION IS BEING PROVIDED TO CONSUMERS, I DON'T THINK IT'S A CLOSE QUESTION HERE.

IF THE INDUSTRY WERE TO GIVE UP ANY EFFORT TO INFORM CONSUMERS ABOUT CONTENT AND ANY EFFORT IS SELF-REGULATION IN THE STORES, THE STATES COULD COME ALONG AND SAY "AT LEAST YOU HAVE TO DISCLOSE WHICH ONES ARE MORE VIOLENT AND LESS VIOLENT," AND WE'D HAVE TO LOOK AT THE LAW AND HOW IT WAS DONE THEN.

BUT THAT'S NOT THE SITUATION HERE. WHAT YOU HAVE HERE IS AN EFFORT TO SAY "WE THINK PEOPLE ARE MAKING THE WRONG DECISIONS IN MAKING THESE PURCHASES AND PARENTS AREN'T DOING A GOOD ENOUGH [18] JOB AND WE'RE GOING TO COME ALONG AND SAY KIDS NEED TO BE PROHIBITED FROM BUYING THE STUFF," EVEN THOUGH THERE'S NO DISPUTE THAT THE MATERIAL IS DESCRIBED IN GREAT DETAIL ON THE PACKAGE.

AND THAT, I SUBMIT, IS NOT SOMETHING THAT THE STATE CAN DO.

AND THE CASE LAW IS VERY CONSISTENT ON THIS. AS RECENTLY AS LAST FRIDAY THE COURT IN ILLINOIS HELD UNCONSTITUTIONAL

A VERY SIMILAR LAW REJECTING ALL OF THE ARGUMENTS.

INDEED, AFTER HAVING HEARD THE TESTIMONY OF THEIR LEADING PSYCHOLOGISTS WHO, THE VERY SAME PEOPLE THAT THEY CITE HERE, AND MADE THE POINT THAT IN OUR COUNTRY, IF THERE'S SPEECH OUT THERE THAT IS HARMFUL TO PEOPLE'S PSYCHOLOGICAL DEVELOPMENTS WHEN THEY'RE KIDS, IT'S UP TO THE PARENTS AND NOT THE COURTS TO DECIDE, TO GO AROUND DECIDING TO TAKE CARE OF THAT PROBLEM AND DIFFERENT PEOPLE WILL HAVE DIFFERENT STANDARDS AND THE GOVERNMENT SHOULDN'T BE IN THIS BUSINESS.

THE COURT: OKAY. I THINK I UNDERSTAND YOUR POSITION.

MORE OUT OF CURIOSITY, BECAUSE I THINK I KNOW YOUR ANSWER, COULD YOU ANSWER QUESTION 1.

MR. LYON: YOU'RE GOING TO HAVE TO [19] REFRESH MY RECOLLECTION. OH, WHICH GAMES ARE COVERED BY THE STATUTE.

MY ANSWER IS, YOU'LL FIND UNSURPRISINGLY, THAT WE DON'T REALLY KNOW WHICH GAMES ARE COVERED.

THE COURT: I WOULD HAVE BEEN SHOCKED IF YOUR ANSWER WERE DIFFERENT.

LET ME HEAR FROM THE STATE.

MR. MORAZZINI: GOOD MORNING, YOUR HONOR. ZACK MORAZZINI FOR THE STATE.

ACTUALLY, PLAINTIFFS HAVE ANSWERED PART OF QUESTION 1 FOR YOU IN THEIR DECLARATION OF TED PRICE. THEY SUBMITTED – AT PAGE 4 HE STATES, AND I'LL QUOTE, "I BELIEVE FOR THE FOLLOWING" – "I BELIEVE THE FOLLOWING GAMES MAY FALL UNDER THE PROVISIONS OF THIS STATUTE, TERMINATOR 3, MINORITY REPORT, AND MEDAL OF HONOR, FRONT LINE."

SO THEY HAVE MADE AN ANSWER TO YOUR QUESTION 1 THROUGH THEIR MOVING PAPERS, YOUR HONOR.

HOWEVER, OUR POSITION – I'M NOT INTIMATELY FAMILIAR WITH THE FULL GAME PLAY OF EACH OF THESE GAMES, BUT I AM FAMILIAR WITH ONE OF THEM, THE FIRST ONE YOU LIST, POSTAL 2, AND I THINK THE STATE'S POSITION WOULD BE THAT THAT GAME IS COVERED BY BOTH PRONGS OF THE STATUTE.

THE COURT: OKAY. ACTUALLY, THE PURPOSE [20] OF MY QUESTION WAS REALLY TO RAISE THE QUESTION OF WHETHER THE STATUTE IS VAGUE OR NOT BECAUSE PEOPLE WOULD INTERPRET – SOME WOULD SAY IT

APPLIES TO SOME OF THESE AND SOME WOULD SAY IT DOES NOT.

AND THAT RAISES A QUESTION ABOUT WHETHER THE ACT CAN BE ENFORCED BY ANY, CITY ATTORNEY, COUNTY COUNCIL, OR DISTRICT ATTORNEY.

ISN'T IT LIKELY, IF THIS WERE ENACTED, THAT YOU'D HAVE SOMEONE IN SAN FRANCISCO, FOR EXAMPLE, SAYING "WE DON'T FEEL THAT THAT FALLS WITHIN THE ACT," AND SOMEONE IN ORANGE COUNTY SAYING "WE FEEL IT DOES"?

MR. MORAZZINI: CERTAINLY, YOUR HONOR. THAT'S ENTIRELY POSSIBLE.

BUT THAT PARALLELS THE WHOLE HISTORY OF THE OBSCENITY LAWS WE HAVE IN THIS COUNTRY.

THE COURT: BUT ISN'T THERE A DIFFICULTY EQUATING OBSCENITY AND HORRIFIC VIOLENCE?

MR. MORAZZINI: NOT WHEN WE'RE TALKING ABOUT THE AUDIENCE OF MINORS, YOUR HONOR.

OUR POSITION IS THAT IT'S A NATURAL CONNECTION. ONE NATURALLY FOLLOWS THE OTHER.

IF WE'RE TALKING ABOUT THE HARMFUL IMPACT ON MINORS, SEXUAL NUDITY, *GINSBERG*, NO ONE CAN DISPUTE – AN ISSUE IN *GINSBERG* WAS SIMPLE NUDITY [21] IN WHATEVER FORM.

AND IF THE U.S. SUPREME COURT ALLOWS, WITHOUT SPECIFIC FINDINGS FROM A LEGISLATIVE BODY, ALLOWS FOR THE PROPOSITION THAT SIMPLE NUDITY CAN BE SO HARMFUL TO CHILDREN THAT IT CAN BE BANNED AS OBSCENE FOR THAT AUDIENCE, THEN VIOLENCE, ESPECIALLY WHEN IT'S AS NARROWLY DEFINED AS THE STATE HAS DONE HERE, THERE'S NO LOGICAL DISTINCTION.

IF A BLOODY CORPSE – PARDON MY LANGUAGE, YOUR HONOR – BUT IF A BLOODY CORPSE BEING KNOCKED AROUND A VIDEO GAME SCREEN CAN BE REGULATED BECAUSE IT DOESN'T HAVE A BRASSIERE ON, BUT IF YOU PUT A BRASSIERE ON THAT BLOODY CORPSE IT CAN'T BE REGULATED BECAUSE THE NUDITY IS TAKEN OUT OF IT, THAT'S AN ILLOGICAL CONCLUSION AND THE LAW DOES NOT LEAD TO ABSURDITIES SUCH AS THAT, YOUR HONOR.

THE COURT: WHAT – THERE IS CASE LAW THAT SUGGESTS THAT *GINSBERG* IS KIND OF LIMITED TO THE OBSCENITY FIELD.

WHAT DEFINES WHAT AREAS THE STATE COULD SAY ARE INAPPROPRIATE FOR KIDS?

MR. MORAZZINI: I THINK BY DOING EXACTLY WHAT THE STATE DID HERE, YOUR

HONOR, IN DEFINING THE MATERIAL IN TERMS OF IT'S [sic] OBSCENITY AS TO THE [22] MINORS.

IF YOU CAN FIND THAT IT, THAT IT IS – THAT A REASONABLE PERSON WOULD FIND THAT IT APPEALS TO THE DEVIANT AND MORBID INTEREST OF A MINOR, IF YOU CAN FIND THAT IT HAS NO SOCIALLY REDEEMING VALUE IN THE COMMUNITY AS TO WHAT'S APPROPRIATE FOR MINORS, IF YOU CAN MEET THE *MILLER V. CALIFORNIA* DEFINITION OF OBSCENITY, BUT DIRECTED AT VIOLENCE, THERE'S NO LOGICAL REASON WHY, IF IT WERE SIMPLE NUDITY, YOU'RE FREE TO REGULATE IT, BUT IF YOU THROW A BRASSIERE ON, YOU'RE NOT FREE ANYMORE TO REGULATE IT, YOUR HONOR.

NO BINDING OPINION IN THIS COURT TIES YOUR HANDS OVER THIS ISSUE.

CERTAINLY THE SEVENTH CIRCUIT AND THE EIGHTH CIRCUIT ARE NOT BINDING. IN FACT, THEY'RE NOT EVEN PERSUASIVE.

MOST OF THOSE LAWS AT ISSUE DEALT WITH NOT PROTECTING MINORS FROM HARM, BUT PROTECTING THE COMMUNITY FROM THE MINORS PLAYING THE GAMES AND GOING OUT AND COMMITTING VIOLENT ACTS, WHICH THE STATE CONCEDES WOULD BE SUBJECT TO *BRANDENBERG* AND FELL UNDER

BRANDENBERG. THE STATE'S LAW IS DIFFERENT.

THE COURT: WHAT ABOUT – WHEN I GREW [23] UP – AND I STILL DO, AS A MATTER OF FACT – I HATE SCARY MOVIES. THEY REALLY SCARE ME. AND SOMEBODY JUMPING OUT FROM BEHIND A CLOSED DOOR BOTHERS ME.

I CAN SEE SOMEBODY CONCLUDING THAT REALLY SCARY MOVIES ARE VERY, VERY UNHEALTHY FOR YOUNG CHILDREN.

COULD THE STATE IMPOSE SOME REGULATION THAT DEFINES A SCARY MOVIE IN SOME WAY WHICH SAID, "HUH-UH, IF THERE WAS A PSYCHOLOGICAL STUDY THAT SAID SEEING SCARY MOVIES WILL CAUSE YOU TO BE A FRIGHTENED PERSON FOR THE REST OF YOUR LIFE"?

MR. MORAZZINI: YOUR HONOR, I THINK ANY LAW THAT WOULD ATTEMPT TO DO THAT WOULD HAVE TO BE SUBJECT TO THE OBSCENITY AS TO MINOR STANDARDS.

SO THE HORROR WOULD HAVE TO HAVE NO REDEEMING, ARTISTIC, OR SOCIAL VALUE AND MEET THAT DEFINITION.

BUT BEYOND THAT, I THINK IN A HYPOTHETICAL WORLD, IF THERE WERE A SCARY MOVIE THAT WERE SO OBSCENE AS TO MEET THE DEFINITION, THEN IT'S POSSIBLE.

THE COURT: WHAT ABOUT THE FACT THAT UNDER THIS ACT, YOU MAY WELL HAVE DIFFERENT PEOPLE DRAWING DIFFERENT CONCLUSIONS?

AND GOING BACK TO MY EXAMPLE, IF [24] SOMEBODY, A DISTRICT ATTORNEY OR THE COUNTY COUNSEL OR THE DISTRICT ATTORNEY IN ORANGE COUNTY, FEELS THAT A PARTICULAR VIDEO FALLS WITHIN THE DEFINITION, AND SOMEONE IN SAN FRANCISCO COUNTY DOES NOT, IS THERE ANY PROBLEM WITH THAT?

MR. MORAZZINI: AGAIN, YOUR HONOR, ABSOLUTELY NOT. I THINK THAT'S THE BEAUTY OF THE LAW IS IT TRACKS THE TRADITIONAL OBSCENITY LAW, WHICH PROVIDES FOR EXACTLY THAT, YOUR HONOR. IT'S ALWAYS SUBJECT TO THE PREVAILING STANDARDS OF THE COMMUNITY.

THAT'S WHY THIS CASE MORE APPROPRIATELY WOULD BE BROUGHT AS AN AS-APPLIED CHALLENGE VERSUS THE FACIAL CHALLENGE FOR QUESTIONS JUST LIKE THAT, YOUR HONOR.

IF THE COUNTY OF SACRAMENTO WANTED TO REGULATE – FOUND THAT A GAME FELL UNDER THE STATUTE, WHEREAS THE COUNTY OF SAN FRANCISCO FOUND THAT IT DID NOT, THAT'S A NATURAL CONSEQUENCE OF

APPLYING THE OBSCENITY STANDARD, PREVAILING TO THE COMMUNITY NORMS.

THE COURT: DO YOU SEE A DISTINCTION BETWEEN REGULATING OR A WARNING AS TO CONTENT AS OPPOSED TO BANNING THE SALE OR DISTRIBUTION?

IN OTHER WORDS, DO YOU THINK IT'S A [25] LESSER STANDARD FOR THE STATE TO MEET IF YOU WERE TO LIMIT YOUR STATUTE TO SOME SORT OF REQUIRED WARNING?

MR. MORAZZINI: I THINK THE INDUSTRY WOULD FIGHT IT JUST AS VIGOROUSLY, YOUR HONOR.

HOWEVER, I DO BELIEVE THAT THE SAME PRINCIPLES WOULD APPLY, WHETHER OR NOT *GINSBERG* WOULD APPLY TO SOMETHING SUCH AS THAT, WHETHER OR NOT IT WOULD BE SUBJECT TO STRICT SCRUTINY.

I DON'T THINK THE ANALYSIS WOULD BE A WHOLE LOT DIFFERENT.

THE COURT: OKAY. SO BASICALLY WHAT YOU'RE SAYING IS WHETHER IT'S A LABELLING REQUIREMENT OR A BAN ON DISTRIBUTION, THE SAME ANALYSIS WOULD APPLY?

MR. MORAZZINI: I BELIEVE SO. IF THE LEGISLATURE HAD SUBSTANTIAL EVIDENCE FROM WHICH THEY COULD MAKE

REASONABLE INFERENCES THAT THESE WARNING LABELS NEED TO BE APPLIED TO THESE VIDEO GAMES, THEN IT WOULD BE UPHELD, CERTAINLY, YOUR HONOR.

THE COURT: OKAY. TALK A LITTLE BIT ABOUT WHY THE OUT OF CIRCUIT CASES ARE NOT INSTRUCTIVE.

MR. MORAZZINI: MULTIPLE REASONS, YOUR [26] HONOR.

THE WASHINGTON DISTRICT CASE, NORTHERN DISTRICT OF WASHINGTON, THAT DEALT WITH VIDEO GAMES THAT CONTAINED VIOLENCE AS TO PUBLIC LAW ENFORCEMENT OFFICERS.

THE COURT: RIGHT.

MR. MORAZZINI: THAT WAS A VIEWPOINT –

THE COURT: RIGHT, I UNDERSTAND THAT.

MR. MORAZZINI: THAT CERTAINLY WAS NOT HELPFUL HERE.

I BELIEVE THE *KENDRICK* CASE THAT THE COURT QUOTED, THE CITY'S MAIN ARGUMENT WAS THAT THEY WERE SEEKING TO PROTECT THE PUBLIC FROM VIOLENT ACTS OF KIDS WHO PLAY THIS GAME.

THAT IS NOT THE STATE'S JUSTIFICATION HERE.

AND I THINK IT'S NOT JUST A CHOICE OF FINDINGS AND TERMS, YOUR HONOR, THOUGH THE INDUSTRY WOULD HAVE YOU BELIEVE THAT.

IT'S BASED ON A SUBSTANTIAL AMOUNT OF DOCUMENTATION AND WITNESS TESTIMONY AND OTHER MATTERS THAT WILL BE MORE FULLY DEVELOPED AFTER DISCOVERY. IT'S BASED ON SUBSTANTIAL EVIDENCE.

THE EIGHTH CIRCUIT CASE –

THE COURT: ISN'T THERE – I DON'T MEAN [27] TO GET SIDETRACKED BECAUSE I WANT TO GET BACK TO THIS, BUT DOESN'T THE PLAINTIFF HAVE A POINT THAT THE VIOLENCE THAT IS OBJECTED TO BY THE PSYCHOLOGICAL STUDIES THAT THE LEGISLATURE LOOKED AT IS VIOLENCE IN GENERAL AND IS NOT LIMITED TO THIS PARTICULAR TYPE OF VIOLENCE THAT YOU'VE TRIED TO DEFINE?

MR. MORAZZINI: ACTUALLY, YOUR HONOR, I THINK IT'S JUST THE OPPOSITE. IT'S -- THE STATE IS MORE NARROWLY TAILORED. THOUGH THE FINDINGS DON'T DIFFERENTIATE BETWEEN – THEY DO DIFFERENTIATE BETWEEN LEVELS OF VIOLENCE, YOUR

HONOR. IT'S MISLEADING TO TRY TO STATE OTHERWISE.

I'M NOT INTIMATELY FAMILIAR WITH THESE HEARSAY DECLARATIONS FROM A DIFFERENT COURT AND PARTIAL INCOMPLETE TRANSCRIPTS FROM SUPPOSED WITNESSES THAT AREN'T EVEN IDENTIFIED IN THEIR TRANSCRIPTS.

THE COURT: RIGHT.

MR. MORAZZINI: NEVERTHELESS, YOUR HONOR, IT'S A REASONABLE INFERENCE THAT THE LEGISLATURE MADE, AND THE LEGISLATURE, YOUR HONOR, WAS VERY MUCH AWARE THAT THEY WOULD BE SUBJECT TO LEGAL CHALLENGE.

SO THERE WAS A PRACTICAL REASON TO GO [28] ABOVE AND BEYOND MERE VIOLENT VIDEO GAMES LIKE THE *ST. LOUIS* CASE DID. THAT REGULATED ALL VIOLENTLY GRAPHIC VIDEO GAMES. THERE WAS A PRACTICAL REASON.

THE STATE OF CALIFORNIA WANTS THIS LAW TO SURVIVE ALL LEVELS OF SCRUTINY, SO BY TAKING THE MOST OBSCENE VIOLENCE IN THE VIDEO GAMES, THE LEGISLATURE TRIED TO ADVANCE – TRIED TO GET ONE STEP AHEAD OF PLAINTIFFS HERE.

AND IT'S NO SURPRISE THAT LAWS ARE DRAFTED WITH LEGAL CHALLENGES IN MIND, YOUR HONOR. THE LEGISLATIVE HISTORY OF THIS BILL SHOWS THAT.

ALL OF THESE CASES FROM OTHER CIRCUITS AND OTHER DISTRICT COURTS CITED BY PLAINTIFFS ARE REFERENCED IN THE LEGISLATIVE HISTORY OF THIS.

THE COURT: WHY ISN'T THERE AT LEAST A SERIOUS ISSUE THAT WARRANTS AN INJUNCTION, WHETHER OR NOT YOU WIN IN THE LONG RUN?

MR. MORAZZINI: YOUR HONOR, BECAUSE WE'VE PRESENTED SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD.

PLAINTIFFS HAVE CITED TO NOTHING IN OUR RECORD, YET THROUGH THEIR REPLY PAPERS, THEY TRY TO BRING IN THIS EVIDENCE THAT THE STATE CAN'T MAKE ANY SENSE OF ONE WAY OR ANOTHER, INCOMPLETE TESTIMONY AND SO FORTH, YOUR HONOR.

[29] I THINK THERE'S NO SERIOUS ISSUE BECAUSE THEY HAVE FAILED, COMPLETELY FAILED TO MEET THEIR BURDEN OF PROOF. THEY CITE TO NOTHING IN OUR LEGISLATIVE RECORD SHOWING THAT THE STATE OF CALIFORNIA DID NOT MAKE REASONABLE INFERENCES BASED ON SUBSTANTIAL EVIDENCE. THEY SIMPLY DON'T.

THE ONLY THING IN THE RECORD THE PLAINTIFFS CITE TO IN ALL THEIR MOVING PAPERS IS THE LEGISLATIVE ANALYST'S REPORT THAT HAD SOME NEGATIVE COMMENTS.

THE COURT: OKAY. BACK WHERE I INTERRUPTED YOU WHEN YOU WERE DISTINGUISHING OUT OF CIRCUIT CASES, DID YOU GET THROUGH THAT LIST?

MR. MORAZZINI: I BELIEVE I DID, YOUR HONOR. I DISCUSSED THE SEVENTH CIRCUIT *KENDRICK*, THE *MALENG* IN WASHINGTON, AND THE *ST. LOUIS*, ALL VIOLENTLY GRAPHIC VIDEO GAMES.

YOUR HONOR, I THINK ANOTHER DISTINGUISHING FACTOR HERE IS, LIKE THE *INDIANAPOLIS* CASE THAT WAS JUST LODGED WITH THE COURT RECENTLY, YOUR HONOR, THAT WAS – THAT DECISION CAME OUT AFTER A FULL EVIDENTIARY HEARING WHERE WITNESSES WERE ALLOWED TO TESTIFY, APPARENTLY, AND DECLARATIONS AND AFFIDAVITS FOR SOME REASON WERE ALLOWED TO CONTROL THE DAY.

[30] WE HAVEN'T COME ANYWHERE NEAR THAT, YOUR HONOR. WE'RE SIMPLY IN THE COURSE OF A PRELIMINARY INJUNCTION, SHORT TURN AROUND MOTION. THE STATE SIMPLY WENT TO ITS LEGISLATIVE RECORD, GOT MATERIALS THAT SHOW THAT THERE'S

SUBSTANTIAL EVIDENCE SHOWING THAT MINORS WHO PLAY GRAPHIC, ULTRA VIOLENT VIDEO GAMES – HOW DOES THE STATE PUT IT – THE CHILDREN ARE MORE LIKELY TO PROCEED DOWN A DEVELOPMENTAL TRAJECTORY WHERE THEIR RELATIONSHIPS WITH THEIR PARENTS, TEACHERS, AND OTHERS DETERIORATES.

NOBODY HAS BEEN ABLE TO PROVE, NOT EVEN THROUGH THESE HEARSAY INAPPROPRIATE MATERIALS PLAINTIFFS HAVE SUBMITTED, THAT PLAYING VIOLENT VIDEO GAMES IS NOT AT LEAST A HUGE RISK FACTOR IN THIS, THOUGH THEIR EXPERTS APPARENTLY SAY THERE MAY BE OTHER EXPLANATIONS.

NOR HAS IT BEEN DISPROVEN THAT PLAYING THESE GAMES CAN CAUSED [sic] INCREASED AGGRESSIVE BEHAVIOR AND THOUGHTS, WHICH IS A HUGE RISK FACTOR IN SENDING CHILDREN DOWN THIS DEVELOPMENTALLY DELETERIOUS TRAJECTORY, YOUR HONOR.

AND THAT'S WHY THE STATE BELIEVES THAT, EVEN AT BEST, IF THERE'S A SPLIT OF AUTHORITY AS TO WHAT THE RESEARCH SHOWS, THE LEGISLATURE HAS THE [31] RIGHT TO BREAK THAT TIE.

AND IN DOING SO, SIDING WITH THE CHILDREN AND THE PROTECTION OF THE

CHILDREN AND ENABLING PARENTS TO PROTECT THEIR CHILDREN, THE TIE GOES TO THE LEGISLATURE, YOUR HONOR.

THE COURT: OKAY. LET ME SEE IF ANY OF YOUR CO-COUNSEL WANT TO SAY ANYTHING.

MR. MORAZZINI: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

MR. ROLLO: THANK YOU, YOUR HONOR. DAVID ROLLO APPEARING FOR THE COUNTY DEFENDANTS.

I'M PREPARED TO ADDRESS YOUR QUESTIONS, BUT I'D LIKE TO RESPOND, FIRST OF ALL, TO SOME ARGUMENTS OF COUNSEL FOR THE PLAINTIFF,

IT'S INTERESTING THAT THE EUPHEMISMS THAT GET USED IN A CASE LIKE THIS – COUNSEL REFERRED TO CHILDREN AS "A LARGE NUMBER OF PEOPLE WHOSE CONSTITUTIONAL RIGHTS MAY OR MAY NOT GET VIOLATED BY THIS ORDINANCE," AND I THINK THAT'S A TELLING REFLECTION OF THE DISCOMFORT, PERHAPS, ON THE OTHER SIDE ABOUT SAYING HERE IN OPEN COURT THAT THE STATE CANNOT PROHIBIT AT ALL THE DISTRIBUTION OF EXTREMELY VIOLENT VIDEO GAMES WITH RESPECT TO CHILDREN.

I THINK THAT'S A LUDICROUS POSITION FROM [32] A COMMON SENSE STANDPOINT, NUMBER ONE.

AND, NUMBER TWO, IT SHOWS NO DEFERENCE WHATSOEVER TO THE LEGISLATURE'S FUNCTION IN FACT FINDING AND ENACTING ORDINANCES OF THIS TYPE.

OF COURSE THE STATE CAN PROHIBIT THE DISTRIBUTION OF MATERIALS LIKE THIS. THE STATE RESTRICTS ALL KINDS OF CONSTITUTIONAL RIGHTS RELATIVE TO MINORS. MINORS ARE SUBJECT TO CURFEWS, THEY CAN'T BUY ALCOHOL, THEY CAN'T VOTE. COMMERCIAL SPEECH RELATIVE TO MINORS IS RESTRICTED CONSTANTLY.

FEDERAL COURTS HAVE UPHELD STATUTES RESTRICTING RADIO BROADCASTS RELATIVE TO MINORS DURING CERTAIN TIMES OF DAY.

THERE'S THE SAFE HARBOR PROVISIONS RELATIVE TO THE TELEVISION BROADCASTS THAT THE FCC HAS HAD UPHELD IN FEDERAL COURT.

IT'S RIDICULOUS TO ARGUE THAT THE STATE HAS NO BUSINESS DISTRIBUTING THIS KIND OF MATERIAL TO MINORS.

YOU KNOW, WHENEVER JUDGES OR LAWYERS START REFERRING TO THE CLASSICS IN CHILDREN'S LITERATURE AS A REASON TO

RESTRICT THE STATE'S ABILITY TO DISTRIBUTE THIS KIND OF MATERIAL, YOU CAN REST ASSURED THAT THE FIRST AMENDMENT IS ABOUT [33] TO BE INVOKED TO PROTECT SOMETHING THAT WOULD HAVE SENT THE FOUNDERS SCURRYING FOR THE BUCKETS OF TAR AND FEATHERS.

THE ISSUE OF VARIED ENFORCEMENT IN DIFFERENT JURISDICTIONS I THINK HAS BEEN ADEQUATELY ADDRESSED BY THE STATE'S ATTORNEY.

YOU WILL ALWAYS HAVE PEOPLE FINDING DIFFERENT WAYS TO INTERPRET THE MEANING OF STATUTES, AND THAT'S NOT A BASIS FOR FINDING THAT THE LAW IS UNCONSTITUTIONALLY VAGUE OR MAY PRESENT SOME SORT OF CONSTITUTIONAL PROBLEM.

WERE THAT TO BE THE CASE, THEN THE ARGUMENT OF THE PLAINTIFFS WOULD BE CORRECT. THE STATE CAN'T POSSIBLY DEFEND OR PREVENT THIS KIND OF DISTRIBUTION.

THAT - THERE MAY WELL BE A DIFFERENCE IN APPLICATION DEPENDING ON THE JURISDICTION.

AND OBVIOUSLY UNDER THE OBSCENITY PRECEDENT, THAT'S NOT A PROBLEM CONSTITUTIONALLY.

AND I THINK TO SINGLE OUT THE COMMUNITY STANDARDS AS A BASIS FOR FINDING THIS PARTICULAR STATUTE IS UNCONSTITUTIONAL IS NOT, IS NOT CORRECT. THE STATUTE IS NOT THAT BROAD.

THE OTHER SECTIONS THAT HAVE TO BE MET RELATIVE TO FINDING THE MATTER TO BE CHARACTERIZED [34] AN EXTREMELY VIOLENT VIDEO GAME, FIRST OF ALL, IT HAS TO APPEAL TO A REASONABLE PERSON THAT THE GAME AS A WHOLE, THE ACTS OF KILLING OR – THE STATUTE DESCRIBES THE ACTS AS KILLING, MAYHEM, DISMEMBERMENT, OR SEXUAL ASSAULT, NOT ONLY HAS TO BE PATENTLY OFFENSIVE RELATIVE TO COMMUNITY STANDARDS WITH RESPECT TO MINORS, IT ALSO HAS TO APPEAL TO THE DEVIANT OR MORBID INTEREST OF MINORS AS DESCRIBED OR IMAGINED BY THE FICTIONAL REASONABLE PERSON WHICH IS USED IN ALL KINDS OF LEGAL STANDARDS, AND ALSO HAS TO HAVE NO SERIOUS LITERARY OR EDUCATIONAL OR ARTISTIC VALUE.

SO SINGLING OUT THE NOTION THAT THE – I'LL USE THE TERM "MAYHEM" TO DESCRIBE THE ACTS THAT THE LAW DESCRIBES AS VAGUE OR MAY BE A PROBLEM BECAUSE IT MAY NOT BE SUBJECT TO UNIFORM ENFORCEMENT, I THINK THE STATUTE ADEQUATELY ADDRESSES THAT BY ALSO INCLUDING THE NOTION THAT NOT ONLY SHOULD

IT BE PATENTLY OFFENSIVE TO COMMUNITY STANDARDS, BUT IT ALSO HAS TO APPEAL TO THE DEVIANT OR MORBID INTEREST OF MINORS, AND IT ALSO HAS TO HAVE NO SERIOUS LITERARY, EDUCATIONAL, OR ARTISTIC VALUE.

THAT LEAVES OPEN THE POSSIBILITY THAT IN ANY JURISDICTION THAT LOOKS AT THIS, THEY'RE GOING [35] TO HAVE TO DETERMINE NOT ONLY WHETHER OR NOT IT'S PATENTLY OFFENSIVE UNDER THE PREVAILING COMMUNITY STANDARDS, BUT ALSO WHETHER IT APPEALS TO THE DEVIANT OR MORBID INTEREST OF MINORS, AND ALSO WHETHER IT HAS NO SERIOUS LITERARY OR EDUCATIONAL OR ARTISTIC VALUE.

THOSE ARE THREE THINGS THAT HAVE TO BE CONSIDERED WHEN LOOKING AT THE STATUTE, NOT JUST THE ISSUE OF COMMUNITY STANDARDS.

ON THE ISSUE OF STRICT SCRUTINY, I THINK THE *GINSBERG* STANDARD DOES APPLY HERE. THERE'S NOT A SINGLE LAW OR A SINGLE, A SINGLE SUPREME COURT CASE THAT WOULD PREVENT THIS COURT FROM FINDING THAT, LIKE OBSCENITY, EXTREME VIOLENCE AS IT APPLIES TO MINORS IS SOMETHING THAT IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION.

THE COURT ASKED THE QUESTION IN ITS TENTATIVE RULING WHAT ABOUT, AND I PARAPHRASED THIS, WHAT ABOUT NON-VIOLENT GAMES THAT TEACH OR DEPICT BAD BEHAVIOR, AND THE COURT LISTED EXAMPLES SUCH AS DISLOYALTY OR SELFISHNESS OR SPITEFULNESS.

IF WE'RE TO SPECULATE ABOUT THAT, I'D HAVE TO SAY THAT, LIKE THE STATE'S ATTORNEY, IT WOULD DEPEND ON THE LEGISLATURE'S FINDINGS RELATIVE TO THAT.

[36] THERE MAY WELL COME A TIME WHERE GAMES LIKE THAT ARE PRODUCED AND SOLD AND DISTRIBUTED TO MINORS, AND THERE MAY WELL COME A TIME WHERE THE ANECDOTAL EVIDENCE, IF NOTHING ELSE, SUGGESTS THAT THAT IS SOMETHING THAT'S HARMFUL TO MINORS.

I THINK THE DIFFERENCE IN WHAT WE'RE TALKING ABOUT HERE IS THE EXTREME VIOLENCE COUPLED WITH THE TRAINING ASPECT OF THESE KINDS OF VIDEOS.

THESE GAMES ARE USED, PARTICULARLY DOOM, A VERSION OF THAT IS USED BY THE MILITARY TO TRAIN ITS SOLDIERS ON HOW TO KILL AND HOW TO SHOOT AND HOW TO FIGHT.

AND THAT ASPECT OF WHAT WE'RE TALKING ABOUT HERE IS QUITE A BIT DIFFERENT THAN SAYING – FOR EXAMPLE, THE BOARD

GAME OF MONOPOLY, WHICH REWARDS SELFISHNESS, WHICH REWARDS GREED, THAT'S NOT A TRAINING GAME. THAT REFERS TO THAT, TO THOSE CHARACTERISTICS IN A GENERAL SENSE.

WHAT THESE VIDEO GAMES DO IS TRAIN SOMEONE.

NOW, IF YOU'RE TALKING ABOUT A VIDEO GAME THAT IS THE EQUIVALENT OF MONOPOLY, I DON'T THINK THERE WOULD BE ANY REGULATION THAT WOULD BE APPROPRIATE FOR SOMETHING LIKE THAT .

IF YOU'RE TALKING ABOUT A VIDEO GAME THAT [37] TEACHES YOU HOW TO EMBEZZLE WHEN YOU BECOME A BANK TELLER, THAT MIGHT BE A DIFFERENT STORY.

IF THERE'S A VIDEO GAME THAT IS REALISTICALLY DEPICTING HOW TO BECOME A SHOPLIFTER, THAT MIGHT BE A DIFFERENT STORY.

IF THERE'S A VIDEO GAME THAT'S DEPICTING HOW TO BUILD A BOMB, THAT MIGHT BE A DIFFERENT STORY.

I THINK RELATIVE TO YOUR QUESTION, WHAT OTHER TYPES OF BAD BEHAVIOR COULD BE REGULATED, I THINK THE SHORT ANSWER IS IT DEPENDS.

BUT AS JUSTICE POSNER SAID IN THAT SEVENTH CIRCUIT CASE, EXPERIMENTATION IS TO BE ENCOURAGED BY THE LEGISLATURE, AND THE GOVERNMENT HAS TO START SOMEWHERE.

AND I THINK THE, THE STATUTE IN THIS CASE IS EXCEEDINGLY PRECISE. IT'S NOT VAGUE AT ALL.

AND YOU ASKED ABOUT, WELL, WHETHER OR NOT CERTAIN SECTIONS OF IT WERE VAGUE, AND WHAT COULD BE DONE TO FIX IT?

AGAIN, SPECULATING, I DON'T SPEAK FOR THE STATE ON THIS SUBJECT, BUT MY OWN REACTION TO THAT WOULD HAVE BEEN TO ELIMINATE OR SEVER, AS THE STATUTE ALLOWS, SECTION 1746(B) AND REMOVE ALL OF THE NOTIONS OF WHAT'S HEINOUS AND WHAT'S TORTURE [38] AND WHAT'S HUMAN IMAGE AND WHAT APPROXIMATES A HUMAN IMAGE.

PERHAPS THAT COULD BE SEVERED FROM THE STATUTE IF THE COURT WAS SO INCLINED AND THAT WOULD SEEM TO ME TO SOLVE ALL THE PROBLEMS RELATIVE TO THE ALLEGATIONS OF AMBIGUITY OR VAGUENESS.

AND I GUESS THE ONLY OTHER ISSUE I HAVE TO ADD ON BEHALF OF THE COUNTY IS I DON'T THINK IT'S RIPE AS TO THE COUNTY. THERE IS NO CASE PENDING BROUGHT BY

EITHER THE DISTRICT ATTORNEY OR THE COUNTY COUNSEL AND THIS IS NOT THE APPROPRIATE FORUM TO RESTRICT THAT ABILITY TO DECIDE.

THE COURT: OKAY. THANK YOU.

MR. ROLLO: THANK YOU.

THE COURT: OKAY. I'LL GIVE YOU A COUPLE MINUTES, BUT I'M RUNNING VERY BEHIND AND I DON'T WANT TO BE UNFAIR TO OTHERS.

MR. LYON: I JUST WANT TO MAKE A COUPLE OF QUICK POINTS, YOUR HONOR.

ON THIS ISSUE OF THE BURDEN OF PROOF, I THINK IT'S IMPORTANT TO RECOGNIZE WHAT WHILE WE'RE THE PLAINTIFFS, THE BURDEN OF JUSTIFYING THIS LAW IS SQUARELY ON THE STATE UNDER THE APPLICABLE STRICT SCRUTINY. WE CITE A NUMBER OF CASES FOR THAT, INCLUDING THE *R.A.V.* CASE IN OUR BRIEF.

[39] THE COURT: I DON'T THINK I QUARREL WITH THAT.

MR. LYON: AND I JUST WANT TO RESPOND, THOUGH, TO THE ARGUMENT THAT SOMEHOW WE HAVEN'T DISPROVEN THAT THESE THINGS ARE TRUE AND THAT SOMEHOW WE'VE ACTED INAPPROPRIATELY BY

PUTTING A BUNCH OF HEARSAY IN FRONT OF THE COURT.

THEY'RE THE ONES WHO PUT BEFORE THE COURT ALL THE ARTICLES WITH NO AFFIDAVITS OF ANY SORT AND ALL WE DID WAS SAY, "LOOK, THERE'S TWO SIDES TO THIS STORY. IF YOU WANT TO HAVE A HEARING, HERE'S THE KINDS OF THINGS THAT YOU'LL HEAR."

AND AS TO WHAT YOU SHOULD DO NOW, GIVEN THAT THAT'S THE KIND OF RECORD THAT YOU'RE PRESENTED WITH, GIVEN ALL THE LAW OUT THERE ALL OVER THE COUNTRY, IT SEEMS TO ME AT A MINIMUM, AS YOU SUGGESTED, THERE'S A SERIOUS QUESTION GOING TO THE MERITS HERE AND THE EQUITIES STRONGLY FAVOR MAINTAINING THE STATUS QUO.

SO IF YOU'RE INCLINED TO CONSIDER CREATING THIS NEW CATEGORY OF UNPROTECTED SPEECH FOR KIDS, WHICH NO COURT HAS DONE, THEN WE OUGHT TO HAVE THIS THING ENJOINED AND HAVE A HEARING.

THE COURT: WHAT OUT OF CIRCUIT CASE DO YOU FEEL IS MOST ANALOGOUS TO THIS ONE?

MR. LYON: THE INDIANAPOLIS CASE, THE *AMAA* CASE, AND THE *IDSA* CASE FROM THE EIGHTH CIRCUIT, BOTH OF THEM ARE VERY STRONGLY ANALOGOUS IN THAT THEY

REJECT THE APPLICATION OF THE *GINSBERG* TEST, STRICT SCRUTINY APPLIES, AND THE SAME PSYCHOLOGICAL TESTIMONY THAT WAS CITED HERE, THAT THE ANDERSON AND DEALS STUDY WAS REJECTED AS INSUFFICIENT JUSTIFICATION FOR CENSORSHIP IN BOTH OF THOSE CASES.

THIS IS NOT A NEW AND SIGNIFICANTLY DIFFERENT LAW. IT'S ANOTHER ATTEMPT TO TRY TO DO THE SAME THING THAT HAS BEEN DONE IN ALL THESE OTHER CASES.

THE IDEA OF USING THE *GINSBERG* THREE-PART TEST IS HARDLY A NOVELTY. IT HAS BEEN SQUARELY REJECTED BY AT LEAST TWO CIRCUITS, AND THE REASON FOR THAT IS THE SUPREME COURT SAID YOU CAN'T DO IT IN THE *MILLER* CASE AND THE *ERZOZNIK* CASE. THIS IS NOT SOMETHING THAT IS UP TO THE STATES TO DO.

ON THE ISSUE OF VAGUENESS, I WOULD QUICKLY NOTE THAT WHILE MR. PRICE SAID IN HIS DECLARATION THAT HE THOUGHT SOME OF THESE GAMES MIGHT BE COVERED AND MIGHT NOT BE COVERED, HE DIDN'T KNOW.

WE'VE NOW HAD AN ARGUMENT IN WHICH YOU'VE [41] ASKED THE STATE TO TELL YOU WHETHER OR NOT THESE GAMES ARE COVERED AND NO ONE MADE ANY ATTEMPT TO TELL YOU.

AND THAT'S WHAT ALWAYS HAPPENS. EVERYBODY SAYS THE LAWS ARE CRYSTAL CLEAR UNTIL YOU ASK THEM, "IS OUR GAME COVERED BY THE LAW OR NOT?" AND THE LAWYERS DON'T KNOW BECAUSE IT'S A COMPLICATED STANDARD THAT HAS LOTS OF SUBJECTIVITY TO IT.

THE COURT: YOU DON'T KNOW IT WHEN YOU SEE IT?

MR. LYON: THE MANUFACTURES, UNDER THE STRUCTURE THEY HAVE HERE, HAVE TO DECIDE WHETHER OR NOT IT'S COVERED OR NOT FOR THE WHOLE STATE OF CALIFORNIA. THEY HAVE TO HAVE A LABEL WHEN IT'S SHIPPED INTO THE STATE OF CALIFORNIA, AND THAT LABEL IS GOING TO APPLY WHETHER IT'S SHIPPED TO SAN FRANCISCO OR ORANGE COUNTY OR BAKERSFIELD.

THE DIFFERENT STANDARDS ARE GOING TO APPLY, BUT THE SAME LABEL IS GOING TO HAVE TO BE THERE OR NOT BE THERE.

I WOULD STRONGLY URGE YOU, IF YOU'RE CONSIDERING GOING IN THIS DIRECTION, TO ENJOIN THE LAW, MAINTAIN THE STATUS QUO, AND LET US HAVE A REAL HEARING WHERE YOU CAN HEAR WHAT THE FACTS ARE.

[42] THE COURT: OKAY. THANK YOU. I REALIZE THAT YOU'RE ANXIOUS FOR A

DECISION. I'LL GET IT OUT SOMETIME NEXT WEEK.

MR. LYON: THANK YOU VERY MUCH.

MR. MORAZZINI: THANK YOU, YOUR HONOR.

MR. ROLLO: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY

COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/ Lee-Anne Shortridge
LEE-ANNE SHORTRIDGE,
CSC CRR
CERTIFICATE NUMBER
9595

[1] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VIDEO SOFTWARE) C-05-04188 RMW
DEALERS ASSOCIATION)
AND ENTERTAINMENT) SAN JOSE,
SOFTWARE ASSOCIATION,) CALIFORNIA

PLAINTIFFS,) MAY 12, 2006

VS.) PAGES 1-32
)
ARNOLD SCHWARZENEGER,)
IN HIS OFFICIAL CAPACITY)
AS GOVERNOR OF THE)
STATE OF CALIFORNIA; BILL)
LOCKYER, IN HIS OFFICIAL)
CAPACITY AS ATTORNEY)
GENERAL OF THE STATE OF)
CALIFORNIA; GEORGE)
KENNEDY, IN HIS OFFICIAL)
CAPACITY AS SANTA CLARA)
COUNTY DISTRICT)
ATTORNEY; RICHARD)
DOYLE, IN HIS OFFICIAL)
CAPACITY AS CITY)
ATTORNEY FOR THE CITY)
OF SAN JOSE; AND ANN)
MILLER RAVEL, IN HER)
OFFICIAL CAPACITY AS)
COUNTY COUNSEL FOR THE)
COUNTY OF SANTA CLARA,)

DEFENDANTS.)
)

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE RONALD M. WHYTE
UNITED STATES DISTRICT JUDGE

(APPEARANCES ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR CERTIFICATE NUMBER 9595

[2] APPEARANCES:

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FOR DEFENDANT SCHWARZENEGGER:
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FOR COMMON SENSE MEDIA:
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[3] SAN JOSE, CALIFORNIA MAY 12, 2006

PROCEEDINGS

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: NEXT MATTER, C-05-04188, VIDEO SOFTWARE DEALERS ASSOCIATION, ET AL, VERSUS ARNOLD SCHWARZENEGGER, ON FOR PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE.

MS. FALLOW: GOOD MORNING, YOUR HONOR. KATHERINE FALLOW FOR THE PLAINTIFFS.

MR. DETTMER: ETHAN DETTMER ALSO FOR THE PLAINTIFFS, YOUR HONOR.

MR. MORAZZINI: GOOD MORNING, YOUR HONOR. ZACKERY MORAZZINI, DEPUTY ATTORNEY GENERAL FOR THE GOVERNOR AND THE ATTORNEY GENERAL.

MR. GOODIN: AND ROBERT GOODIN, YOUR HONOR, FOR AMICUS CURIAE, COMMON SENSE MEDIA.

THE COURT: ALL RIGHT. THE CITY AND COUNTY APPARENTLY AREN'T TAKING A POSITION, OR –

MR. MORAZZINI: YOUR GUESS IS AS GOOD AS MINE, YOUR HONOR.

THE COURT: OKAY. LET ME MAKE A COUPLE OF COMMENTS AND THEN I'LL HEAR YOUR POSITIONS.

IT APPEARS TO ME THAT THE STRICT SCRUTINY STANDARD DOES APPLY, AND AS I UNDERSTAND IT, BOTH [4] PARTIES SEEM TO AGREE THAT THERE IS APPROPRIATE DEFERRAL TO LEGISLATIVE FINDINGS IF THEY'RE SUPPORTED BY SUBSTANTIVE SUP-PORTING EVIDENCE, OR SUBSTANTIAL SUPPORTING EVIDENCE.

I'M UNCLEAR AS TO WHETHER THE STATE CONCEDES THAT THEY CAN'T MEET THE *BRANDENBERG* TEST IF THAT'S THE APPROPRIATE TEST.

AND I'M – IF THE LEGISLATIVE FINDINGS ARE REQUIRED TO BE SUPPORTED BY SUBSTANTIAL EVIDENCE, HOW DOES THE COURT GO ABOUT MAKING THAT JUDGMENT?

DOES IT JUST LOOK AT THE FINDINGS, OR DOES IT TAKE EVIDENCE, OR HOW DOES IT GO ABOUT THAT TASK?

AND I'M ALSO INTERESTED IN WHETHER OR NOT THE PLAINTIFFS TAKE THE POSITION THAT THERE IS NO RESTRICTION THAT THE STATE COULD PLACE ON THE ACCESS BY CHILDREN TO ANY TYPE OF VIOLENT VIDEO.

FOR EXAMPLE, IF THE STATE ADOPTED THE INDUSTRY'S LABELLING RULES, WOULD

THAT FLY IN THE FACE OF THE CONSTITUTION?

AND IS IT THE PLAINTIFF'S POSITION THAT THE ONLY RESTRICTION THAT THE STATE CAN PLACE UPON KIDS' ACCESS TO VIDEO GAMES IS IF THEY'RE PORNOGRAPHIC?

[5] I GUESS THOSE ARE MY INITIAL –

(DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE CLERK.)

THE COURT: THOSE ARE SOME INITIAL THOUGHTS OR COMMENTS. LET ME HEAR FROM THE PLAINTIFFS FIRST BECAUSE IT'S THEIR MOTION.

MS. FALLOW: THANK YOU.

THE COURT: OR THEIR – WELL, IT'S CROSS-MOTIONS, SO I GUESS THAT YOU'RE THE PLAINTIFF.

MS. FALLOW: SURE. THANK YOU, YOUR HONOR.

AS TO THE FIRST QUESTION, WHETHER THE STATE CONCEDES THAT THEY CAN'T MEET THE *BRANDENBERG* STANDARD, OBVIOUSLY THEY CAN ADDRESS WHETHER THEY CONCEDE, BUT IT IS OUR POSITION THAT TO THE EXTENT THAT THE ACT TARGETS EXPRESSION OR VIOLENT ACTS, IT DOES TRIGGER THE *BRANDENBERG* STANDARD, AND WE BELIEVE

THAT THERE'S NO SHOWING HERE THAT THE STATE HAS MET THAT STANDARD.

IN ORDER TO SATISFY *BRANDENBERG*, YOU HAVE TO SHOW AN INTENT TO CAUSE VIOLENCE AND A LIKELIHOOD THAT THE SPEECH WILL ACTUALLY CAUSE IMMINENT VIOLENCE, AND VIDEO GAMES ARE INTENDED TO ENTERTAIN, NOT TO INCITE VIOLENCE.

[6] AND, ALSO, THE SOCIAL SCIENCE COMES NOWHERE CLOSE TO SHOWING THAT IT ACTUALLY CAUSES VIOLENCE, WHICH WE CAN TALK ABOUT ON THE SUBSTANTIAL EVIDENCE ISSUE.

THE STATE HAS TRIED TO DISTANCE ITSELF FROM *BRANDENBERG* BY DISAVOWING ANY INTEREST IN PREVENTING VIOLENCE.

I THINK IF YOU LOOK AT THE STUDIES ON WHICH IT RELIES, WHAT THAT SOCIAL SCIENCE IS INTERESTED IN IS THIS THEORY OF WHETHER VIOLENT VIDEO GAMES CAUSE INDIVIDUALS TO ACT AGGRESSIVELY, AND THE SUPREME COURT HAS MADE CLEAR, AS RECENTLY AS IN THE *FREE SPEECH COALITION* CASE, THAT YOU CAN'T RESTRICT HARM BASED ON THE THEORY THAT -- EXCUSE ME.

YOU CAN'T RESTRICT SPEECH BASED ON THE THEORY THAT IT WILL CAUSE HARM AT SOME INDEFINITE PERIOD OF TIME IN THE FUTURE.

THE COURT: EVEN AS TO CHILDREN?

MS. FALLOW: I'M SORRY?

THE COURT: EVEN AS TO CHILDREN?

MS. FALLOW: YES. I DON'T THINK THERE'S ANY BASIS FOR MAKING AN EXCEPTION TO THAT WHEN IT COMES TO CHILDREN OUTSIDE OF THE VERY NARROW CATEGORY OF SEXUAL MATERIALS.

[7] THE COURT: SO BASICALLY YOU'RE SAYING THAT NO REGULATION THAT AFFECTS SPEECH CAN BE IMPOSED BY THE STATE WITH RESPECT TO CHILDREN, EXCEPT FOR SOMETHING THAT WOULD INCITE IMMEDIATE VIOLENCE OR SUBJECT THEM TO PORNOGRAPHY?

MS. FALLOW: TO MATERIALS THAT ARE CONSIDERED HARMFUL TO MINORS OR OBSCENE TO MINORS.

I THINK UNDER THE SUPREME COURT'S FIRST AMENDMENT JURISPRUDENCE, THE BASELINE VIEW IS THAT INDIVIDUALS HAVE A RIGHT TO FREE SPEECH NO MATTER HOW OFFENSIVE THAT SPEECH IS CONSIDERED OR HOW THE IDEA THAT IT CAUSES MINORS TO THINK BAD THOUGHTS OR NOT BE EMPATHIC OR WHATEVER THE ISSUE IS.

OUR POSITION IS THAT MINOR VERSUS FIRST AMENDMENT RIGHTS, OUTSIDE OF THIS

VERY NARROW CATEGORY OF SEXUAL MATERIALS, THE STATE CANNOT RESTRICT THAT SPEECH.

AND, INDEED, THE STATE'S THEORY IS BOUNDLESS BECAUSE THE STATE COULD THEN RESTRICT ANY KIND OF SPEECH THAT IT BELIEVES CAUSES MINORS EITHER TO BEHAVE MORE AGGRESSIVELY, WHICH AGAIN HASN'T BEEN PROVEN HERE, BUT CAUSES MINORS TO BE NOT NICE PEOPLE OR BE RACIST OR WHATEVER SORT OF BAD VALUES THE STATE DOESN'T WANT TO ENCOURAGE.

AND THAT'S JUST – YOU CAN'T RESTRICT [8] SPEECH ON THAT BASIS.

THE COURT: SO CARRYING YOUR ARGUMENT TO THE EXTREME, I FORM A COMPANY AND I SEND OUT ADVERTISEMENTS TO KIDS SAYING "RENT FROM ME THE VIDEO AND YOU'LL GET TO WATCH WOMEN SLICED IN HALF AND MEN SLICED IN HALF AND BLOOD SPURT OUT AND PEOPLE BEGGING FOR MERCY AND THIS IS REALLY FUN STUFF TO LOOK AT."

THAT'S OKAY?

MS. FALLOW: WELL, I THINK AS A PARENT, YOU OBVIOUSLY MAY WANT TO RESTRICT WHETHER YOUR KIDS GET THOSE MATERIALS.

BUT I DON'T BELIEVE – THE GOVERNMENT CANNOT PLACE THAT KIND OF RESTRICTION.

I MEAN, IN THE *WINTERS* CASE, THE SUPREME COURT CONSIDERED A LAW THAT WOULD RESTRICT SORT OF CRIME AND TRUE HORROR NOVELS WHEN THERE WAS A LOT OF CONCERN IN THE '40S AND '50S THAT THOSE NOVELS WOULD CAUSE JUVENILE DELINQUENCY AND CAUSE MINORS TO BECOME SOCIOPATHS.

BUT THE SUPREME COURT SAID YOU CAN'T RESTRICT BASED ON THAT GROUND.

THE COURT: OKAY.

MS. FALLOW: ON THE ISSUE OF SUBSTANTIAL EVIDENCE, WE AGREE THAT THE STANDARD IS THAT THE [9] STATE HAS TO PROVE SUBSTANTIAL EVIDENCE IN SUPPORT OF ITS COMPELLING INTEREST.

WE WOULD NOTE HERE THAT AS A THRESHOLD MATTER, THE COURT NEED NOT EVEN REACH THE ISSUE OF SUBSTANTIAL EVIDENCE BECAUSE HERE THERE IS NO LEGITIMATE COMPELLING INTEREST. THE STATE HAS BEEN UNABLE TO POINT TO A LEGITIMATE COMPELLING INTEREST.

EVEN ACCEPTING THE STATE'S SOCIAL SCIENCE ON ITS FACE, AT MOST IT WOULD SUPPORT AN INTEREST IN CONTROLLING HOW MINORS THINK OR FEEL, OR TO PREVENT FUTURE BAD ACTS WHICH WOULD TRIGGER *BRANDENBERG*.

SO IT CANNOT IDENTIFY A LEGITIMATE, COMPELLING INTEREST IN THIS CASE.

THE COURT: SO IF IT – BASICALLY THE, I THINK IT'S THE ANDERSON STUDIES AND THE PEDIATRIC GROUPS THAT HAVE SUGGESTED THIS IS REALLY BAD STUFF FOR KIDS, THAT'S JUST TOO BAD?

MS. FALLOW: WELL, YOU HAVE TO LOOK AT WHAT THEY'RE SAYING AND IN WHAT WAY IS IT BAD FOR KIDS, AND I THINK IF YOU LOOK AT THE EVIDENCE, WHAT IT'S TALKING ABOUT IS EITHER IT CAUSES KIDS TO ACT MORE AGGRESSIVELY, AND THE CONCERN THERE IS THAT AT SOME POINT IN THE FUTURE THEY'RE GOING TO GO OUT [10] AND COMMIT A CRIME OR ENGAGE VIOLENTLY, DEAL WITH CONFLICTS VIOLENTLY AND THEN YOU'RE IN THE WORLD OF *BRANDENBERG*.

OR IT SAYS THEY HAVE LESS EMPATHY TOWARDS OTHERS OR THEY PERCEIVE THE WORLD AS HOSTILE OR THEY'RE – THEY THINK THAT PEOPLE – THEY THINK THAT PEOPLE ARE GOING TO ACCUSE THEM OF CHEATING OR VARIOUS THINGS AND THOSE ARE ALL ABOUT THOUGHT CONTROL.

BUT I ALSO THINK, IN TERMS OF THE LEVEL OF REVIEW FOR SUBSTANTIAL EVIDENCE, WHAT – YOU HAVE TO START WITH STRICT SCRUTINY, WHICH IS AN INCREDIBLY HEAVY BURDEN, AND THE SUPREME COURT

HAS MADE CLEAR, ESPECIALLY RECENTLY IN CABLE AND INTERNET CASES, WHEN YOU RESTRICT SPEECH BASED ON CONTENT, THE STATE CARRIES A VERY HEAVY BURDEN OF PROVING: A, A HARM THAT SUPPORTS A COMPELLING STATE INTEREST; AND ALSO SHOWING THE ABSENCE OF LESS RESTRICTIVE ALTERNATIVES AND, OF COURSE, SATISFYING THE NARROW TAILORING REQUIREMENT.

AND HERE THE EVIDENCE THAT THE STATE IS RELYING UPON, WHICH IS IN THE LEGISLATIVE HISTORY, IT JUST COMES NOWHERE NEAR TO PROVIDING SUBSTANTIAL EVIDENCE .

EVEN ON ITS FACE, IT'S SIMPLY A [11] CORRELATIONAL GROUP OF STUDIES SAYING THAT AGGRESSIVE INDIVIDUALS MAY BE CORRELATED WITH AGGRESSIVE VIDEO GAMES OR AGGRESSIVE MEDIA.

BUT AS THE COURT IN THE *BLAGOJEVICH* CASE IN ILLINOIS POINTED OUT, THAT DOESN'T RULE OUT A VERY PLAUSIBLE ALTERNATIVE EXPLANATION THAT AGGRESSIVE INDIVIDUALS ARE ATTRACTED TO AGGRESSIVE MEDIA.

THE OTHER – THERE ARE SOME STUDIES THAT ARE EXPERIMENTAL, BUT THEY'RE ALL SHORT-TERM.

THEY'RE RUN FROM – THEY HAVE SUBJECTS PLAY A VIDEO GAME FROM 10 MINUTES TO 75 MINUTES, AND THEN THEY GO OUT AND ADMINISTER SOUND BLASTS TO AN OPPONENT OR WATCH KIDS ENGAGE IN FREE PLAY, AND THOSE KINDS OF SHORT-TERM EFFECTS CANNOT BE EXTRAPOLATED TO SOME SORT OF LONG-TERM CAUSAL CONCLUSION.

WITH REGARD TO THE STATEMENTS BY THE AMERICAN PEDIATRIC ASSOCIATION OR OTHER MEDICAL ASSOCIATIONS, AS THE COURT IN MICHIGAN JUST HELD WHEN IT RULED AND INVALIDATED A SIMILAR LAW IN MICHIGAN, THOSE ARE REALLY POLICY STATEMENTS. THEY'RE NOT BASED ON – THEY'RE NOT EXPLICITLY BASED ON SOCIAL SCIENCE.

AND TO THE EXTENT THAT THEY ARE, THAT [12] THEY'RE BASED ON THE SAME SCIENCE THAT IS SUBJECT TO THE SAME FLAWS AND LIMITATIONS –

THE COURT: WHY DO PARENTS NOT WANT THEIR KIDS TO SEE THIS STUFF?

MS. FALLOW: I'M SORRY. WHY ARE PARENTS –

THE COURT: RIGHT, WHY DON'T THEY WANT KIDS TO SEE THE STUFF?

MS. FALLOW: WELL, I THINK IT ACTUALLY VARIES BASED ON PARENTS, AND A LOT OF PARENTS ARE GOING TO MAKE THE DECISIONS BASED ON THE AGE OF THEIR CHILD, AND THE MATURITY OF THEIR CHILD.

THE INDUSTRY HAS PROMULGATED THE VOLUNTARY RATINGS WITH THE PURPOSE OF GIVING PARTIES AS MUCH INFORMATION ABOUT THE CONTENT OF THE GAMES, AND THE VIDEO GAME INDUSTRY BELIEVE THAT IS IT'S THE PARENTS' RESPONSIBILITY, AND IT SHOULD BE THEIR PREROGATIVE, TO DECIDE WHAT GAMES THEY WANT THEIR KIDS TO VIEW, TO PLAY AND VIEW.

THE COURT: WHY DO THE PARENTS – I MEAN, THE VOTE OF THE LEGISLATURE ON THESE BILLS PROBABLY REFLECTS THE VIEW OF MOST MEMBERS OF THE PUBLIC.

WHY DO YOU THINK MOST PARENTS DON'T WANT THEIR KIDS TO SEE THIS STUFF?

MS. FALLOW: HONESTLY, AS AN EMPIRICAL [13] MATTER, I'M NOT SURE THAT IT'S MOST PARENTS.

BUT OF COURSE I WOULD UNDERSTAND THAT – I DON'T HAVE CHILDREN, BUT I CAN IMAGINE THAT AS A PARENT, I MIGHT DECIDE THAT I THINK MY CHILD AT A PARTICULAR AGE, I DON'T WANT THEM TO SEE CERTAIN

MOVIES, I DON'T THINK THEY SHOULD WATCH CERTAIN TELEVISION GAMES.

THE COURT: WHY?

MS. FALLOW: BECAUSE I WANT TO DIRECT THEIR UPBRINGING AND ENCOURAGE THE KIND OF VALUES THAT I – AND BECOME THE KIND OF PERSON THAT I WANT THEM TO BECOME.

BUT I JUST – THE GOVERNMENT CAN'T BE IN THAT BUSINESS.

THE COURT: SO IF THE STATE ADOPTED – EXCUSE ME.

(DISCUSSION OFF THE RECORD BETWEEN THE COURT AND THE CLERK.)

THE COURT: SO IF THE STATE ADOPTED THE –

MS. FALLOW: THE RATINGS.

THE COURT: – THE RATINGS, THAT WOULD BE UNCONSTITUTIONAL?

MS. FALLOW: YES, I THINK FOR THE FUNDAMENTAL REASON THAT IF THEY WERE TO ADOPT THE [14] RATINGS, IT WOULD STILL IMPOSE A CONTENT-BASED RESTRICTION ON SPEECH AND IT STILL WOULD TRIGGER STRICT SCRUTINY AND THE STATE STILL COULDN'T SATISFY STRICT SCRUTINY.

THE OTHER ISSUE IT WOULD RAISE IS IT WOULD CONSTITUTE AN IMPERMISSIBLE DELEGATION OF THE STATE'S AUTHORITY TO DECIDE WHAT KIND OF STATE IS PERMISSIBLE, OR SPEECH IS PERMISSIBLE AND NOT PERMISSIBLE TO A THIRD PARTY ENTITY, OR A PRIVATE ENTITY.

AND, IN FACT, IN THE '70S, AND I BELIEVE THE EARLY '80S, THERE WERE A SERIES OF CASES WHERE VARIOUS JURISDICTIONS ATTEMPTED TO INCORPORATE THE RATINGS SYSTEM FOR THE MPAA, THE MOVIE RATINGS, AS A WAY OF DELINEATING BETWEEN LEGAL AND ILLEGAL SPEECH AND THOSE ATTEMPTS WERE ALL STRUCK DOWN.

THE COURT: LET'S TALK ABOUT VAGUENESS FOR A MOMENT.

MS. FALLOW: I – SORRY.

THE COURT: DO YOU – GO AHEAD.

MS. FALLOW: OUR POSITION, AS STATED IN OUR BRIEFS, IS THAT THE TERMS OF THE ACT ARE NOT SUFFICIENTLY DEFINITE TO MEET THE CONSTITUTIONAL STANDARDS FOR VAGUENESS.

I UNDERSTAND THAT OBVIOUSLY THE COURT, IN [15] ITS P.I. ORDER, SAID THAT IT DISAGREED THAT THE ACT COULD BE REASONABLY APPLIED BY PEOPLE OF ORDINARY INTELLIGENCE.

BUT WE WOULD SUBMIT THAT THERE ARE MANY GAMES IN THE ACT – I MEAN THAT WE HAVE SUBMITTED, AND ALSO GAMES OUT THERE IN THE WORLD THAT IT WOULD BE VERY DIFFICULT TO APPLY THESE TERMS TO.

FOR INSTANCE, THE USE OF THE TERM "SERIOUS PHYSICAL ABUSE" IN THE SECOND PRONG OF THE ACT'S DEFINITION –

THE COURT: WHAT IF THE SECOND PRONG WERE ELIMINATED?

MS. FALLOW: WE THINK THAT SAYING "A MORBID INTEREST IN VIOLENCE" OR "WHAT IS INAPPROPRIATE FOR CHILDREN IN THE CONTEXT OF VIOLENCE" DOES NOT HAVE SUFFICIENTLY DEFINITE MEANING.

AND THE MICHIGAN COURT, IN *GRANHOLM*, HAD A SIMILAR LAW AND ALSO CONCLUDED THAT THAT DOES NOT HAVE SUFFICIENTLY DEFINITE MEANING.

I MEAN, I THINK YOU TAKE A GAME LIKE GOD OF WAR, WHICH DOES SHOW VIOLENT SCENES OF BATTLE IN THE CONTEXT OF CLASSIC GREEK MYTHS AND IS VERY ANALOGOUS TO BOTH MOVIES THAT SHOW SIMILAR STORIES OR EVEN CLASSIC WORKS, AS JUDGE POSNER NOTED IN THE [16] *KENDRICK* CASE, LIKE THE ODYSSEY, IT DOES SHOW VIOLENCE. BUT IT ALSO HAS SERIOUS LITERARY AND ARTISTIC VALUE.

SO MAYBE ON THAT FIRST PRONG – YOU COULD SAY, WELL, MAYBE IT MEETS THE THIRD PRONG. BUT IT'S HARD TO TELL.

THE COURT: OKAY. THANKS.

LET ME HEAR FROM YOUR OPPOSITION.

MR. MORAZZINI: GOOD MORNING, YOUR HONOR.

INITIALLY REGARDING THE *BRANDENBERG* TEST AND ITS APPLICABILITY, THE STATE DOESN'T CONCEDE THAT *BRANDENBERG* – THAT WE CANNOT MEET THE *BRANDENBERG* STANDARD.

HOWEVER, THE LEGISLATIVE RECORD THAT WAS PROVIDED, THE EVIDENCE CLEARLY DEMONSTRATES THAT THE STATE'S INTEREST WAS PROTECTING CHILDREN THEMSELVES AND THE STATE – THE RESEARCH SHOWS THAT THERE'S A CORRELATION BETWEEN PLAYING VIOLENT VIDEO GAMES AND THE INTERNAL HARM TO THE DEVELOPING PSYCHE AND PHYSIOLOGY OF CHILDREN.

SO WE DON'T CONCEDE *BRANDENBERG* CAN'T BE MET. IT'S JUST THAT IT SO CLEARLY SHOULDN'T APPLY IN THIS CASE.

THE COURT: AND IT SHOULDN'T APPLY BECAUSE YOU'RE TALKING ABOUT INJURY TO THE CHILDREN [17] THEMSELVES AS OPPOSED TO OTHER PEOPLE?

MR. MORAZZINI: EXACTLY. *BRANDENBERG* IS DIRECTED AT PREVENTING IMMINENT LAWLESSNESS.

IT'S NOT LAWLESSNESS IF A CHILD BECOMES MORE AGGRESSIVE TO HIMSELF AND DESTROYS HIS TOYS AND TEARS HIS ROOM UP. THAT'S NOT UNLAWFULNESS.

BUT IT CERTAINLY IS UNHEALTHY FOR THE CHILD.

WE BELIEVE THE RESEARCH CLEARLY DEMONSTRATES THAT CHILDREN RUNNING AROUND AND – YOUR HONOR, IT'S KIND OF A COMMON SENSE APPROACH, THIS INCREASED AGGRESSIVENESS. I'M A NEW FATHER MYSELF AND I HAVE MANY NIECES AND NEPHEWS AND I ATTEND BASEBALL GAMES AND SOCCER GAMES. I CAN POINT OUT AN AGGRESSIVE CHILD WHEN I SEE ONE. IT'S NOT THE MOST HEALTHY THING.

WE HAVEN'T SUBMITTED ANY EVIDENCE IN THE RECORD REGARDING THAT BECAUSE I THINK THE LEGISLATURE DIDN'T NEED EVIDENCE TO SUPPORT THIS COMMON SENSE ISSUE.

SO THE *BRANDENBERG* STANDARD, IT'S OUR POSITION THAT IT'S CLEARLY INAPPLICABLE, BUT WE DO NOT CONCEDE IT COULDN'T BE MET.

THE COURT: OKAY.

MR. MORAZZINI: WE JUST HAVEN'T ATTEMPTED [18] TO.

THE COURT: OKAY.

MR. MORAZZINI: YOUR HONOR ALSO ASKED A QUESTION REGARDING HOW SHOULD THIS COURT GO ABOUT DECIDING WHETHER OR NOT SUBSTANTIAL EVIDENCE WAS CONSIDERED?

I THINK YOUR HONOR CAN TAKE A LOOK AT EVEN JUST THE MATERIALS THE STATE HAS PROVIDED FROM THE LEGISLATIVE RECORD.

THIS IS OVERWHELMING EVIDENCE AND IT'S SUPPORTED BY EVERY MAJOR MEDICAL GROUP, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE CALIFORNIA PSYCHIATRIC ASSOCIATION, WE CITED ALL OF THEM IN OUR BRIEFING, YOUR HONOR.

WHETHER OR NOT THAT'S SUBSTANTIAL EVIDENCE, I THINK THIS COURT NEEDS – THIS COURT CAN LOOK AT THE EVIDENCE WE'RE CONSIDERING AS BEING SOCIAL SCIENCE, NOT HARD SCIENCE.

AND WHAT HAS SOCIAL SCIENCE DEMONSTRATED? SOCIAL SCIENCE GENERALLY DEMONSTRATES CORRELATIONS TO SHOW CAUSATION. STRONGER CORRELATIONS MEAN MORE DIRECT CAUSATION.

THE LEGISLATURE CONSIDERED EVIDENCE SHOWING THAT THE CORRELATION WAS GREATER REGARDING PLAYING VIOLENT VIDEO GAMES AND INCREASED [19] AGGRESSION AND HARM TO MINORS THAN THERE IS FOR EXPOSURE TO LEAD-BASED PAINT AND RETARDATION AND IQ LEVELS OR EXPOSURE TO SECONDHAND SMOKE AND LARYNX CANCER. THIS ISN'T A ZERO SUM GAME.

THE COURT: LET'S GET TO A HARD ISSUE.

LET'S ASSUME THAT THE STATUTE IS NOT VAGUE. LET'S ASSUME THAT THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE CONCERNS ABOUT THE PSYCHOLOGICAL DEVELOPMENT OF A CHILD.

WHAT LAW SUPPORTS THE CONCEPT THAT BECAUSE WE'RE DEALING WITH CHILDREN, THE LEGISLATURE CAN RESTRICT SOMEONE'S SPEECH IN AN AREA OTHER THAN PORNOGRAPHY OR THE IMMEDIATE PROMOTION OF VIOLENCE?

MR. MORAZZINI: I THINK THE STRICT SCRUTINY STANDARD ITSELF BEING MET WOULD SUPPORT THE STATE'S EFFORTS HERE.

IF WE ASSUME THAT THERE'S A COMPELLING STATE INTEREST IN PROTECTING THE PHYSICAL WELL BEING OF CHILDREN –

AM I – AM I FEELING YOUR QUESTION CORRECTLY?

THE COURT: YEAH. I WAS REALLY ASKING YOU TO ASSUME THAT THERE'S SUBSTANTIAL EVIDENCE THAT SUPPORTS THE CONCLUSION THAT THERE'S A NEXUS BETWEEN WATCHING THESE VIOLENT VIDEOS AND THE PSYCHOLOGICAL DEVELOPMENT OF A CHILD.

MR. MORAZZINI: CERTAINLY. AND WHETHER OR NOT THAT'S A COMPELLING STATE INTEREST?

THE COURT: I SUPPOSE THAT I'D LIKE TO HEAR COMMENT ON. IS THAT SOMETHING THAT IS SUFFICIENT TO RESTRICT SOMEONE'S FIRST AMENDMENT RIGHT?

MR. MORAZZINI: ABSOLUTELY, YOUR HONOR. AND I BELIEVE THE *CABLE COMMUNICATIONS VERSUS THE FCC* CASE SUPPORTS THAT.

IF YOU HAVE BEFORE YOU – IF THE LEGISLATURE HAS BEFORE IT EVIDENCE THAT IS SUBSTANTIAL THAT SHOWS A HARM BEING CAUSED BY A SPECIFIC ACTIVITY, CERTAINLY REGARDING CHILDREN AND MINORS, THEN THE STATE HAS A COMPELLING INTEREST IN HELPING PARENTS PREVENT THEIR CHILDREN FROM SUFFERING THE DELETERIOUS EFFECTS OF THE ACTIVITY.

THE COURT: OKAY.

MR. MORAZZINI: I THINK THAT'S WELL ESTABLISHED, YOUR HONOR.

THE COURT: CAN YOU THINK OF AN ANALOGOUS SITUATION THAT EXISTS NOW WHERE THERE IS SUCH PROTECTION, AN AREA WHERE CHILDREN ARE – WHERE SPEECH IS RESTRICTED?

MR. MORAZZINI: CERTAINLY.

[21] THE COURT: WHERE SPEECH IS RESTRICTED FOR THE PURPOSES OF PROTECTING CHILDREN?

MR. MORAZZINI: CERTAINLY, YOUR HONOR. BUT THEY'RE ALL DEALING SPECIFICALLY WITH SEXUAL MATERIAL IN THE *GINSBERG V. NEW YORK* CASE.

BUT THAT DOES NOT MEAN THAT THAT'S THE ONLY PERMISSIBLE AREA FROM WHICH CHILDREN CAN BE PROTECTED, FOR WHICH THE STATE GOVERNMENT CAN ASSIST PARENTS IN PROTECTING THEIR CHILDREN FROM THE HARM.

THE COURT: THAT'S THE ONLY ONE THAT EXISTS NOW, THOUGH, IS IT NOT?

MR. MORAZZINI: I – AS FAR AS I KNOW, YOUR HONOR, IT'S SEX-BASED MATERIAL.

HOWEVER, IF WE'RE TALKING ABOUT GENERAL HEALTH MATTERS AND NONSPEECH ISSUES, IF WE'RE TALKING ABOUT ALCOHOL, CIGARETTES –

THE COURT: YEAH. THE PROBLEM IS WE'RE DEALING WITH SPEECH; RIGHT? I MEAN, THAT'S –

MR. MORAZZINI: ARGUABLY SPEECH, YES.

THE COURT: THAT MAKES IT DIFFERENT.

MR. MORAZZINI: YES.

THE COURT: WHAT – IF YOU LOOK AT (B) OF THE DEFINITION, "ENABLES THE PLAYER TO VIRTUALLY INFLICT SERIOUS INJURY UPON IMAGES OF HUMAN BEINGS [22] OR CHARACTERS WITH SUBSTANTIALLY HUMAN CHARACTERISTICS IN A MANNER WHICH IS ESPECIALLY HEINOUS, CRUEL, DEPRAVED, AND THAT INVOLVES TORTURE OR OTHER PHYSICAL ABUSE TO THE VICTIM," WOULDN'T THAT CLEARLY APPLY TO A VIDEO GAME THAT REENACTED THE ODYSSEY? I THINK IT'S THE ODYSSEY WHERE A BURNING STICK IS POKED IN SOMEONE'S EYE.

MR. MORAZZINI: IT'S WHETHER THE CYCLOPS IS A SUBSTANTIAL – IS A CHARACTER WITH SUBSTANTIALLY HUMAN CHARACTERISTICS.

THE COURT: WELL, MAYBE THAT'S A POSSIBLE WAY TO – LET'S ASSUME THAT A CYCLOPS IS HUMAN.

MR. MORAZZINI: CERTAINLY.

THE COURT: WOULDN'T (B) BE A PROBLEM?

MR. MORAZZINI: I DON'T BELIEVE SO. I THINK IT'S TORTURE TO BLIND ONE'S OPPONENTS NECESSARILY.

THE COURT: BY STICKING A BURNING STICK IN THEIR EYES?

MR. MORAZZINI: ARGUABLY.

THE COURT: IN OTHER WORDS, WHAT I'M POSSIBLY WONDERING, IS (A) A MORE NARROW DEFINITION THAN (B) ?

MR. MORAZZINI: I WOULD HAVE TO ARGUE YES, YOUR HONOR. THE STATE WOULD HAVE TO ARGUE, [23] YES, THAT (A) IS A MORE NARROW DEFINITION, AND THAT'S BEEN UPHELD BY THE COURTS.

THE COURT: WHAT DO YOU MEAN IT'S BEEN UPHELD? IT'S KIND OF A CONGLOMERATION –

MR. MORAZZINI: CERTAINLY, YOUR HONOR.

THE COURT: -- OF THE DEATH PENALTY AND PORNOGRAPHY TESTS COMBINED, ISN'T IT?

MR. MORAZZINI: THE ORIGINAL – THE PART (A), THE FIRST TEST IS THE OBSCENE AS TO MINORS STANDARD FROM *GINSBERG*, YOUR HONOR.

THE COURT: RIGHT.

MR. MORAZZINI: ABSENT THE SEX-BASED MATERIAL.

THE COURT: RIGHT.

MR. MORAZZINI: AND THE SECONDARY DEFINITION IS THE DEATH PENALTY LANGUAGE THAT THE SUPREME COURT HAS FOUND SUFFICIENTLY PRECISE TO ALLOW A JURY TO MAKE THAT DETERMINATION AND IMPOSE THE PENALTY OF DEATH ON A DEFENDANT.

THE STATE BELIEVES THAT A PERSON OF ORDINARY INTELLIGENCE COULD APPLY THE SECONDARY DEFINITION.

BUT WE ALSO BELIEVE THAT IT'S SEVERABLE IF NECESSARY, YOUR HONOR.

THE COURT: ALL RIGHT. ANY OTHER [24] COMMENTS YOU WANT TO MAKE?

MR. MORAZZINI: YOUR HONOR, I JUST WANTED TO RE-EMPHASIZE THAT THE

EVIDENCE THAT'S IN THE LEGISLATIVE RECORD IS QUITE SUBSTANTIAL.

NOW, PLAINTIFFS DID BRING UP A POINT IN THEIR BRIEFING THAT THEY EVEN ASSERT THAT THE LEGISLATURE DID NOT CONSIDER ANY EVIDENCE THAT SHOWS THE ABSENCE OF A CORRELATION.

YOUR HONOR, WE ADDRESSED THAT IN OUR BRIEFING, AND I JUST WANTED TO POINT OUT AGAIN, YOUR HONOR, THAT THE STATE DID NOT SUBMIT THE ENTIRE LEGISLATIVE RECORD.

THE STATE, MYSELF, WENT TO THE STATE CAPITOL AND DUG THROUGH THE COMMITTEE FILES AND PULLED OUT THE RELEVANT STUDIES THAT SUPPORTED OUR POSITION AND SUBMITTED THAT TO YOUR HONOR.

SO WE BELIEVE THE STATUTE'S NARROWLY TAILORED, THAT THE LEGISLATURE DID NOT JUST CONSIDER A BIASED SUBSET OF EVIDENCE, BUT AS PLAINTIFF'S OWN EXPERT, PROFESSOR DIMITRI, WILLINGLY ADMITTED IN TESTIMONY, DR. ANDERSON IS AN EXPERT IN HIS FIELD AND A LOT OF HIS STUDIES ARE CONTAINED IN THE LEGISLATIVE RECORD, ALONG WITH A LOT OF OTHER STUDIES FROM OTHER EXPERTS IN THEIR FIELD, AND THEY ALL POINT TO ONE SOLID CONCLUSION: [25] THAT THESE GAMES CAUSE INCREASED AGGRESSION IN CHILDREN, YOUR HONOR.

THE COURT: OKAY. MR. GOODIN, DID YOU WANT TO BE HEARD?

MR. GOODIN: YES, I DID, OR DO.

LET ME FIRST ADDRESS THE MATTER OF THE EFFORT TO EXCLUDE OUR BRIEF AND THE EVIDENCE WE SUBMITTED IN SUPPORT OF IT.

IT HASN'T BEEN DISCUSSED, AND YOU DIDN'T ASK ANY QUESTIONS SPECIFICALLY ABOUT THAT, BUT I WOULD POINT OUT TO THE COURT THAT THE ENTIRE PREMISE OF OUR SEEKING AMICUS WAS, MOST IMPORTANTLY, THE KNOWLEDGE OF MY CLIENT ORGANIZATION, COMMON SENSE MEDIA, ABOUT THE STUDIES ON THE SOCIAL SCIENCE OF PSYCHOLOGICAL AND PHYSICAL HARM TO CHILDREN.

THAT'S PRESUMABLY WHY YOU WERE INTERESTED IN HEARING FROM US. THATS THE ONLY ISSUE WE ADDRESSED CONSISTENT WITH YOUR DESIRE NOT TO HAVE US SIMPLY REPLICATE THE STATE'S ARGUMENTS.

I BELIEVE THAT THE EVIDENCE WE SUBMITTED IS FULLY CONSISTENT WITH THE ARGUMENTS THAT THE STATE HAS MADE IN SUPPORT OF THE CONCLUSION THAT THERE IS SUBSTANTIAL EVIDENCE SUPPORTING A NEXUS BETWEEN VIOLENT VIDEO GAMES AND HARM TO CHILDREN.

[26] AND WE BELIEVE ALSO THAT THE EVIDENCE FROM A VARIETY OF SCHOLARS ACROSS THE COUNTRY THAT WE SUBMITTED, THE SIX DECLARATIONS, INDICATES THAT THE STATE WAS BY NO MEANS CHERRY PICKING TO GET ONLY THE SOCIAL SCIENCE THAT SUPPORTED ITS POSITION, BUT IN FACT HAD LEGISLATED CONSISTENTLY WITH SOCIAL SCIENCE'S STRONG EVIDENCE.

I ALSO WOULD SAY, OBVIOUSLY IF YOU ARE OF THE MIND TO CONCEDE THE POINT THAT SUBSTANTIAL EVIDENCE EXISTS AND RULE WITH THAT ASSUMPTION, WE WOULDN'T NEED TO TAKE TESTIMONY.

BUT I THINK IF THERE'S ANY DOUBT IN THE COURT'S MIND ABOUT THE EXISTENCE OF THE NEXUS BETWEEN HARM TO CHILDREN – THAT'S WHAT WE'RE TALKING ABOUT, HARM TO CHILDREN, PSYCHOLOGICAL AND PHYSICAL HARM TO CHILDREN – I DO BELIEVE THAT IT WOULD BE INCUMBENT ON THE COURT TO ALLOW BOTH THE STATE, AND AMICUS, IF YOU CHOOSE, TO PRESENT THE EVIDENTIARY BASIS FOR THAT CONCLUSION.

I WOULD ALSO AGREE WITH MR. MORAZZINI, I DON'T KNOW OF ANY CASE OUTSIDE THE *GINSBERG* CONTEXT WHICH CARVES OUT THE ABILITY TO HAVE SPEECH NOT SHOWN TO CHILDREN, BUT I DON'T THINK THAT *GINSBERG* IS EXCLUSIVE AND WE DO

BELIEVE STRONGLY IN THE STATE'S POSITION THAT THE INTEREST IS COMPELLING, [27] IT'S HARM TO CHILDREN, AND THAT THE STATE HAS MET ITS BURDEN, ALBEIT A TOUGH BURDEN, OF STRICT SCRUTINY IN THIS CASE.

THE COURT: OKAY. THANK YOU. MATTER SUBMITTED, OR DID YOU WANT TO MAKE A FINAL COMMENT?

MS. FALLOW: COULD I RESPOND BRIEFLY?

THE COURT: YEAH.

MS. FALLOW: JUST A FEW THINGS.

ON THE MATTER OF THE AMICUS FILINGS, WE BELIEVE THIS EXCEEDS THE PROPER ROLE OF AN AMICUS. THEY COULD HAVE FILED A BRIEF DESCRIBING THEIR BACKGROUND AND TALKING ABOUT MATTERS THAT HAVE RAMIFICATIONS BEYOND THIS CASE. THEY DIDN'T.

BE THAT AS IT MAY, WE BELIEVE THAT THE EXPERT DECLARATIONS SUBMITTED BY COMMON SENSE MEDIA ARE SUBJECT TO THE SAME FLAWS AND LIMITATION AS THE SCIENCE IN THE LEGISLATIVE HISTORY.

SO WE DON'T THINK THAT IT WOULD CHANGE THE CONCLUSION THAT HAS BEEN REACHED BY EVERY SINGLE COURT TO HAVE CONSIDERED SIMILAR LAWS THAT THIS KIND

OF SOCIAL SCIENCE DOES NOT SUPPORT, DOES NOT PROVIDE SUBSTANTIAL EVIDENCE IN FURTHERANCE OF A COMPELLING STATE INTEREST.

EVEN DR. ANDERSON, WHO IS UNDOUBTEDLY THE MOST WIDELY PUBLISHED PERSON IN THIS AREA, CONCEDES [28] THAT IT'S MOSTLY CORRELATIONAL, AND I THINK THAT DR. ANDERSON WOULD READILY CONCEDE THAT CORRELATION DOES NOT EQUAL CAUSATION, AS WOULD EVERY SOCIAL SCIENTIST.

BUT IN ANY EVENT, AT MOST IT'S A VERY SMALL, VERY SLIGHT CORRELATION.

AND AS DR. ANDERSON HAS ADMITTED AT TRIAL, THERE IS – THE EVIDENCE IS THAT TELEVISION EFFECTS ARE BASICALLY THE SAME FOR VIDEO GAMES.

SO THERE IS NO BASIS FOR SINGLING OUT VIDEO GAMES FOR THIS KIND OF DISCRIMINATORY SPEECH RESTRICTION.

I WOULD SAY ON THE *BRANDENBERG* POINT – OH, ONE OTHER THING ABOUT SUBSTANTIAL EVIDENCE.

THE STATE SUGGESTS THAT ITS PLAINTIFF'S BURDEN TO DISPROVE A CAUSAL CONNECTION.

BUT UNDER STRICT SCRUTINY, IT'S CLEARLY THE STATE'S BURDEN TO SUBMIT SUBSTANTIAL EVIDENCE.

ON THE *BRANDENBERG* ISSUE, AS WE'VE STATED IN OUR BRIEF, YOU CAN'T RECAST THE STATE AGENCY INTEREST IN PREVENTING VIOLENCE BY CHARACTERIZING IT AS AN INTEREST IN PROTECTING THE AGGRESSOR, HARM TO THE AGGRESSOR AS OPPOSED TO HARM TO THE VICTIM, BECAUSE THEN YOU COULD ALWAYS AVOID *BRANDENBERG* IN THAT WAY.

[29] I THINK ULTIMATELY, AS I'VE ALREADY DISCUSSED, THE PRIMARY ISSUE HERE IS THAT THE STATE CAN'T BE IN THE BUSINESS OF RESTRICTING SPEECH BASED ON A BELIEF THAT IT WILL CAUSE MINORS TO HAVE CERTAIN PERSONALITIES.

IT SEEMS LIKE, TO ME, THAT FASHION MAGAZINES, FOR INSTANCE, YOU COULD ARGUE CONTRIBUTE TO YOUNG GIRLS HAVING BAD BODY IMAGES.

BUT YOU COULDN'T RESTRICT ALL FASHION MAGAZINES FOR TEENAGE GIRLS OR YOUNG GIRLS BASED ON THAT PROPOSITION.

FINALLY, *GINSBERG* HAS BEEN RELEGATED TO THE

THE COURT: THE ANALOGY THERE DOESN'T REALLY – I MEAN, YOU COULD LIMIT

YOUNG GIRLS', OR YOUNG PEOPLE'S ACCESS TO THINGS THAT WERE PORNOGRAPHIC, AND THAT'S KIND OF THE LINE THAT'S BEEN DRAWN, BUT NOT TO FASHION MAGAZINES, AND ISN'T THIS SORT OF THE SAME THING WHERE THEY'RE SAYING, WELL, VIDEO GAMES ARE OKAY, EVEN THOUGH A LOT OF PARENTS MAY FEEL OTHERWISE, BUT THOSE THAT ARE REALLY VIOLENT AND HEINOUS AND DEPRAVED AND YOU CAN RESTRICT THEM?

MS. FALLOW: WELL, MAYBE MY ANALOGY IS INAPT.

[30] BUT I GUESS WHAT I WAS TRYING TO SAY IS TO THE EXTENT YOU ARGUE THAT A FASHION MAGAZINE CAUSED HARM TO DEVELOPING TEENAGE GIRLS BECAUSE IT CAUSED THEM TO FEEL BAD ABOUT THEMSELVES, WHICH SOME PEOPLE THINK, YOU COULDN'T RESTRICT THE SPEECH ON THAT BASIS.

BUT I, I ESSENTIALLY AGREE THAT *GINSBERG* IS RELEGATED JUST TO THIS VERY NARROW CATEGORY OF SEXUALLY EXPLICIT SPEECH.

I DON'T BELIEVE THAT THERE IS ANY INDICATION FROM GINSBERG OR FROM LATER SUPREME COURT CASES THAT IT GAVE THE GOVERNMENT A BLANK CHECK TO RESTRICT SPEECH IN THIS MANNER.

FINALLY, ON THE VAGUENESS GROUND, I WOULD REITERATE THAT THE TERMS, EVEN IN SECTION (A), ARE VAGUE.

WHAT APPEALS TO A DEVIANT OR MORBID INTEREST IN VIOLENCE, I HONESTLY DON'T KNOW HOW THAT WOULD BE APPLIED TO, FOR INSTANCE, SOME OF THE GAMES WE'VE SUBMITTED IN THE RECORD, INCLUDING GOD OF WAR AND RESIDENT EVIL.

THE COURT: OKAY. I DO HAVE ONE QUESTION FOR THE STATE THAT I FORGOT TO ASK.

MR. MORAZZINI: CERTAINLY, YOUR HONOR.

THE COURT: DO YOU THINK IT MAKES ANY [31] DIFFERENCE THAT THIS IS DIRECTED AT ALL MINORS AS OPPOSED TO, SAY, MINORS UNDER AGE 10 OR SOME SUCH THING?

MR. MORAZZINI: NOT AT ALL, YOUR HONOR.

I THINK THE SUPREME COURT RECENTLY MADE THAT DISTINCTION CLEAR IN THE *ROPER V. SIMMONS* CASE WHERE THE SUPREME COURT TOOK IN SOCIAL SCIENCE EVIDENCE FROM EXPERTS AROUND THE GLOBE AND THE COURT HELD THAT THE DEATH PENALTY CAN'T BE IMPOSED ON THOSE UNDER 18.

AND THE SOLE BASIS – WELL, THE MAIN BASIS FOR THAT RULING IS THAT WE'RE TALKING ABOUT DEVELOPING MINDS OF CHILDREN.

I MEAN, THEY'RE NOT – THEY'RE NOT ALWAYS CAPABLE OF TAKING RESPONSIBILITY FOR THEIR ACTIONS PRIOR TO THE TIME THEY TURN 18.

YOUR HONOR, I THINK IN OUR PRELIMINARY INJUNCTION PAPERS AND OUR MOVING PAPERS, WE DO CITE TO AND DISCUSS THE SOCIAL SCIENCE HOLDINGS AND FINDINGS OF THE U.S. SUPREME COURT IN THE *ROPER V. SIMMONS* CASE, SO I THINK IT'S PRETTY CLEAR THAT 18 IS A GOOD LINE TO GO WITH, YOUR HONOR.

THE COURT: ALL RIGHT. THANK YOU BOTH, OR THANK YOU ALL, AND I WILL SEND OUT A RULING SHORTLY.

[32] MR. MORAZZINI: THANK YOU, YOUR HONOR.

MS. FALLOW: THANK YOU, YOUR HONOR.

THE COURT: WE'LL TAKE A COUPLE MINUTES AND WE'LL DO THE CMC'S.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT,

CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/ Lee Anne Shortridge
LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUL 12 2010
OFFICE OF THE CLERK

No. 08-1448

In The
Supreme Court of the United States

◆

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN Jr., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

PETITIONERS' BRIEF

◆

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), is the State required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?

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◆

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. The petition for writ of certiorari was filed on May 19, 2009, and was granted on April 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

◆

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." This provision applies to the states through the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). California Civil Code sections 1746-1746.5, prohibiting the sale of violent video games to minors, are reproduced in the

Appendix to the petition for writ of certiorari. Pet. App. 93a-100a.

◆

STATEMENT

1. California Civil Code sections 1746-1746.5 (the Act) prohibit the sale or rental of "violent video games" to minors under 18. The Act defines a "violent video game" as one that depicts "killing, maiming, dismembering, or sexually assaulting an image of a human being" in a manner that meets all of the following requirements: (1) A reasonable person, considering the game as a whole, would find that it appeals to a deviant or morbid interest of minors; (2) it is patently offensive to prevailing standards in the community as to what is suitable for minors, and; (3) it causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. The Act does not prohibit a minor's parent or guardian from purchasing or renting such games for the minor. Pet. App. 96a.

The Act provides for a penalty of up to $1,000 per violation, which may be lowered in the discretion of the court. The penalty does not apply to any person who is employed solely in the capacity of a salesclerk or other similar position, provided he or she does not have an ownership interest in the business in which the violation occurred and is not employed as a manager in the business. Pet. App. 98a.

In passing the Act, the California Legislature sought to reinforce the right of parents to restrict children's ability to purchase offensively violent video games. In doing so, the Legislature considered numerous studies, peer-reviewed articles, and reports from social scientists and medical associations that establish a correlation between playing violent video games and an increase in aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in both minors and adults. JA 116-43. The Legislature also considered the Federal Trade Commission's report that the video game industry specifically markets M-rated (Mature) video games to minors, that 69% of 13- to 16-year-old children were able to purchase M-rated games, and that only 24% of cashiers asked the minor's age. JA 817-89.

The record contains examples of the violent content of various video games that may be covered by the Act. For example, the district court described one of the games in the record:

> The game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. The player's character makes sardonic comments during all this; for example, urinating

> on someone elicits the comment "Now the flowers will grow."

Pet. App. 78a (internal citation omitted).

2. Respondents, representing the video game and software industries, brought a facial challenge to the Act. On Respondents' motion for a preliminary injunction and the parties' cross-motions for summary judgment, the United States District Court for the Northern District of California ruled that, absent sexual content, violence alone cannot be considered unprotected speech under the First Amendment, even when the restriction is limited to minors. Pet. App. 53a-58a, 86a-89a. As a content-based restriction on speech, the district court reviewed the Act under a strict scrutiny standard. Applying that standard, the district court concluded that, although protecting the physical and psychological well-being of minors is a compelling governmental interest, the State failed to demonstrate a sufficient causal connection between minors playing the covered games and the harm sought to be avoided by the Act. Pet. App. 58a-60a. The district court also held that the Act was not the least restrictive means of achieving the compelling interest in that the State did not demonstrate that parental controls available on some new versions of gaming consoles would be less effective. Pet. App. 60a-62a. The district court therefore held that the Act was facially unconstitutional under the First Amendment and permanently enjoined its enforcement. Pet. App. 39a.

3. The Court of Appeals for the Ninth Circuit affirmed. The court rejected the State's argument that the Act only covers speech that should not be entitled to First Amendment protection as to minors and should be reviewed under the same flexible standard that is applied to restrictions on the sale of sexual material to minors under *Ginsberg v. New York*, 390 U.S. 629 (1968). Pet. App. 15a-23a. Under *Ginsberg*, the Act would be upheld so long as it was not irrational for the Legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641. The court below acknowledged that the *Ginsberg* Court "offered two justifications for applying this rational basis standard: (1) that 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society'"; and (2) the state's "'independent interest in the well-being of its youth.'" Pet. App. 18a (quoting *Ginsberg*, 390 U.S. at 639-40). But the court distinguished *Ginsberg* nevertheless, concluding that the case applies only to sexual material, not violent material. Pet. App. 19a-22a. The court thus reviewed the Act under strict scrutiny and held that the State's evidence failed to establish a sufficient direct causal connection between violent video games and the physical and psychological harm to minors that the Act is intended to prevent. Pet. App. 27a-32a. The court of appeals also affirmed the district court's finding that, even assuming a direct causal connection had been shown, the Act was not the least

restrictive means of preventing the identified harm to minors. Pet. App. 32a-34a.

◆

SUMMARY OF ARGUMENT

California's prohibition on the sale of offensively violent video games to minors is constitutional. Whatever First Amendment value these games may possess for adults, such games are simply not worthy of constitutional protection when sold to minors without parental participation. There is no sound basis in logic or policy for treating offensively violent, harmful material with no redeeming value for children any different than sexually explicit material.

The Act promotes parental authority to restrict unsupervised minors' ability to consume a narrow category of material in order to protect minors' physical and psychological welfare, as well as their ethical and moral development. California has a vital interest in supporting parental supervision over the amount of offensively violent material minors consume. The Act ensures that parents – who have primary responsibility for the well-being of minors – have an opportunity to involve themselves in deciding what level of video game violence is suitable for a particular minor. In doing so, the Act does not impinge upon the rights of adults, as it was deliberately structured to accommodate parental authority over minors while leaving access by adults completely unfettered.

It is well-recognized that the societal values served by the freedom to consume expressive material do not justify recognizing a constitutional right for minors of the same magnitude as that for adults -- and this should be true whether the expressive material is sexually explicit or offensively violent. Instead, while minors certainly enjoy the protection of the First Amendment, it is a more restricted right than that assured to adults, who may judge for themselves what level of sexually explicit or violent material they should consume.

I. The First Amendment permits states to restrict minors' access to offensive and harmful violent video games absent parental supervision.

A. Because the State has a vital interest in reinforcing parents' authority to direct the upbringing of children in order to protect their physical and psychological welfare, as well as their ethical and moral development, restrictions on minors' access to offensively violent material are constitutionally permissible. The First Amendment rights of minors are not coextensive with the rights of adults. This precious right presupposes the capacity of the individual to make a reasoned choice as to whether to consume specific speech. Minors lack such capacity, and their liberty is best protected when the government reinforces parental authority and involvement in choices that can affect minors' well-being, including their moral and intellectual growth. Therefore, laws that prohibit the sale to minors of violent material that is patently offensive, appeals to a minor's deviant or morbid interest, and lacks serious socially redeeming value for minors should properly be reviewed under the standard set forth by this Court in *Ginsberg v. New York*, 390 U.S. 629 (1968). If the regulated material satisfies the above criteria, it should make no constitutional difference whether the material depicts sex or violence. Under the *Ginsberg* standard, the Act must be upheld so long as it was not irrational for the California legislature to determine that exposure to the material regulated by the statute is harmful to minors.

Application of the *Ginsberg* standard, as opposed to strict scrutiny, is critical to ensuring that parents, who have the primary responsibility for minors' well-being, will receive the support of laws designed to aid in the discharge of that responsibility. Children occupy a unique place in civil society, and any application of the law must reflect this fact. The First Amendment rights of minors are not always co-extensive with the rights of adults. Because the parts of the brain involved in behavior control continue to mature through late adolescence, speech may have a deeper and more lasting negative effect on a minor than on an adult. Application of strict scrutiny would effectively ignore many undeniable distinctions between adults and minors.

B. The *Ginsberg* standard of review properly balances the rights of minors with states' interest in reinforcing parents' prerogative to direct the upbringing of children. Parents are entitled to such reinforcement in their efforts to protect their children from expressive material that is just as harmful, if not more so, as sexual material. Applying the *Ginsberg* standard in this context respects the parental role over children. Application of strict scrutiny, on the other hand, would improperly elevate the rights of minors to consume offensive material to a level that has never been recognized before by this Court.

The primary interests served by strict scrutiny are misplaced in this context. This searching level of review applies to ensure that the rights of adults to partake in a robust marketplace of ideas are not curtailed without an overwhelming justification. But this Court has consistently recognized that parents must be permitted, with governmental assistance, to help shape that marketplace for minors given their underdeveloped sense of responsibility and vulnerability to negative influences. This holds true even for regulations on material with no sexual component, such as profanity. The *Ginsberg* standard properly accounts for fundamental differences in the inherent vulnerabilities and susceptibilities to negative influences between adults and minors.

The First Amendment has never been understood as guaranteeing minors unfettered access to offensively violent material. Such material shares the same characteristics as other forms of unprotected speech, especially sexually explicit material. Throughout history, many states have enacted laws that regulate the sale of both sexual and violent material to minors. Such restrictions reflect society's understanding that violent material can be just as harmful to the well-being of minors as sexually explicit material. This is further reflected in the fact that violence can strip constitutional protection from otherwise protected material. Sexually explicit material that would be otherwise protected for distribution to adults can be considered obscene given the violent nature of its depiction. No rational justification exists for treating violent material so vastly different than sexual material under the First Amendment when reviewing restrictions on distribution to minors.

C. The Act properly supports parental authority over minors while serving fundamental societal interests. The Act also serves to eliminate the perceived societal approval of minors purchasing and playing offensively violent video games – a distinct harm to the development of minors recognized by social science and this Court. Allowing minors to legally purchase such games implies societal approval. The Act eliminates any possibility of such an imprimatur.

Technological and scientific advancements reaffirm society's long-standing concerns with minors' unsupervised exposure to violent material. Today, minors have access to intensely graphic, realistic, offensive violence in the games covered by the Act. And social science has developed to a point where a correlation can be demonstrated between minors who play violent video games and physical and psychological harm. Respondents' own system of self-regulation of the sale of video games recognizes that certain video games are inappropriate for minors given the level of violent content available during game play. Indeed, through their rating system, Respondents apparently agree that minors should not be able to purchase games where the violent content reaches the level of "intense violence," which can include human decapitation, torture, burning, and general mayhem as depicted in the State's physical exhibit lodged with the Court.

II. The First Amendment does not require states to demonstrate proof of a direct causal link between violent video game play and harm to minors. If the government must defend a regulation on speech to minors as a means of preventing anticipated harms under strict scrutiny, a proper application of this level of review requires that the state legislature draw reasonable inferences based on substantial evidence. The social science considered by the California Legislature was more than sufficient to justify its decision to restrict minors' unfettered access to offensively violent video games.

III. The Act is the least restrictive means of serving the State's compelling interests. The California Legislature properly relied upon the FTC's report to Congress that, even with the video game industry's efforts to voluntarily restrict the sale of M-rated video games to minors, a majority of children ages 13 to 16 were still able to purchase such games from retailers. California was not required to simply accept the status quo in the face of such evidence, and its efforts to implement a more effective means of preventing minors from purchasing offensively violent video games survives judicial review.

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ARGUMENT

I. THE FIRST AMENDMENT PERMITS STATES TO RESTRICT THE SALE OF OFFENSIVELY VIOLENT VIDEO GAMES TO MINORS

As this Court unequivocally held in *Ginsberg v. New York*, 390 U.S. 629 (1968), states may properly restrict minors' access to material that is fully protected as to adults. This ruling, and the reasoning supporting it, is equally applicable to regulations on minors' access to offensively violent material. Such material, like obscenity, is harmful to minors and has little or no redeeming social value for them. Parents are entitled to support of the law in their efforts to protect minors from this material in order to direct their ethical and moral development. Because the State is only limiting this material with respect to its sale to minors, strict scrutiny does not apply to the California Act. Rather, history, tradition, and our continuing understanding of the inherent vulnerability and susceptibility of minors to negative influences confirm that California should be allowed to restrict minors' access to offensively violent material as it has done here.

In *Ginsberg*, this Court held that States may restrict the sale of offensive sexual material to children, notwithstanding that the First Amendment fully protects such material as to adults. The court below erred when it held that the *Ginsberg* analysis is limited to sexual images. *Ginsberg* does not turn on the difference between sexual images and other forms of speech. Like much of the Court's jurisprudence before and after *Ginsberg* – often having nothing to do with sexual material – this case is premised upon society's traditional interest in protecting children from harm and helping parents direct their children's moral and social development. California's statutes restricting the sale of offensively violent video games to children serve precisely these interests. Violent video games, like sexual images, can be harmful to minors and have little or no redeeming social value for them. When sold to minors, offensively violent material must be recognized as a "categor[y] of speech that [has] been historically unprotected, but [has] not yet been identified or discussed as such in our case law." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010). The Court should adopt the *Ginsberg* standard here so that the States may support parents' efforts to protect children from this material as part of their long-recognized duty to direct their ethical and moral development.

A. The First Amendment Allows the Government to Enact Restrictions That Prevent Harm to Children and Enable Parents to Guide Their Children's Upbringing

1. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech." Laws that restrict the content of speech are presumptively invalid, and the government has the burden of proving otherwise. *Stevens*, 130 S. Ct. at 1584. "From 1791 to the present, however, the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,'" including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.* The prevention and punishment of speech that falls into these traditional categories "has never been thought to raise any constitutional problem." *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). "Context," moreover, "is all-important," *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978), and the Court also has allowed the government to regulate the content of offensive speech that could harm children, even though the speech would have been fully protected in other contexts.

Such regulations are constitutionally permissible, in part, because this Court has recognized that minors' First Amendment rights are often less extensive than those of adults. The liberty of human expression guaranteed by the First Amendment – the freedom to choose for oneself what to publish, read, or view in order to promote a free trade in ideas – presupposes the capacity of the individual to make a reasoned choice. *Ginsberg*, 390 U.S. at 649 (Stewart, J., concurring). The proper interpretation of the First Amendment recognizes the fact that minors are not possessed of mental faculties equivalent to adults, and reflects society's well-established understanding that for certain narrowly-defined areas of expressive material, minors lack the capacity to make a reasoned choice. The right of parents to involve themselves in such decisions is entitled to the support of the law.

This Court has recognized that children occupy a unique place in civil society. This principle has borne itself out in two ways in the Court's precedent: (1) a recognition that parents must have substantial freedom to direct the upbringing of their children; and (2) a recognition that minors' rights may be curtailed in ways that the rights of adults cannot. Consistent with these principles, this Court has recognized that the First Amendment rights of minors are not "co-extensive with those of adults." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, n. 11 (1975); *see also Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring). Indeed, "[i]t is well-established that a State or a municipality can adopt more stringent controls on communicative materials available to youths than to those available to adults." *Erznoznik*, 422 U.S. at 212. Accordingly, the government can bar the sale of sexual material to minors even when, in other contexts, the First Amendment would protect the material.

In *Ginsberg*, a store owner was convicted of violating a New York statute prohibiting the sale to minors material the state legislature found to be harmful to minors, although it was not obscene as to adults. 390 U.S. at 634. The statute at issue was directed at images of simple "nudity" as well as sexual depictions – "girlie magazines," as the Court referred to them. *Id*. at 645-47. The statute defined the term "harmful to minors" as a description or representation, "in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." *Id*. at 646.

Although the New York law at issue in *Ginsberg* would not have survived judicial scrutiny had it applied to adults, this Court upheld the law because it targeted purchases only by minors. *Id*. at 639-46. The Court recognized the state's power to define obscenity in a variable manner – using one definition applicable to adults and a more broad definition applicable only to minors. Thus, the *Ginsberg* Court applied the following standard: "To sustain state power to exclude material defined as obscene by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641.

The Court focused on the offensive, harmful nature of the speech when consumed by children, rather than on the sexual content of the speech. *See id.* at 673 (Fortas, J., dissenting) (objecting that the majority did not determine whether the magazines were actually obscene under the new standard). Specifically, the Court cited two interests that justify a relaxed application of the First Amendment.

> First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

Id. at 639 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Accordingly, "The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg*, 390 U.S. at 639. The Court noted that the statute "expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id.*

The second interest that justified a relaxed standard is that the "State also has an independent interest in the well-being of its youth." *Id.* at 640. While supervision of children is best left to parents, parental guidance "cannot always be provided," and society has "a transcendent interest in protecting the welfare of children." *Id.* (quotations omitted). The Court cited *Prince v. Massachusetts*, 321 U.S. 158 (1944), which upheld the enforcement of Massachusetts's child labor law against the guardian of a nine-year-old girl for this fundamental, yet self-evident proposition. There, the Court "recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" *Ginsberg*, 390 U.S. at 640-41 (quoting *Prince*, 321 U.S. at 165).

Consequently, *Ginsberg* turns on two interests that focus on children and parents rather than on any inherent difference between sexual speech and other forms of speech that may harm children. This Court has continued to focus on these interests in assessing the constitutionality of regulations that seek to protect minors from the potentially harmful effects of otherwise protected speech.

In a case that involved offensive words, not sexual images, this Court held that the government could regulate speech that would be otherwise fully protected, in part because of potential harm to children. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court considered the FCC's authority to proscribe radio broadcasts that it found "indecent but not obscene." *Id.* at 729. The speech was a radio broadcast of George Carlin's twelve-minute monologue "Filthy Words," a satirical discussion of swear words that "you can't say on the public . . . airwaves." *Id.* Notably, while some of the words had sexual connotations ("fuck"), others did not ("piss," "shit"), nor did the case involve sexual images, as in *Ginsberg*. *See Pacifica*, 438 U.S. at 767 (" . . . the Carlin monologue is obviously not an erotic appeal to the prurient interests of children . . . and [is] therefore not obscene" as to them) (Brennan, J., dissenting).

In upholding the FCC's authority to regulate the broadcasting of such material, the Court focused not only on the unique qualities of broadcast media, but also on the potential harm to minors in the listening audience. The Court found that the language at issue – the seven dirty words – "could have enlarged a child's vocabulary in an instant." *Id.* at 749. Citing *Ginsberg*, the Court noted "the government's interest in the 'well-being of its youth' and in supporting 'parents claim to authority in its own household,'" which along with the "ease with which children may obtain access to broadcast material . . . amply justify" a more flexible application of the First Amendment. *Pacifica*, 438 U.S. at 749-50 (quoting *Ginsberg*, 390 U.S. at 639-40).

2. In focusing on the interests of parents and children, *Ginsberg* and *Pacifica* are not novel. This Court often considers society's traditional interests in supporting parents and protecting children when determining the scope of a variety of constitutional rights.

a. The Court has specifically invoked these interests in the context of public schools. Although students do not "shed their constitutional rights at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), it is well settled that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Veronica School Dist. 47J v. Acon*, 515 U.S. 646, 656 (1995) ("Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . . "). Although this is due in part to "the special characteristics of the school environment," *Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quotation omitted), the treatment of students' rights in the school setting also reflects "the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children." *Fraser*, 478 U.S. at 684.

Accordingly, the Court has considered cases involving student speech in public schools in this context and has often shown flexibility toward public school officials in regulating offensive speech of various types. Like parents, "public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." *Fraser*, 478 U.S. at 681 (quotation omitted). "The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially acceptable behavior." *Id.* Although the Court has upheld a student's right to wear an armband to protest the Vietnam War, *Tinker*, 393 U.S. at 506, it has allowed school officials to sanction students for their lewd comments made to fellow students, *Fraser*, 478 U.S. 675, to remove books from a school library that officials deemed vulgar, *Board of Education v. Pico*, 457 U.S. 853 (1982), and to sanction a student for displaying a banner ("BONG HiTS 4 JESUS") when school officials reasonably concluded it promoted drug use, even though the student himself described the banner as mere "nonsense" and members of the Court variously described it as "cryptic," "ambiguous," "silly," and "ridiculous." *Morse v. Frederick*, 551 U.S. 393, 401, (2007). Notably, none of these cases involved speech that would have met *Ginsberg*'s variable obscenity standard.

Although school cases present their own unique circumstances, the flexibility that the Court allows public school officials is instructive here. If public schools may permissibly restrict students' free speech rights, then the State of California should be allowed no less authority when they pass legislation designed to do nothing more than reinforce parents' right to directly control the upbringing of children. To hold otherwise would effectively grant public schools (arms of the state) greater authority to directly restrict minors' speech rights than a state itself has when it acts to reinforce parental rights over their own children. After all, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, 321 U.S. at 166. Parents are entitled to the law's support no less than public school teachers.

b. Reviewing the law more broadly, society's interest in protecting children from harm from a variety of sources, not just obscenity, and assisting parents in this important task is well-established in our Nation's history and traditions.

It is not simply in the First Amendment arena that minors' rights are restricted. Society recognizes the utility and legitimacy of a differential between the rights of minors and the rights of adults because minors are not *sui juris*. They cannot vote, *see* U.S. Const. amend. XXVI, and thus "might be considered politically powerless to an extreme degree." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 472 n. 24 (1985) (Marshall, J., concurring in part). And in California as in many states and the District of Columbia, minors generally cannot marry without parental consent, Cal. Fam. Code § 301; 23 Pa. Stat.

Ann. § 1304; N.Y. Dom. Rel. Law § 7; D.C. Code § 46-411, serve on a petit jury or grand jury, Cal. Code Civ. Proc. § 197; Cal. Pen. Code § 893, obtain a chauffer's license or drive a school bus, Cal. Veh. Code §§ 12515, 12516, purchase tobacco, Cal. Pen. Code § 308(b), play bingo for money, Cal. Pen. Code § 326.5(e), or execute a will. Cal. Prob. Code § 6220. And, of course, states may restrict their access to sexually explicit, harmful material. *E.g.*, Cal. Pen. Code §§ 313; 313.1; 313.2; *Ginsberg*, 390 U.S. 629.

Such laws, many of which could encroach upon fundamental rights in other contexts, present no constitutional problems because this Court "long has recognized that the status of minors under the law is unique in many respects" and "'children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.'" *Belotti v. Baird*, 443 U.S. 622, 633-34 (1979) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)). This Court has jealously guarded the "unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural. . . ." *Belotti*, 443 U.S. at 634 (internal quotation omitted). To foster this relationship "requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.*

The decisions in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), demonstrate an understanding by this Court that the Constitution guarantees parents full authority to direct their children's development. In *Pierce*, the Court held unconstitutional Oregon's compulsory education law, which required every parent of a child between the ages of 8 and 16 years to send their children to a public school. 268 U.S. at 529. The Court found that such a requirement "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Recognizing the separate, and sometimes conflicting, roles of the state and the parent, the Court noted that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

In *Wisconsin v. Yoder*, the Court rejected the state of Wisconsin's argument that exempting Amish children from compulsory public education up to the age of 16 would fail to recognize the substantive right of the child to a secondary education and would curtail the power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents. 406 U.S. at 229-30. Instead, the Court recognized that it was the parents' rights, not those of their children, which would determine Wisconsin's power to mandate compulsory public education. *Id.* at 230-31.

It is upon these foundational principles that we, as a society, recognize that parental authority over minors is the bastion of ultimate liberty in adulthood. "Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Belotti*, 443 U.S at 638-39.

In addition to reflecting the interests of parents in directing the upbringing of their children, this Court's jurisprudence has specifically identified the physiological reasons why minors are not yet capable of exercising the full panoply of constitutional rights. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court recognized three important differences between adults and minors under eighteen which compel states to apply differing legal standards that will accommodate such differences: "First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill considered actions and decisions.'" *Id.* at 569. Second, the Court found that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Id.* And third, the Court noted that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* Notably, the Court based its holding on research produced by social science – the same type of social science relied upon by the California Legislature (JA 144 *et seq.*) – recognizing that the susceptibility of minors to harmful effects of external influences, well beyond that of adults, justifies differentiations in treatment in the eyes of the law.

Just recently in *Graham v. Florida*, 130 S. Ct. 2011 (2010), this Court reaffirmed the importance of these distinguishing factors: "As compared to adults, juveniles have a 'lack of maturity and an underdeveloped sense of responsibility'; they 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" *Id.* at 2026 (internal citations omitted). The Court also recognized that these "salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* (internal citation omitted). The Court relied upon social science in assessing the physiological differences, noting that "Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* (internal citations omitted).

These same concerns illustrate why allowing minors unrestricted access to offensively violent material is particularly antithetical to the goals of society. If minors are "more vulnerable or susceptible to negative influences," *id.*, that will be equally true of the offensively violent video games that would be restricted under the Act. Similarly, because the adolescent brain is still developing and "the character of a juvenile is not as well formed as that of an adult," *Roper*, 543 U.S. at 569, the California Legislature should have the flexibility to limit children's access to a narrow category of offensively violent video games that depict and even reward gruesome violence such as decapitations, torture, and mutilation.

This Court's continuing concerns with the unique status of minors under the law, the societal interest in protecting them from harmful material, and the fundamental right of parents to direct their moral and ethical growth are all addressed by the Act. Applying the standard of review set forth in *Ginsberg* to the facts of this case will allow California to lend support of the law to promote these critical concerns.

B. The *Ginsberg* Standard Strikes the Proper Balance Between Minors' Rights and the States' Interest in Helping Parents Direct the Upbringing of Their Children.

Ginsberg should be applied to the Act. It is an established, 40-year-old standard that strikes an appropriate balance between the relevant interests. Strict scrutiny, on the other hand, would nullify any meaningful evaluation of those interests. Moreover, the type of violent material at issue here is similar to other forms of unprotected speech, and offensive violence may certainly be a feature of sexual material that can be regulated under *Ginsberg*.

1. Applying the *Ginsberg* standard to violent material aimed at children, rather than exclusively to sexual material, furthers the very same interests repeatedly recognized by this Court. The *Ginsberg* standard, which was built upon established constitutional principles that have since been set forth with particularity in *Miller v. California*, 413 U.S. 15 (1973), strikes a careful balance between the rights of minors and the fundamental interests of parents and the State. It allows States to restrict minors' access to patently offensive material that appeals to their deviant interest, unless it has serious redeeming value for minors. The constitutionality of such a regulation

should not turn on empirical evidence, but on society's recognition of the importance of the parental role in assessing the appropriateness of such material given the distinct characteristics of the child or adolescent.

Application of strict scrutiny, on the other hand, would improperly elevate the right of minors to purchase material that may be more harmful than the magazines at issue in *Ginsberg*, while minimizing fundamental interests of parents and the State. To apply strict scrutiny to the Act would impede the States' ability to assist parents in protecting minors in the face of new and developing media. Such an unrealistically searching level of judicial review is often described as "strict in theory, but fatal in fact," *Fullilove v. Klutznick*, 448 U.S. 448, 507 & 519 (1980) (Powell, J., concurring in judgment; Marshall, J., concurring in judgment), and would place a nearly insurmountable hurdle in the path of legitimate, well-reasoned legislation that seeks to protect minors.

In First Amendment jurisprudence, strict scrutiny often applies to ensure that the rights of adults to partake in a robust marketplace of ideas are not restricted by the government absent justifications of the highest order. However, the individual right to consume speech is inextricably intertwined with the expressive material's worthiness of constitutional protection in any given context. For example, when traditionally obscene material is at issue, the First Amendment rights of individuals give way to the states' right to prevent the material's public dissemination.

Thus, in the seminal case *Roth v. United States*, 354 U.S. 476 (1957), this Court held that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484; *see also Miller*, 413 U.S. at 23 ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."). *Ginsberg* and *Pacifica*, however, make clear that, when children are the audience, other interests are also relevant. Strict scrutiny properly applies where there is both a right to receive the material by the audience, and the material itself is worthy of constitutional protection considering the audience to which it is directed. Neither of these elements is present when California restricts the sale of offensively violent video games to minors.

As this Court recognized in *Ginsberg*, the governmental interest served by restricting minors' access to certain expressive material is not limited to protecting them from physical or psychological harm. It also assists in preventing the impairment of minors' "ethical and moral development." *Ginsberg*, 390 U.S. at 641. Surely the First Amendment cannot be applied in a manner that would require empirical proof of how expressive material impacts such nebulous concepts as one's ethics or morals. Instead, a legislative body should be permitted to act cautiously in the interests of society if it rationally determines that offensively violent video games depicting brutal and sadistic acts committed by the game player are likely to harm the development of a child. The Court emphasized a similar point in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973): "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex." *Id.* at 63. The Court's reasoning applies just as well to video games marketed directly to children that contain crass commercial exploitation of violence.

Application of strict scrutiny to regulations that take account of the fundamental differences between minors and adults would simply nullify the distinctions themselves. When the audience to which it is sold consists of minors, offensively violent material does not merit strict scrutiny. The *Ginsberg* standard properly balances the rights of minors and adults with the rights of parents and the States, and provides the appropriate level of protection to which the expressive material is entitled given its audience.

2. The *Ginsberg* standard also should apply here because offensively violent material, when marketed to minors, shares similar characteristics with other forms of unprotected speech. The rationale underlying the Court's refusal to extend the First Amendment's protections to certain categories of speech applies equally with regard to offensively violent material sold to minors. As a society, we have historically understood that obscenity, which has varied in definition over time, is outside the

protection of the First Amendment. At the time of the framing of the Constitution, every State criminalized blasphemy or profanity as well, and the vast majority provided for the prosecution of libel. *Roth*, 354 U.S. at 482 & n. 11-12. This was so despite the fact that 10 of the 14 States that ratified the Constitution guaranteed the freedom of expression. *Id.* at 482 n. 10. Those who drafted the First Amendment saw no conflict between guaranteeing the freedom of expression and laws prohibiting speech that had harmful effects on the citizenry, such as obscene gestures and blasphemous language.[1] Similarly, federal law has consistently criminalized the transportation of obscene materials across state lines. The first federal obscenity statute, the Tariff Act of 1842, forbade the importation of "indecent and obscene" pictorial matter and authorized confiscation. *Manual Enterprises, Inc. v. Day* 370 U.S. 478, 483 n. 5 (1962). And in 1865 Congress passed a statute barring from the mails obscene books, pamphlets, pictures and prints as well as other "vulgar and indecent" publications. 13 Stat. 504, 507 (1865); *see also* Kevin W. Saunders, *Violence as Obscenity*, 106-08 (1996).

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[1] The laws prohibiting blasphemy and profanity were aimed at the effects of such laws on society. For instance, the Massachusetts statute outlawing profanity states that such speech "has a natural tendency to weaken the solemnity and obligation of Oaths" and "to loosen the bonds of civil society." Ch. 33, Laws of Mass. (1789). As this Court has noted, while "[t]he tendency to deprave is not the characteristic which makes a publication obscene," it is "the justification for the intervention of the common law." *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 485 (1962). As a result, as one of the first decisions expounding on the definition of obscenity in England observed, for a matter to be obscene, it must "deprave and corrupt those whose minds are open to such immoral influences." *Regina v. Hicklin* (1868) L.R. 3 Q.B., at 371.

The First Amendment, of course, was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. Nevertheless, "States have a legitimate interest in prohibiting the dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller*, 413 U.S. at 18-19 (1973).[2] Similarly, so-called "fighting words" are "not in any sense proper communication of information or opinion safeguarded by the Constitution." *Chaplinsky*, 315 U.S. 568, 572 (1942). Offers to engage in illegal behavior are also unprotected, since "offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection." *United States v. Williams*, 553 U.S. 286, 298 (2008).

As is true of these other forms of unprotected speech, offensively violent speech aimed at minors can be harmful, and our Nation's traditional interest in protecting minors outweighs any benefit derived from such speech. History amply supports this conclusion. In addition to regulating the distribution of sexual material, especially as to minors, many states have regulated violent material as well. These laws reflect a societal understanding that violent material can be just as harmful to the well-being of minors as sexually explicit material. Illinois, for example, made it a crime to exhibit to minors publications principally devoted to "illustrating or describing immoral deeds," or made up of accounts of "criminal deeds" or "pictures and stories of deeds of bloodshed, lust, or crime." Illinois Act June 3, 1889, Laws 1889, p. 114; 720 Ill. Comp. Stat. 670/1 (2008). Similarly, Michigan prohibits the sale to minors of prints "devoted to the publication of criminal news, police reports, or criminal deeds" as "tending to corrupt the morals of youth," and this law traces its roots to 1881. *See* Mich. Penal Code, Act 328 of 1931, § 750.142; section 5 of Act 260 of 1881, How., § 2002. *See also* Ohio Rev. Code. § 2905.34 (1963 Supp.) ("No person shall knowingly . . . show to a minor . . . [any material] principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime.").[3]

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[2] Professor Tribe notes that "[a]t one time or another, obscenity has been made the object of criminal law in all fifty states." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, ch. 12, n. 15 (2d ed. 1988).

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[3] Of course, California is just one of nine states and municipalities to pass laws restricting minors' access to violent video games in recent years. *See* 21 Okla. Stat. §§ 1040.76-.77; 2005 Mich. Public Act 108; La. Rev. Stat. 14:91.14; Minn. Stat. § 325I.06; Ill. Crim. Stats. 5/12A-5(a), 5/12A-10(e), 5/12B-15; Rev. Code Wash. 9.91.180; City-County Council of the City of Indianapolis

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Many of these laws make an explicit connection between violent material and obscene speech. This relationship between sex and violence was well articulated by the Rhode Island legislature in its preamble to the amendments to its obscenity statute of 1956:

> It is hereby declared that the publication, sale and distribution to minors of comic books devoted to crime, sex, horror, *terror, brutality and violence*, and of pocket books, photographs, pamphlets, magazines and pornographic films devoted to the presentation and exploitation of illicit sex, lust, passion, *depravity, violence, brutality*, nudity and immorality are a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.

Rhode Island P.L. 1956, chap. 3686, quoted in *State v. Settle*, 90 R.I. 195, 198-99 (1959) (emphasis added). Even today, the State of Ohio's obscenity statute defines material that is "harmful to juveniles" as not only obscenity, but representations of "extreme or bizarre violence, cruelty, or brutality." Ohio Rev. Code, § 2907.01(E)(3); *see also* Tenn. Code Ann. § 39-17-901 (defining "harmful to minors" as including representations of "nudity, sexual excitement, sexual conduct,

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and Marion County General Ordinance No. 72 (July 10, 2000); St. Louis County Ordinance No. 20,193 (Oct. 26, 2000).

excess violence or sadomasochistic abuse"); Section 524 of The Penal Code of June 24, 1939, P.L. 872 as amended 18 P.S. § 4524 (Penn.) ("Obscene literature consists of any writing . . . or other printed paper devoted to the publication and principally made up of criminal news, police reports or accounts of criminal deeds, or pictures of stories of deeds of bloodshed, lust or crime.").

These restrictions reflect society's understanding that, just like sexual material, violent material can be harmful to the well-being of minors. In the context of distribution to minors, sexual material is not the only pig to enter the parlor. And a state's ability to regulate such material does not depend upon proof that it is obscene. *Cf. Pacifica*, 438 U.S. at 750-51. Society has never considered such material appropriate for distribution to minors. As discussed more fully below, and in accord with society's long-standing concerns, modern social science shows that consumption of violent material, and video games specifically, is significantly linked to increases in aggressive behavior, aggressive cognition, aggressive affect, cardiovascular arousal, and decreases in helping behavior. JA 479-80. These harms, while intrinsically detrimental to the individuals themselves, can manifest as an automatically aggressive response to others, resulting in hostility, verbal arguments, and physical fighting. JA 600-01. The societal interest in assisting parents in protecting minors from such harmful, offensive material has a long tradition in this country and is well-founded.

3. Finally, when determining whether the *Ginsberg* standard should apply to offensively violent material as well as sexual material, it is important to note that violence already plays a major role in First Amendment jurisprudence. Otherwise protected sexual material can qualify as obscenity, even as to adults, based upon the violent nature of its depiction. Images of extreme sexual torture, for example, can be considered obscene by the prevailing standards of any given community. *See, e.g.*, *State v. Reece*, 110 Wash. 2d 766 (1988) (upholding store manager's conviction for selling obscene magazines, defined to include depictions of "violent or destructive sexual acts"). In many cases, but for the violent content, the sexual nature of the material would not be legally obscene. The presence of violence can be the determining factor in finding otherwise-protected sexual material deviant, prurient, shameful, or morbid, and can cause protected material to become patently offensive. Violence can remove all redeeming social value from otherwise protected material. *Id.*; *see also* La. Rev. Stats. Ann. § 14:106(a)(6) (defining obscenity in part as "sexually violent material" including "whippings, beatings, torture, and mutilation of the human body"); Ga. Code Ann. § 16-12-80(b)(3)(E) (defining obscenity as "[s]exual acts of flagellation, torture, or other violence"); Ohio Rev. Code § 2907.01(F)(3) (defining "harmful to juveniles" as including depictions of "bizarre violence, cruelty, or brutality" that tends to arouse minors).

Admittedly, these existing obscenity laws link violence with sexual material. Nevertheless, if violent content can strip otherwise protected material of its constitutional protection, then offensively violent content alone should be considered unprotected expression, at least with respect to its sale to minors. The harms averted and societal interests promoted through the regulation of sexual and violent material are merely two sides of the same coin. It would be ironic indeed if the First Amendment were interpreted to permit states to assist parents in protecting minors from sexual material – depictions of images and acts that they may legally engage in after the age of majority -- yet prohibit them from protecting minors from offensively violent material – depictions of acts that they may never legally engage in.

C. The Act Properly Reinforces Parental Authority Over Minors, and Comports With Both the Traditional and the Present Understanding of the First Amendment Rights of Minors

1. The Act Serves Fundamental Societal Interests

Applying the principles underling *Ginsberg v. New York*, 390 U.S. 629 (1968) and its progeny, and recognizing the vital interests of the State and the rights of parents to direct the upbringing of their children, the Act comports with the requirements of the First Amendment. Through its limited application, the Act properly allows the State to reinforce parental authority over minors to protect them from offensive and harmful material. Parents are entitled to such reinforcement because the California Legislature rationally determined that offensively violent material is just as harmful to minors, if not more so, as sexual material.[4]

By definition, the Act covers only those video games where the player can kill, maim, dismember, or sexually assault an image of a human being in a manner that a reasonable person, considering the game as a whole, would find (1) appeals to a deviant or morbid interest of minors, (2) is patently offensive to prevailing standards in the community as to what is suitable for minors, and (3) causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.[5] Pet. App. 96a. As with obscenity, fighting words, and other forms of unprotected speech, the violent video games covered by the Act, by definition, add nothing to the free exchange of ideas for minors, do not represent a step to the truth, and any benefit to be derived from them by minors is clearly outweighed by the societal interest in order and morality. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Whatever First Amendment value these games may possess for adults, they are simply not worthy of constitutional protection when sold to minors.

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[4] In *Ginsberg*, this Court recognized that "there is no lack of 'studies' which purport to demonstrate that obscenity is or is not 'a basic factor in impairing the ethical and moral development of . . . youth and a clear and present danger to the people of the state.' But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." 390 U.S. at 641 (internal citation omitted).

[5] The Act also contains a secondary definition of covered games, but only one definition need be met. Petitioners conceded below that this secondary definition does not provide an exception for material that has serious redeeming value for minors, as the primary definition so provides, and may therefore be unconstitutionally broad. This section of the Act, however, is severable. Cal. Civ. Code § 1746.5.

The Act also serves to eliminate the perceived societal approval of minors playing offensively violent video games – a distinct developmental harm recognized by this Court. In *Ginsberg*, the Court cited the Columbia University Psychoanalytic Clinic in reporting on the independent harm to developing egos when minors perceive a societal approval of viewing pornography:

> Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read: '(P)sychiatrists . . . made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive. The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit

> implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval-another potent influence on the developing ego.'

Ginsberg, 390 U.S. at 642 n. 10. By prohibiting minors from independently purchasing the covered video games, the Act serves to remove any possible imprimatur of societal approval. The Act thus serves to leave the minor's identification process in the hands of the parents without any contradictory message from the State.

The Act allows California to carry on this Court's tradition of supporting parental rights over minors. Particularly with respect to material that can cause a child or adolescent to be more prone to aggressive, antisocial behavior, California has a strong interest in allowing parents to ensure that their children will not be exposed to violent video games without their knowledge and consent, allowing them to direct the upbringing of their children in the manner they see fit. Further, the Act is limited to minors, who do not always have the same First Amendment rights as adults. As with pornographic speech, California may properly limit minors' access to the offensive violence in certain video games so long as it is not irrational for the Legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641. As is made clear from the studies in the record, discussed below, it was entirely rational for California to make this determination.

2. Advancements in Technology and Social Science Reaffirm Society's Long-Standing Concerns With Minors' Exposure to Violent Material

This Court has never suggested that a State may not regulate minors' unfettered access to offensively violent material.[6] And given the quantum leaps in technology and social science since this Court last considered a State's attempt to regulate access to violent material, this Court should confirm that such regulations, if narrowly drawn and limited to minors, comport with the First Amendment.

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[6] *Winters v. New York*, 333 U.S. 507 (1948), is not to the contrary. There, the Court reviewed a defendant's conviction under a statute prohibiting the distribution of publications (to adults as well as minors) "principally made up of criminal news reports, police reports, or accounts of criminal deed, or pictures, or stories of deeds of bloodshed, lust or crime." *Id.* at 508. This Court struck down the statute on vagueness grounds. *Id.* at 519. Notably, however, the Court made clear that it was not holding that a state "may not punish circulation of objectionable printed matter, assuming it is not protected by the principles of the First Amendment," or that states are "prevented by the requirement of specificity from carrying out their duty of eliminating the evils to which, in their judgment, such publications give rise." *Id.* at 520. It was not the statute's objective that troubled the Court, only the terms employed to achieve it. The Court never took issue with the statute's aim of restricting the distribution of "collections of criminal deeds of bloodshed or lust . . . so massed as to become vehicles for inciting violent and depraved crimes against the person. . . ." *Id.* at 513. In the 60 years since *Winters* was decided, violent material has become profoundly more graphic and interactive, and goes well beyond reading "accounts of criminal deeds" taken from police reports. *See* Petitioners' Video Game Violence compilation DVD, lodged with the Court.

The level of graphic detail and realism contained in many modern violent video games is without historical parallel. As noted by one journalist, "[a]s the systems that run video games become more powerful, developers are able to add more complex elements to these games. The big one: Realism. [¶] With advanced 3D graphics, the characters in some modern games look so lifelike it's actually frightening. But beyond just the graphics, creators have also been trying to make the game play more realistic as well." *See* Robert Janelle, *Video Game Realism* (Sept. 5, 2007) http://videogames.suite101.com/article.cfm/video_game_realism (last visited July 6, 2010). Describing the level of realism in one video game, the writer notes, "[H]ave you been shot? You'll have to dig the bullet out with a combat knife, apply disinfectant, suture the wound shut and finally, apply a band-aid." *Id.* Such realism adds to the violent, horrific nature of many video games available to minors.

Moreover, research has shown how media violence generally, and video game violence specifically, can lead to aggressive, antisocial behavior and feelings. As far back as 1972, the Surgeon General testified before Congress that "the overwhelming consensus and the unanimous Scientific Advisory Committee's report indicates that televised violence, indeed, does have an adverse effect on certain members of our society." JA 235-36. More recently, in a 2000 joint statement, the American Academy of Pediatrics, the American Academy of Child & Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association stated that 30 years of research demonstrates that entertainment violence has negative impacts on children:

> At this time, well over 1000 studies – including reports from the Surgeon General's office, the National Institute of Mental Health, and numerous studies conducted by leading figures within our medical and public health organizations – our own members – *point overwhelmingly to a causal connection between media violence and aggressive behavior in some children. The conclusion of the public health community, based on over 30 years of research, is that viewing entertainment violence can lead to increases in aggressive attitudes, values and behavior, particularly in children.*

JA 378 (emphasis added). The group concluded that children who are exposed to violence are more likely to use violence to resolve conflicts. They are more likely to be desensitized to violence, and are more likely to mistrust others. Researchers have found that youths who watch violent scenes in television and movies "subsequently display more aggressive behavior, aggressive, thoughts, or aggressive emotions than those who do not." JA 247. Similar findings have been made with respect to violent music lyrics (JA 271) and, as discussed in Part II, violent video games.

3. Respondents' Own System of Self-Regulation Recognizes That Certain Video Games Are Not Appropriate for Minors Given the Level of Violent Content

The traditional understanding of the proper place of violence in the spectrum of material that is appropriate for minors continues today. And it is even demonstrated by the Respondents' own rating system. The Entertainment Software Ratings Board (ESRB) gives video games ratings from EC (Early Childhood) up to AO (Adults Only), which represent age-based recommendations to retailers. JA 95. Violent content is a factor considered by the ESRB in every single rating.

For example, games will receive a rating of M (Mature) if they "contain intense violence, blood and gore, sexual content, and/or strong language." *Id.* The ESRB even rates games based solely upon violent content, absent any sexual component: games will receive a rating of E 10 + (Everyone 10 and older) if they contain "minimal cartoon, fantasy or mild violence and/or infrequent use of mild language." *Id.* Respondents' own rating system thus acknowledges that, as a society, we continue to believe that there exists a level of violent content in expressive material that is not appropriate for consumption by minors absent parental guidance.

Nowhere is this better exemplified than in the ESRB's rating of the video game *Postal II*. The ESRB gave this game a rating of M (Mature) and provides the following description: "Blood and Gore, Intense Violence, Mature Humor, Strong Language, Use of Drugs."[7] But the industry's attempt at self-regulation does not begin to describe the game's violent content. As demonstrated in Petitioner's Video Game Violence video compilation (lodged with the Court by Petitioners), the violence in *Postal II* includes torturing images of young girls, setting them on fire, and bashing their brains out with a shovel, for no reason other than to accumulate more points in the game. In one scene in *Postal II*, the player (who sees through the eyes of the shooter) looks through a scope on an assault rifle and sees a very realistic image of a person's face. The player then shoots the victim in the kneecap. As the player watches the victim attempt to crawl away, moaning in pain, the player pours gasoline on the victim and lights him on fire. As the burning victim continues to crawl, the player urinates on the victim, and says "That's the ticket." After noting that it "smells like chicken," the player again looks at the victim through the scope on the gun, and again sees a realistic human face, on fire, crawling toward him. The player then shoots the victim in the face, which turns into charred remnants of a human image. In another scene, the player hits a woman in the face with a shovel, causing blood to gush from her face. As she cries out and kneels down, the player hits her twice more with the shovel, this time decapitating her. The player then proceeds to hit the headless corpse several more times, each time propelling the headless corpse through the air while it continues to bleed.

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[7] *See* http://www.esrb.org (enter the term "Postal II" in the search box to reveal ESRB's rating and description of the game).

With regard to their distribution to minors, both sexually explicit and violent material exist at the periphery of the First Amendment. Neither represents an essential part of any exposition of ideas for minors absent parental guidance, nor does their social value represent a step to truth. Accordingly, like obscene material, offensively violent material sold to minors should not receive a level of First Amendment protection that would trigger strict scrutiny. California must be allowed to reinforce parents' right to direct the upbringing of their children by protecting them from material that Respondents themselves believe is inappropriate for minors. Properly interpreted, the First Amendment poses no barrier to California's efforts to limit the unfettered access of minors to offensively violent video games through the Act.

II. THE FIRST AMENDMENT DOES NOT DEMAND PROOF OF A DIRECT CAUSAL LINK BETWEEN EXPOSURE TO VIOLENT VIDEO GAMES AND HARM TO MINORS

When the government defends a regulation on speech as a means of preventing anticipated harms, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), properly requires reviewing courts to uphold legislators' predictive judgments of harm when they have "drawn reasonable inferences based on substantial evidence." *Id.* at 666. The court below imposed a far more stringent standard of proof that will affect future cases on a broad variety of subjects. Petitioners ask this Court to reject the heightened standard of proof imposed by the lower court. Requiring legislative bodies to come forward with proof of direct causation of harm to minors would effectively eliminate the States' ability to help parents protect the health and welfare of minors when the protective measure touches upon protected rights.

Never has this Court required a legislative body to come forward with proof of a direct causal nexus between offensive material and physical or psychological harm to minors. Such an evidentiary requirement would presumably entail experimentation on minors in order to justify legislation seeking to protect them from harm. In order to show direct causation, researchers would theoretically be required to isolate a minor from all other forms of violence (be it media violence, school violence, or family violence) while exposing the minor only to violent video games in order to determine whether such exposure directly causes the negative physical and psychological impacts observed by the existing literature. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (refusing to require Congress to come forward with studies where minors are intentionally exposed to indecent television broadcasts, isolated from all other indecency). Such a study would be as unethical as it is impracticable. By effectively requiring it, the Ninth Circuit placed California in a situation where it could only justify a law prohibiting the sale of violent video games to minors through the use of a study that can never be performed.

Instead, any interpretation of the First Amendment must recognize that responsible, rigorous social science uses field experiments, cross-sectional correlation studies, longitudinal studies, and meta analyses combining the results of other studies to form conclusions regarding causation. Minors can be observed and surveyed regarding the violent material they consume, their interactions with other children and teachers, and their school performance. Correlations can then be obtained and professional opinions formed regarding the impact that the consumption of violent material has on minors. From those professional opinions, responsible social scientists can also draw valid conclusions regarding the impact that consumption of violent material can have on the physical and psychological well-being of minors. Legislative bodies must be permitted to rely on this established process in formulating social policy. A proper application of the *Turner* standard permits them to do so.

In *Turner*, this Court upheld federal must-carry broadcast provisions requiring cable television systems to dedicate a portion of their channels to the transmission of local broadcast stations. 512 U.S. at 666. In defending the regulation, the government relied upon Congress's legislative finding that, absent mandatory carriage rules, "the continued viability of local broadcast television would be 'seriously jeopardized.'" *Id.* at 665. The Court accepted the government's justification for the regulation, recognizing that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Id.* This Court held that in reviewing government regulations on speech, a court "must accord substantial deference to the predictive judgments" of the legislative body. *Id.* A state's predictive judgments, therefore, are properly upheld so long as the reviewing court finds that "in formulating its judgments, [the state] has drawn reasonable inferences based on substantial evidence." *Id.*

Most recently, this Court acknowledged that the government cannot be expected to obtain the unobtainable when it acts to protect minors from the harmful effects of indecent broadcast media. In *Fox Television Stations*, this Court held that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency." 129 S. Ct. at 1813. Importantly, the Court noted that "[i]t is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. . . . It is something else to insist upon obtaining the unobtainable." *Id.* Therefore, this Court held that "Congress has made the determination that indecent material is harmful to children, and has left enforcement of the ban to the Commission. If enforcement had to be supported by empirical data, the ban would effectively be a nullity." *Id.*

Never has this Court demanded proof of direct causation of harm to minors in order to justify a regulation on the speech they may consume absent parental guidance. However, the opinion of the court below does just that. In this case, the court of appeals purported to apply the standard set forth in *Turner Broadcasting System* in reviewing the Act (Pet. App. 25a-32a), when it held that the State failed to prove the existence of a compelling governmental interest because "the evidence presented by the State does not support the Legislature's purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of causation. . . . None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm." Pet. App. 31a-32a. The court of appeals found the State's evidence fatal to its case because only a correlation, not direct causation, was established. In the absence of direct causation, the court held that the State failed to demonstrate the existence of a compelling interest. Pet. App. 31a.

But by requiring proof of a direct causal link, the court below effectively narrowed the *Turner* standard. Indeed, the deference that the *Turner* Court intended to provide to legislative bodies was replaced in the decision below with an insurmountable hurdle. Under existing social science, empirical evidence of direct causation required by the Ninth Circuit may well prove unobtainable.

Although there have been even more studies since the California Legislature passed the Act, the evidence before it definitely established a correlation between playing violent video games and increased automatic aggressiveness, aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in minors and adults. For instance, in a 2004 study involving over 600 eighth and ninth grade students, researchers asked students to rank how violent a video game was on a 7-point scale, and were then asked how many hours they played that game per week. JA 600, 611-13. The students were then asked how often they had gotten into an argument with a teacher on a 4-point scale, ranging from "almost daily" to "less than monthly" and were asked if they had gotten into a physical fight in the last year. Students' trait hostility (the relatively permanent internal characteristic of anger and aggression) was also measured. Those students who played violent video games more often were more likely to argue with their teachers and more likely to have been involved in a physical fight. Significantly, those students with low trait hostility who played more violent video games were *more* likely to argue with teachers or engage in fights than students with higher trait hostility who did not play violent video games, suggesting a causal connection between playing violent video games and aggressive behavior. JA 633.

Similar results were obtained in a study of 130 undergraduate students, who were randomly assigned to play one of 10 video games, half of which were violent, and half of which were not. JA 479, 493-94. After playing the game for 20 minutes, they were asked to fill in a missing letter to complete a word that could be either aggressive or non-aggressive, such as explo_e, which could be explore or explode. Those individuals who played a violent video game were more likely to complete the word in a violent, aggressive way than those who had played a non-violent game. Researchers also observed greater increases in blood pressure for those who were playing the violent video games. Another study of 150 fourth and fifth graders found that playing violent video games was correlated with lower empathy as well as stronger pro-violence attitudes. JA 705-06.

These studies and the others considered by the California Legislature are not isolated instances, as revealed by meta-analyses of multiple studies.[8] A 2004 meta-analysis of all studies containing data testing a possible connection between exposure to violent video games and aggressive behavior showed that "there is considerable correlational and experimental evidence linking exposure to violent video games with increases in aggressive behavior and to several aggression-related variables." JA 558. In a separate meta-analysis, researchers concluded that "exposure to violent video games is significantly linked to increases in aggressive behavior, aggressive cognition, aggressive affect, and cardiovascular arousal, and to decreases in helping behavior." JA 577. Moreover, researchers concluded that "[m]ethodologically weaker studies yielded smaller effect sizes than methodologically stronger studies, suggesting that previous meta-analytic studies of violent video games underestimate the true magnitude of observed deleterious effects on behavior, cognition, and affect." *Id.*

Certainly, Respondents would not dispute that video games, given their interactive nature, can be excellent mechanisms for teaching minors a variety of subject matters. The California Legislature considered the research that supports this conclusion. JA

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[8] In a meta-analysis, researchers aggregate the results of numerous different studies, which has the benefit of a much larger sample size.

382, 414-16 (concluding that playing violent video games leads to greater hostile attribution bias and increased aggressive behaviors – "exemplary" teaching of aggression). But just as the interactive nature of video games makes them exemplary teachers in positive contexts, it is this interactive nature that also poses a special risk to minors when the games contain extreme violence. As noted in an article by two professors, video games are especially effective at leaving lasting impressions on the player:

> Visual or auditory changes, such as edits that change the angle of camera view or sound effects, make us look at them. Increasing the frequency of edits has been shown to improve recognition memory (up to a point . . . there is an optimal level). Furthermore, provocative scenes of sex and violence not only capture one's attention, but also supply vivid visual images, which are known to create better memory than the same information provided verbally (e.g., Paivio & Begg, 1981). Active participation in aggressive or provocative scenes in video games increases physiological arousal (e.g., Ballard & Weist, 1996; Gwinup, Haw, & Elias, 1983; Lynch, 1994; Lynch, 1999; Murphy, Alpert, & Walker, 1992; Segal & Dietz, 1991). This physiological responding in the context of "playing fun games" is likely to condition one's emotions to such activities, not unlike other addictive "highs."

JA 395-96.

In short, the studies considered by the Legislature conclusively establish a connection between playing violent video games and increases in aggressive behavior in children. Absent intrusive, unethical, and possibly illegal experimentation on minors, social science might never be able to discover a single environmental variable that causes automatic aggression, increased aggressive behavior, antisocial behavior, desensitization to violence, and poor school performance. *See, e.g.*, studies beginning at JA 144, 232, 479, 577, 600, 646, 705. Perhaps this environmental variable would remain elusive even if these experiments were performed. But such testing cannot be demanded by the First Amendment. This Court should reverse the opinion below, and reaffirm that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting System, Inc.*, 512 U.S. at 666.

III. THE ACT IS THE LEAST RESTRICTIVE MEANS OF SERVING THE STATE'S COMPELLING INTERESTS

The Act represents the least restrictive means through which the State can effectively achieve its goals of helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games. The court of appeals erred in holding otherwise.

Specifically, the court of appeals held that even assuming the State had demonstrated the existence of a compelling interest, the mere "possibility that an enhanced education campaign about the ESRB rating system directed at retailers and parents" could be a less restrictive means to achieve the government's interests, and therefore the Act could not survive strict scrutiny. Pet. App. 33a. The court also appeared to hold that because new gaming consoles would contain parental controls, the Act was not the least restrictive means of achieving the legislature's goals. *Id.* at 32a-33a. Neither holding is correct.

When California passed the Act in 2005, the legislature had considered the Federal Trade Commission's report to Congress on the marketing of violent media to children. JA 130, 140, 746. The FTC reported that in 2000, 85% of children ages 13 to 16 where able to purchase M-rated video games without being accompanied by an adult. JA 816. As of 2004, the FTC reported that "Sixty-nine percent of the children were able to purchase M-rated games, and more than half (56%) of the youngest shoppers – 13-year-olds – were able to buy an M-rated game." *Id.* The FTC found that "[e]ven among those retailers with programs in place to restrict sales, 55% of the unaccompanied children were able to buy violent M-rated games." *Id.* at 817. Ultimately, the FTC reported that although these results reflected improvement over the years, "the numbers still fall short of what might be expected given the multi-year effort by the ESRB to encourage retailers to adopt restrictive sales policies." *Id.*

Moreover, Respondents themselves acknowledged that the ESRB's rating system is entirely voluntary, and not all video game publishers submit their games to the ESRB for ratings. *See* Entertainment Software Rating Board, *Frequently Asked Questions*, http://www.esrb.org/ratings/faq.jsp (last visited July 6, 2010). Thus, for games receiving no ESRB rating, no amount of educational campaigning will impact the sale of such games to minors. And parental controls now available on some gaming consoles would apparently be useless. Moreover, any child with a computer or gaming console connected to the Internet can easily search the World Wide Web for instructions on how to bypass the parental control feature of any console.[9]

As the Court recognized in *Ashcroft v. American Civil Liberties Union*, "the court should ask whether the challenged regulation is the least restrictive means among available, *effective* alternatives." 542 U.S. 656, 666 (2004) (italics added). Here, California demonstrated that the Act, through the imposition of civil penalties, was the only effective means of ensuring that parents have the ability to involve themselves at the initial stage of the process. The California Legislature was not willing to simply maintain the status quo, hoping that purported industry efforts would eventually eliminate children's access to offensively violent video games. The proper application of the First Amendment in this context permits the State to intervene when the industry fails.

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[9] For example, a Google search for the terms "xbox 360 parental control bypass" (actual search not in quotes) returned multiple web site links containing instructions on how to perform the bypass. *See, e.g.*, http://forum.teamxbox.com/showthread.php?t=357331 (containing directions on parental control bypass).

◆

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

Respondent Entertainment Merchants Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Respondent Entertainment Software Association, through its undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The California statute at bar is the latest in a long history of overreactions to new expressive media. In the past, comic books, true-crime novels, movies, rock music, and other new media have all been accused of harming our youth. In each case, the perceived threat later proved unfounded. Video games are no different. They are a widely popular form of expression enjoyed by millions of people. As such, under the First Amendment, they cannot be censored absent the most compelling justification, based on firm evidence of harm, through a narrowly tailored statute where there is no less-restrictive alternative.

California asks the Court to withdraw First Amendment protection from some ill-defined subset of video games, at least as to minors, based on the same sort of unsupported claims that animated past efforts to regulate new media. This Court should reject California's dangerous proposal. As the Court has long recognized, it is not the role of government to decide which expressive materials are "worthy" of constitutional protection. Pet. Br. 6. And there is no reason to think parents need California's "assistance" in deciding which expression is worthwhile for their children. Nor is there any empirical basis for singling out video games for special regulation.

Nothing in *Ginsberg v. New York*, 390 U.S. 629 (1968), or this Court's school speech or broadcasting cases supports California's sweeping argument for a new category of unprotected speech subject to content-based censorship. Unlike explicit sexuality, violence is not and never has been a taboo subject for children. It is therefore impossible to craft statutory language that adequately demarcates the line between violence that is "appropriate" for minors and violence that is not. This Court should decline California's invitation to create a new and potentially boundless exception to the First Amendment, especially where, as here, there is no evidence of any real problem in need of government intervention.

STATEMENT

A. The Nature Of Video Games

Video games are a modern form of artistic expression. A video game is an interactive software program that a player experiences on a screen, such as a television or computer monitor. Like films, video games incorporate dialogue, music, visual images, plot, and character development. J.A. 13. Like the best of literature, they often involve classic themes that have captivated audiences for centuries, such as good-versus-evil, triumph over adversity, struggle against corrupt powers, and quest for adventure. *Id.*

Unlike the viewer of a film or the reader of a book, the player of a video game has some control over the story. For example, a movie about D-Day – like *Saving Private Ryan* – might depict a protagonist risking his life in battle, gaining the respect of fellow soldiers, and facing moral dilemmas, with scenery and music enhancing the story. *Medal of Honor: Frontline*, a video game about D-Day, has all of these elements, but differs because the player exercises some control over the choices made by the protagonist and the subsequent story development when confronted with various challenges, like landing on Omaha Beach. J.A. 65. For example, while a D-Day storyline requires the player to storm the beach, the player may attempt to travel that distance over a range of routes, quickly or slowly, fighting or avoiding conflict, taking risks to save others or focusing on preserving himself. In this respect, playing a video game is like improvising a performance of a musical score, because the player engages in and contributes to the expressive activity rather than passively consuming it. Video game play is also like a musical performance in that it requires an element of physical skill and virtuosity, such that accomplished players have more expressive options than novices.[1]

More than two-thirds of American households include at least one player of video games – a term that encompasses games created both for specialized game consoles and handheld devices (*e.g.*, the Nintendo Wii, Sony PlayStation, or Microsoft Xbox 360 consoles, and the Nintendo DS and Sony PlayStation Portable handheld game systems) and for personal computers. Entertainment Software Association, Industry Facts, *available at* http://www.theesa.com/facts/index.asp (last visited Sept. 9, 2010). The average age of a player is 34. *Id.* Forty percent are women. *Id.* American consumers spend more than $10 billion a year on video games. *Id.*

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[1] Respondents submitted six games into the record: *Medal of Honor: Frontline*, *God of War*, *Tom Clancy's Rainbow Six 3*, *Jade Empire*, *Resident Evil IV*, and *Full Spectrum Warrior*. Respondents also submitted videotapes of more than two-and-a-half hours of excerpted game play from the six games (in contrast to the five minutes of excerpts submitted by California), and have lodged a DVD with the Court containing the game play excerpts.

As games have grown more popular, they have become more varied. For example, in one popular series called *The Sims,* the player designs an alter ego who lives an ordinary life, makes friends, and takes on a profession. Jamin Brophy-Warren, *Do the Sims Dream of Electric Sheep?,* Wall St. J., May 29, 2009, at W7. *God of War,* one of the games Respondents submitted into the record, is drawn directly from Greek mythology and depicts the battles of the protagonist Kratos, who fights gods and mythical beasts in a quest to redeem his own brutal past. J.A. 73-76.

Other games in this increasingly sophisticated medium mirror film and book genres. As a review of a western-themed game titled *Red Dead Redemption* observed:

> Like our own, the world of Red Dead Redemption . . . is one in which good does not always prevail and yet altruism rarely goes unrewarded. This is a violent, unvarnished, cruel world of sexism and bigotry, yet one that abounds with individual acts of kindness and compassion. Like our own, this is a complex world of ethical range and subtlety where it's not always clear what the right thing is. . . .

> Riding along in the desert, you may see two groups of men shooting it out. Whether to intervene is your choice. If you do, it may not be clear which are the good guys. . . . Do you help?

Seth Schiesel, *Way Down Deep in the Wild, Wild West*, N.Y. Times, May 17, 2010, at C1.

Some games are based directly on popular books and movies. For example, *Rainbow Six 3* (another game in the record) is based on the Tom Clancy novel *Rainbow Six*. Both the novel and the video game concern a clandestine anti-terrorist group composed of American ex-special-forces soldiers. J.A. 78-80. Several video games have also been based on *The Terminator*, a popular movie series in which Petitioner Schwarzenegger portrayed an android-like creature sent back in time as part of a future war between humans and computers.

Indeed, video games have become so popular that books and movies are now increasingly based on them. One example is the successful film *Prince of Persia: Sands of Time*, which, like the video game on which it is based, follows the adventures of an ancient Persian prince who acquires a magical dagger that allows him to reverse time. *See "Prince Of Persia" Is Highest-Grossing Video Game Movie*, USA Today, June 28, 2010, *available at* http://content.usatoday.com/communities/entertainment/post/2010/06/prince-of-persia-is-highest-grossing-video-game-movie-ever/1.

Like other media, video games may depict violence. Thus, the soldiers in *Medal of Honor* attack

Nazis; the unit in *Rainbow Six 3* fights terrorists; the redeemed outlaw hero of *Red Dead Redemption* kills members of his old gang; and the Prince of Persia battles human and non-human foes. Some games depict violence in graphic detail – as do some movies (such as *Saving Private Ryan, The Godfather, The Wild Bunch*) and some classic literature (such as *The Red Badge of Courage, Titus Andronicus, The Iliad*). And a few games, like *Postal 2* (which is virtually the only video game mentioned in Petitioners' brief), include satire or content intended to provoke or offend – much as "transgressive" works in other media are intended to be provocative. The vast majority (82 percent) of games sold, however, are rated as suitable for children under seventeen. http://www.theesa.com/facts/index.asp.

Like other software products, video games can be purchased on a physical DVD in a store or through a website. Increasingly, games can be purchased for direct download over the Internet without obtaining a physical copy (similar to buying a song on iTunes) or played entirely online without downloading. Many games can be played online cooperatively with other players anywhere in the world, including friends, family, or new acquaintances on social network sites like Facebook. *See, e.g.*, Michael S. Rosenwald, *FarmVille, Other Online Social Games Mean Big Business, and Bonding*, Wash. Post, Aug. 3, 2010, at B01 (describing Facebook games and noting that "middle-age women are disproportionately represented in game use on Facebook").

B. The Video Game Industry's Rating System And Technological Controls

The video game industry has adopted a rating system to inform consumers about the content of each game. That system – which the Federal Trade Commission has called the "most comprehensive" of industry-wide media rating systems – is implemented by the Entertainment Software Rating Board ("ESRB"), an entity established by respondent Entertainment Software Association. J.A. 84. The ESRB gives one of six age-specific ratings to each game: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teen); M (Mature 17+); and AO (Adults Only 18+). J.A. 86. It also assigns content descriptors, such as "Crude Humor," "Strong Language," "Cartoon Violence," "Intense Violence," and "Suggestive Themes," among over two dozen others, J.A. 95, 878-79, and provides online ratings summaries for all titles rated since July 2008. *See* FTC, Marketing Violent Entertainment to Children 27 (Dec. 2009), *available at* http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf ("FTC 2009 Report").

The purpose of the rating system is to empower consumers and parents to make informed choices about the games they buy, rent, or play. J.A. 85. Like the movie rating system, ESRB ratings are not legally mandated, but essentially all game publishers submit their games for ratings, which are displayed on their game packages. J.A. 85-86, 89. A recent FTC report found that 87 percent of surveyed parents are aware of the ESRB ratings; of those, 73 percent use them "all," "nearly all," or "most of the time" when buying games, 87 percent are "very" to "somewhat" satisfied with them, and 93 percent find them "moderately" to "very" easy to understand. FTC, Marketing Violent Entertainment to Children 27, 29, C-18 (April 2007), *available at* http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf ("FTC 2007 Report").

All major video game retailers, and countless smaller stores, have joined in voluntary efforts to educate consumers about the ESRB system, to prevent individuals under age 17 from buying or renting games rated "M" absent parental consent, and to avoid carrying or providing to minors "AO"-rated games. J.A. 47; FTC 2009 Report at 27-28, 44. Most retailers will not sell games that have not been rated by the ESRB. *See* Entertainment Software Rating Board, Frequently Asked Questions, *available at* http://www.esrb.org/ratings/faq.jsp#2 (last visited Sept. 9, 2010). The ESRB also bars marketing of M- and AO-rated games in media where a significant portion of the audience consists of minors. FTC 2009 Report at 24.

The ESRB system has been remarkably effective. The 2009 FTC study found that "the video game industry outpaces the movie and music industries in the three key areas that the Commission has been studying for the past decade":

"(1) restricting target-marketing of mature-rated products to children;"

"(2) clearly and prominently disclosing rating information;" and

> "(3) restricting children's access to mature-rated products at retail."

Id. at 30. Specifically with respect to retail sales, the FTC found that when unaccompanied mystery shoppers under 17 were sent into retail establishments to try to buy M-rated games, they were turned away 80 percent of the time. *Id.* at 28.[3] By comparison, unaccompanied minors were denied R-rated movie tickets 72 percent of the time, *id.* at 13, and were unable to purchase R-rated DVDs 46 percent of the time, *id.* at 14.

Moreover, the fact that a small percentage of minors acting as FTC mystery shoppers were able to buy M-rated games does not mean that many minors in the real world actually buy games of which their parents disapprove. The record evidence shows that parents are present during 83 percent of game purchases by minors, J.A. 87, and a more recent survey puts that figure at 92 percent, FTC 2007 Report at 29. The FTC has consistently noted the "high level of parental involvement in selecting and purchasing video games for their children." *Id.* at 28. That is not surprising, given that all but the oldest minors likely would lack the means to buy games (which typically cost in the range of $50-$60 for new titles) without their parents.

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[3] The State relies on earlier (and superseded) FTC reports from 2000 and 2004, *see* Pet. Br. 57, and simply ignores the FTC's most recent reports showing that ratings are enforced by retailers the vast majority of the time and that the video game industry is at the forefront of effective ratings enforcement.

Parents also have technological tools to restrict what games their children play. The Microsoft Windows operating system and the current generation of game consoles and handheld game systems contain parental control settings that allow parents to decide what type of games may be played on them (*e.g.*, only those games rated T or lower). *See* Pet. App. 54a-55a; PTA & ESRB, *Parent's Guide to Video Games, Parental Controls and Online Safety*, at 6-9, *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf.

C. The Act

On October 7, 2005, Petitioner Schwarzenegger signed into law Assembly Bill 1179, codified at Cal. Civ. Code §§ 1746-1746.5 (the "Act"). The Act restricts the sale or rental of "violent video games" to minors and imposes a labeling requirement on them.

The Act defines a "[v]iolent video game" as one "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that meets one of two sets of criteria. *Id.* § 1746(d)(1). The first set of criteria – the only portion defended by the State – targets any depiction that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *Id.* § 1746(d)(1)(A).

The Act requires anyone who imports into or distributes within California a "violent video game" to place a 2-inch square "18" label on the front of the game's packaging. *Id.* § 1746.2. The Act also makes it illegal for a California retailer to sell or rent a game labeled "18" to a minor under the age of 18. *Id.* § 1746.1. Violations of the labeling or retail provisions are punishable by a civil fine of up to $1,000. *Id.* § 1746.3. The Act provides an affirmative defense if a retailer can prove it relied on evidence, such as a driver's license, that the purchaser or renter was 18 or older. *Id.* § 1746.1.

According to its preamble, the Act purportedly serves two purposes: "preventing violent, aggressive, and antisocial behavior" and "preventing psychological or neurological harm to minors who play violent video games." J.A. 34-35. The Act recites "findings" that "[e]xposing minors to depictions of violence in video games" makes them "more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior," and that "[e]ven minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games." J.A. 34.

The Act is enforceable by district, county and city attorneys. Pet. App. 99a. Arguably, those who distribute or sell video games may also face suit by private citizens under Cal. Civ. Code § 1750, which authorizes suits, including class actions, to redress injuries caused by mislabeled products, providing for awards of compensatory and punitive damages and attorneys' fees.

D. Procedural History

Respondents brought a pre-enforcement challenge alleging that the Act violates the First Amendment and is unconstitutionally vague. Pet. App. 71a. The district court entered a preliminary injunction, holding that the Act was a content-based restriction on expression that was subject to and failed strict scrutiny. Pet. App. 88a-92a. The court then granted summary judgment to Respondents. It concluded that the Act did not use the least restrictive means to accomplish its goals, and that the State's social science failed to demonstrate that the Act would further those goals in the first place. Pet. App. 60a-62a.

The Ninth Circuit affirmed. The court began by rejecting California's claim that *Ginsberg v. New York*, 390 U.S. 629 (1968), permitted government to treat violent expression as obscenity for minors. Pet. App. 20a. The court then found that the Act failed strict scrutiny. Among other shortcomings, it held that California's social science evidence about the effects of video games could not support a reasonable inference that the games were harmful to minors. Pet. App. 27a-32a. The court found that the work of Dr. Craig Anderson – the primary researcher upon whom California relies – was "significantly undermine[d]" by his own concessions about, *inter alia*, the "glaring empirical gap" in video game research. Pet. App. 28a. The court concluded that, although "we do not require the State to demonstrate a 'scientific certainty,' the State must come forward with more than it has." Pet. App. 32a.

Further, the court found that the Act was unconstitutional because it was not the least restrictive means of furthering California's interest. The court held that California had not taken account of various means of reinforcing the industry's system of self-regulation, and had failed to address the fact that all modern video game systems contain controls allowing parents to specify what games may be played. Pet. App. 32a-33a.

SUMMARY OF ARGUMENT

1. Video games, a form of expression as rich in content as books and movies, are fully protected by the First Amendment. As with literature, art, movies, comic books, television, and theater, some video games depict violence, and those depictions are likewise wholly protected by the First Amendment. The Act restricts this protected speech based on its content. Under longstanding First Amendment doctrine, the Act is presumptively unconstitutional and subject to strict scrutiny.

2. Tacitly conceding that the Act cannot withstand strict scrutiny, California argues that "offensively violent" video games should be placed outside the protection of the First Amendment, at least as to minors. This Court recently rejected a similar argument in *United States v. Stevens*, 130 S. Ct. 1577 (2010), emphatically refusing the government's proposal that it should use ad hoc balancing to decide whether portrayals of animal cruelty are constitutionally unprotected.

California argues nonetheless that the government may restrict *minors'* access to "offensive" materials, regardless of whether those materials depict violence. But there is no free-floating state power to censor "[un]worthy" materials for minors. Pet. Br. 6. To the contrary, minors' First Amendment rights are generally coextensive with those of adults, except in narrow, well-defined circumstances not present here. California's argument is not saved by the fact that the State is purportedly acting to assist parents. That justification could justify a ban on virtually anything, including the sale of particular books to minors without parental consent. Parents certainly have the right to determine what expression they want their minor children to experience. But that parental prerogative does not give the government the right to decide what is worthy for minors to view. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000) ("The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."). The Court should continue to put its trust in parents in the first instance, rather than politicians.

California also argues more narrowly that, under *Ginsberg v. New York*, offensive depictions of violence are not entitled to First Amendment protection as to minors. But *Ginsberg* held only that the scope of the category of sexual obscenity – already a recognized category of unprotected expression – might vary as between minors and adults. *Ginsberg* did not hold that other categories of expression, entirely protected as to adults, could be restricted for minors. Moreover, the State's analogy to obscenity fails because depictions of violence, unlike obscenity, have played a long-standing and celebrated role in expression properly consumed by minors, from Greek myths to the Bible to *Star Wars* and *Harry Potter*. A new exception for depictions of violence would threaten access to these materials. California's assertion that it will regulate only "offensive" depictions of violence compounds the First Amendment problem, as "offensiveness" will invite viewpoint discrimination, with depictions of violence committed by malefactors rather than "good guys" being deemed offensive.

Certainly there is no evidence of a problem warranting the creation of a new First Amendment exception. California has not demonstrated that parents currently have trouble monitoring the games their children play. Nor has California shown that video games are harmful to minors. Instead, the social science research California cites has been discredited by every court to have considered it. California's studies do not show that video games are the cause of any harm or that they are any different from any other media.

In the end, California's arguments merely restate the attacks that have been mounted against every new medium as it has emerged, including the true-crime novel, motion pictures, and the Internet. In each case, the claim has been that the new medium will be destructive to minors, and in each case the Court has applied the protections of the First Amendment. Video games are no different. The relative strength of California's purported interest in protecting minors is part of the strict scrutiny analysis, not a reason to jettison it.

3. The Ninth Circuit correctly held that the Act fails strict scrutiny. California has not shown that the Act materially addresses a specific harm that the State has a legitimate interest in targeting. Its argument that the courts should defer to predictive judgments about the impact of violent speech cannot be squared with the central premise of strict scrutiny, which is that the courts must carefully scrutinize content-based bans on speech to guard against censorship of unpopular views or subjects. California also fails to demonstrate the absence of less-restrictive alternatives for achieving its stated goals. The State ignores the industry's successful self-regulatory efforts, parents' level of involvement in game-purchasing decisions, and the availability of technological parental controls, all of which achieve the State's purported goals without government interference. And the State wholly failed to consider sponsoring its own educational campaign to reinforce existing voluntary industry efforts.

4. Finally, the Act is invalid for the independent reason that it is unconstitutionally vague. Its proscriptions – using terms such as "an image of a human being" and "appeal[ing] to a deviant or morbid interest of minors" – have no clear boundary in the context of a medium that is highly diverse and often fanciful. As a result, the law will chill a far broader array of speech than even California purports to target. Over the past century, the Court

has struck down similarly vague attempts to restrict minors' access to non-sexual books and movies. *E.g.*, *Winters v. New York*, 333 U.S. 507 (1948); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968). This law is no different.

ARGUMENT

I. Video Games, Including Those That Depict Violence, Are A Form Of Expression Fully Protected By The First Amendment.

A. Video Games Are Fully Protected Expression.

California has never contested that video games are expression entitled to First Amendment protection. No other conclusion is possible. Video games contain narrative, artwork, and music. They are "a story-laden" medium, Pet. App. 16a, and typically explore the same themes that animate books and movies. When a state seeks to regulate distribution of video games based on the events and images portrayed, strict First Amendment scrutiny presumptively applies, just as with other expressive media. *E.g.*, *Stevens*, 130 S. Ct. at 1584; *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Playboy*, 529 U.S. at 813.

It makes no difference that video games are primarily intended to entertain. This Court has long recognized that popular expressive entertainment is entitled to full-throttled First Amendment protection. As the Court explained in striking down a New York ordinance forbidding the sale of pulp fiction and true-crime novels (or "stories of deeds of bloodshed, lust, or crime"):

> What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

Winters, 333 U.S. at 510; *see also, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (following *Winters* and holding that motion pictures are fully protected by the First Amendment).

These principles apply equally to an interactive medium like video games. Indeed, if anything, the interactive aspect of video games heightens the First Amendment values at stake, because playing a game involves expressive activity not only by the game creators but by the player as well.[3] Further, as Judge Posner explained, "[a]ll literature . . . is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001)

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[3] *Amicus* Eagle Forum argues that video games are unprotected because players engage in the physical act of manipulating a keyboard or controller. But the Act regulates content, not that physical act. Many forms of expression, such as playing the violin or singing an aria, likewise require physical skill or virtuosity, but that does not give government a license to regulate their content. *See Texas v. Johnson*, 491 U.S. 397, 406 (1989) (government may not "proscribe particular conduct because it has expressive elements").

("*AAMA*"). California fundamentally distorts bedrock First Amendment principles when it suggests that video games are entitled to lesser protection because their interactivity *increases* the impact of their expression on the viewer. Pet. Br. 55. Plainly, the Government is not entitled to regulate speech on the ground that it is particularly effective at conveying its message.[4]

B. Depictions Of Violence Are Protected Expression.

Depictions of violence in video games – like all other media - are fully protected by the First Amendment. In *Stevens,* the Court powerfully reaffirmed that the First Amendment leaves unprotected only a handful of "historic and traditional categories long familiar to the bar," including "obscenity," "incitement," and "defamation." 130 S. Ct. at 1584. "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *Id.* (quoting *R.A.V. v. St. Paul,* 505 U.S. 377, 382-83 (1992)) (alterations in original).

As *Stevens* makes clear, depictions of violence have never been considered a category of unprotected expression. 130 S. Ct. at 1584-86. Unlike obscenity, depictions of violence have played a central and celebrated role in literature – whether it be the "*Odyssey*, with its graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake, killing the suitors, and hanging the treacherous maidservants;" or "*The Divine Comedy* with its graphic descriptions of the tortures of the damned; or *War and Peace* with its graphic descriptions of execution by firing squad, death in childbirth, and death from war wounds." *AAMA*, 244 F.3d at 577; *see also* Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. Chi. L. Rev. 1857, 1866 (2007) ("[I]mages of violence are a fundamental part of our history, culture, and politics.").

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[4] Nor is there the slightest support in the social science for the claim that interactivity heightens the purportedly harmful effects of violent works. *See infra* at pp. 41-42.

California nevertheless contends that depictions of violence either are obscenity, Pet. Br. 31-33, or have historically been regulated as the equivalent of obscenity, *id.* at 33-37. Both contentions are meritless.

This Court has unambiguously held that obscenity is limited to "works which depict or describe sexual conduct." *Miller v. California*, 413 U.S. 15, 23-24 (1973); *see Cohen v. California*, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); *Roth v. United States*, 354 U.S. 476, 487-88 (1957); *Swearingen v. United States*, 161 U.S. 446, 451 (1896). California's citation to two 19th-century obscenity statutes referring to "vulgar" or "indecent" materials, Pet. Br. 32-33, hardly suffices to demonstrate that depictions of violence alone can ever be obscene.[5] And the fact that some depictions of sexual obscenity may involve violence, Pet. Br. 39, does not mean that violence, standing alone, is obscene.

Nor has violence historically been regulated as equivalent to obscenity. "[T]he United States has a long history of regulating obscene expression, but it has no tradition of regulating violent speech." Stone, 74 U. Chi. L. Rev. at 1866. *See* Thomas G. Krattenmaker & L. A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory,* 64 Va. L. Rev. 1123, 1199 (1978) (surveying early colonial laws, including those cited in *Roth,* and finding no evidence of prohibitions on depictions of violence).

In the 1880s some states did pass laws attempting to censor depictions of criminal behavior. But these laws, and later attempts to censor movies in the 20th century, were ultimately found to violate the First Amendment. *See Winters,* 333 U.S. at 511 (law struck down was originally passed in 1884 and had "lain dormant for decades"); *Joseph Burstyn,* 343 U.S. at 501-02; *infra* pp. 44-46. By 1948, this Court declared that the "true-crime" tales at issue in

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[5] Under the common law, obscene libel was defined broadly to prohibit "whatever outrages decency and is injurious to public morals," but its application was limited to sexual matters. Frederick F. Schauer, *The Law of Obscenity* 10-11 (1976). Although California cites a smattering of pre-1880s statutes, Pet. Br. 31-33, none encompassed violent materials, as *Roth* recognized in reviewing the history of obscenity. *Roth,* 354 U.S. at 482-89.

Winters were "as much entitled to the protection of free speech as the best of literature." 333 U.S. at 510; *see also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (holding government may not regulate description of true crime based on content).

California cites some of these statutes in an effort to manufacture a tradition of regulation of depictions of violence. Pet. Br. 34-36. But it ignores that these laws are constitutionally unenforceable. For example, California claims inaccurately that "[e]ven today," Ohio's obscenity statute, Ohio Rev. Code § 2907.01(E)(3), defines material "[h]armful to juveniles" to include representations of "extreme or bizarre violence, cruelty, or brutality." Pet. Br. 35. But in 2002, a federal court held that language unconstitutional precisely because "the First Amendment forbids government from preventing juveniles from being exposed to depictions of violence," and the language was later removed from the statute. *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 947 (S.D. Ohio 2002). Similarly, the cited Tennessee statute, which California claims bars the sale of materials containing "excess violence" to minors, had that very language invalidated by the Tennessee Supreme Court. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993).[6] California even cites the *preamble* of a Rhode

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[6] The other cited statutes (from Pennsylvania, Michigan, and Illinois, and an earlier Ohio statute), all contain language materially identical to the statute struck down in *Winters*.

Island statute that contains no actual regulation of non-sexual violent materials. Pet. Br. 35.

In sum, with or without elements of violence, video games are as fully protected by the First Amendment as every other mode of expression.

II. The Court Should Reject The State's Unprecedented Plea To Carve Out First Amendment Exceptions For "Offensively Violent" Video Games.

Despite the foregoing, California insists that it has the authority to ban speech to minors that it deems potentially harmful. Recognizing it cannot satisfy strict scrutiny, California argues that some expression to minors, even if entirely non-sexual in content, is unprotected by the First Amendment. As in *Stevens*, the position advanced by the State here "is startling and dangerous." 130 S. Ct. at 1585.

California's argument takes a variety of forms. At times it seems to say that the government has a right to restrict any expression it finds "offensive" for minors. Pet. Br. 7. At other times, the argument seems to be limited to "offensively violent" expression. *Id.* at 9-10. And at still other times, it seems to be limited to "offensively violent" video games. *Id.* at 10-11.

We explain below why each of these three arguments fails, but it is critical to recognize the radical nature of California's position, however articulated. California asserts the power to decide that certain otherwise-protected, non-sexual content is so offensive that it is "simply not worthy of constitutional protection" as to minors. Pet. Br. 6. But content-based restrictions are presumptively unconstitutional precisely because "opinions and judgments, including esthetic and moral judgments . . . are . . . not for the Government to decree, even with the mandate or approval of a majority." *Playboy*, 529 U.S. at 818. California thus would turn the very rationale for strict scrutiny into an excuse to avoid it.

This argument has almost no stopping point because so many expressive works contain violent depictions or other content that someone could deem offensive for minors. California, for example, has argued that a game based on the *Iliad* could perhaps be regulated if it contained only battle scenes, 9th Cir. Oral Argument at 6:12-6:33, *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002212, and cites with approval decades-old statutes barring the dissemination of true crime novels, Pet. Br. 34-35. Accepting California's position would thus justify censorship of a wide range of expressive materials by states and localities around the country, a result anathema to the First Amendment.

A. The Government Does Not Have Unfettered Power To Ban Speech To Minors.

California's arguments for rational-basis scrutiny are incorrect in principle, and not saved by California's claim that it is merely assisting parents.

1. The general rule is that "[m]inors enjoy the protection of the First Amendment." *McConnell v. FEC*, 540 U.S. 93, 231 (2003), *overruled on other*

grounds by Citizens United v. FEC, 130 S. Ct. 876 (2010). They "are possessed of fundamental rights which the State must respect" and "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969). Minors are participants in the marketplace of ideas, and are "unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." *AAMA*, 244 F.3d at 576-77. When Justice Jackson wrote for the Court that "if there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion," he did so to enforce the right of minors not to salute the flag at school. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 581 (2001) ("We have held consistently that speech 'cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'" (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)).

Thus, "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975). The school and broadcasting cases relied on by California drive the point home. Far from recognizing a boundless power to censor "offensive" material, the cases prove the rule that government may treat expression as unworthy of protection as to minors only in special circumstances.

For example, California relies on *Bethel School District Number 403 v. Fraser*, 478 U.S. 675 (1986), which upheld regulation of lewd comments at school. But the world is not a schoolhouse, and this Court recently emphasized that *Fraser* would have come out differently had the comments been made outside of school. *Morse v. Frederick*, 551 U.S. 393, 405 (2007). The school speech cases turn on "the special characteristics of [that] environment," and do not reflect some generalized power to regulate expression for minors. *Id.* (quoting *Tinker*, 393 U.S. at 506); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (schools may regulate some speech "even though the government could not censor similar speech outside the school"). Indeed, even in school, expression may not be censored simply because it is considered "offensive." The Court rejected that argument in *Morse*, noting that "much political and religious speech might be perceived as offensive to some." 551 U.S. at 409.

Similarly, the Court has allowed greater regulation of broadcast content to protect minors, citing concerns about the "invasive" nature of broadcasting. *See FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978). But the Court has always emphasized that the unique First Amendment treatment of broadcasting cannot be generalized to other expressive situations. *FCC v. Fox Television Stations, Inc.* 129 S. Ct. 1800, 1806 (2009); *Reno v. ACLU*, 521 U.S. 844, 869 (1997) ("[T]he Internet is not as 'invasive' as radio or television . . . . [C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden." (internal quotation and citation omitted)); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 127-28 (1989) ("Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.").[7] In every other context in which minors can be exposed to expression – *e.g.*, in public places, making a telephone call, watching cable television, accessing the Internet – the Court has not freely allowed the government to censor speech it deems inappropriate for minors, instead relying on parents to control access in the first instance. *See Cohen*, 403 U.S. at 16 n.1; *Sable*, 492 U.S. at 127-28; *Playboy*, 529 U.S. at 815; *Reno*, 521 U.S. at 869. Hence, the power upheld in *Pacifica* cannot be transformed into a power to censor speech to minors outside the broadcast context.[8]

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[7] One of the Court's concerns with broadcast expletives is that even fleeting, de-contextualized exposure can undermine the control that parents have over their children's exposure to certain content – that children will simply repeat words that they hear. *See Fox Television*, 129 S. Ct. at 1812-13. That concern does not exist with video games, which have no similar short-term effect and which parents are effectively able to monitor. *Infra* at pp. 36-37.

[8] California's recitation of cases involving minors outside the First Amendment context is not relevant, because these cases do not remotely suggest that minors may lose all of their First Amendment rights. Pet. Br. 22-28. Any special interest that government has in protecting minors can and must be factored

2. California protests it is acting only to assist parents, Pet. Br. 22, but that is no answer. Any restriction on disfavored content could be rationalized in that way.

It is undisputed that parents have the right to determine the materials and viewpoints to which their children should be exposed. It does not follow, however, that *government* may determine in the first instance which expression is "worthy" of protection.[9] The First Amendment leaves "these judgments . . . for the individual to make, not for the Government to decree." *Playboy*, 529 U.S. at 818; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 394 (1992) (government may not "handicap the expression of particular ideas"); *Barnette*, 319 U.S. at 642 (government may not decide what is orthodox for minors).[10]

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into the strict scrutiny analysis; it is not a reason to treat expression as unprotected altogether.

[9] The two cases that California invokes to justify its "helping parents" rationale do not support its position. In both cases, the Court struck down compulsory education laws on the ground that government could not *interfere* with parental prerogatives to educate their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 229-31 (1972). That is an entirely different proposition than allowing government to regulate protected expression in the guise of helping parents.

[10] For the same reason, California is off the mark when it seeks to justify the Act based on the fact that Respondents have chosen to rate video games and to encourage retailers to enforce the rating. Pet. Br. 45. That is not an invitation for the government to impose its own speech regulations. *Playboy*, 529 U.S. at 817.

California also makes the remarkable assertion that it will be giving "offensive" materials the "imprimatur of societal approval" unless it censors them. Pet. Br. 41. That argument gets the First Amendment backwards. Government cannot restrict protected expression to ensure that it lacks the "imprimatur of societal approval." Such regulation distorts the marketplace of ideas in just the way the First Amendment forbids. Only individuals (and parents), not the government, are entitled to decide which expression is worthwhile. *See Playboy*, 529 U.S. at 817-18.

That is especially true because so many different forms of expression are considered inappropriate for minors by at least some parents. For example, many parents are opposed to their minor children reading classic works of American literature like *The Adventures of Huckleberry Finn* because of racial epithets in that book. *See* Dan Cryer, *Why Is Huck So Controversial?*, Newsday, Oct. 15, 1996, at A33; *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1029-30 (9th Cir. 1998). Others object to discussions of evolution or, conversely, of creationism. *See, e.g.*, Michael Winerip, *Evolution's Lonely Battle in a Georgia Classroom*, N.Y. Times, June 28, 2006, at B9. Still others sincerely believe that popular works like the *Harry Potter* series should be off limits because they celebrate a perceived pagan worldview. *See* Holly Kurtz, *Harry Potter Expelled from School*, Denver Rocky Mountain News, Nov. 6, 1999, at 6A. That does not mean a legislature could require some or all of these works to be kept in the "adults only" section of bookstores.

Ultimately, when government regulates expression in the name of assisting parents, it usurps their role and favors the preferences of some parents over those of others. That is simply another presumptively impermissible form of censorship, and it is a reason to apply strict scrutiny, not to bypass it.

B. California's Claimed Right To Censor "Offensively Violent" Expression Directed At Minors Is Historically Baseless And Constitutionally Improper.

At times, California backs away from claiming the right to regulate offensive material generally and instead asserts the right to regulate the supposedly distinct category of "offensive violence." But that narrower approach is still fundamentally contrary to the established First Amendment framework, as reiterated in *Stevens*.

1. California's categorical exception argument relies primarily on *Ginsberg*, which California would extend beyond graphic sexual portrayals to include violent expression. But *Ginsberg* dealt only with a preexisting and traditional category of unprotected expression: obscenity. The Court reasoned that the standard for what constitutes obscenity may be somewhat broader for minors because minors approach sexual material differently on account of their age. Consequently, *Ginsberg* "adjust[ed] the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interest. . .' of such

minors." 390 U.S. at 638 (citation omitted). It was on that basis that the Court applied rational-basis review to materials falling within the definition of obscenity for minors. *Id.* at 639, 643.[11]

Ginsberg expressly disclaimed any holding beyond obscenity. *Id.* at 636-37 ("We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State."). And its treatment of the boundaries of obscenity cannot be read to authorize the creation of *new* categories of unprotected expression to minors. The power to regulate obscenity is not a license to regulate depictions of violence, or any other form of protected expression. *Stevens*, 130 S. Ct. at 1586 (there is no "freewheeling authority to declare [what is] outside the scope of the First Amendment"). California's attempt to derive that power from *Ginsberg* is just a variant of the United States' "startling and dangerous" claim in *Stevens* that any expression can be regulated provided that the government finds it to be sufficiently valueless. *Id.* This Court should reject that notion here just as it did in *Stevens*.

2. Moreover, California's attempt to equate portrayals of violence with sexual materials ignores an important reality: violence, unlike explicit descriptions of sex, is a central feature of expression intended for minors. Eliminating depictions of

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[11] *Ginsberg* also noted the legislature's interest in helping parents monitor their children's access to sexual materials, but only after concluding that the materials were obscene as to minors and applying rational-basis review. *Id.* at 639.

sexual obscenity from children's literature would hardly require any revision because they are so rare; in contrast, eliminating depictions of violence, even extreme violence, would require dramatic change. *AAMA*, 244 F.3d at 578 (depictions of sex, as opposed to depictions of violence, are "an adult invasion of children's culture").

To take just a few examples, *Hansel and Gretel*, one of Grimms' Fairy Tales, recounts how children murder a witch by locking her in a burning oven. Jakob Grimm & Wilhelm Grimm, *Grimms' Tales for Young and Old* 56 (Ralph Manheim trans. 1977) ("*Grimms' Tales*"). *Snow White*, another of the Tales, ends with the evil Queen being forced to wear red-hot iron shoes until she dies from pain. *Id.* at 184. The Greek myths and Ovid's *Metamorphoses*, long fixtures of high school humanities classes, contain violence of the harshest variety.[12] And of course the Bible includes some of the most famous depictions of violence in Western culture. *E.g.*, *Judges* 16 (Samson's decimation of the Philistines); 1 *Samuel* 17 (David slays Goliath and cuts off his head).

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[12] Consider this passage from the *Metamorphoses*:

> The princess willingly her throat reclin'd,
> And view'd the steel with a contented mind;
> But soon her tongue the girding pinchers strain,
> With anguish, soon she feels the piercing pain: . . .
> In vain she tries, for now the blade has cut
> Her tongue sheer off, close to the trembling root.
> The mangled part still quiver'd on the ground,
> Murmuring with a faint imperfect sound: . . .
> The piece, while life remain'd, still trembled fast,
> And to its mistress pointed to the last.

Ovid, *Story of Tereus, Procne, and Philomela in Metamorphoses*, Bk. VI, 187 (John Dryden *et al.* trans., Harper & Bros. ed. 1872)

Contemporary tales for children are no less violent. Generations of children have watched violent movies like *Star Wars* and *Lord of the Rings* (and Westerns and serials before that). Harry Potter witnesses the violent death of his teacher, Dumbledore, at the hands of so-called "Death Eaters." J.K. Rowling, *Harry Potter and the Half-Blood Prince* (2005). Likewise, William Golding's *Lord of the Flies* (1954), which depicts torture and killing *by children*, is commonly assigned in middle and high school because it deals with social impulses towards violence.

California's claim that depictions of violence should be treated like sexual obscenity thus fails not only because it would impermissibly create a new category of unprotected expression, but also because the expression at issue is a recurring theme in works for minors.

3. California argues that it seeks to regulate only "offensive" violence, but that hardly solves the First Amendment problem. As explained above, it is not the government's role to determine which expression is sufficiently offensive to be unworthy of First Amendment protection. *See supra* Part II.A; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *Simon & Schuster*, 502

U.S. at 118 (government has no legitimate interest in "suppressing descriptions of crime out of solicitude for the sensibilities of readers"); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.").

If anything, the government's targeting of "offensive" depictions heightens the First Amendment problem. The clear risk is that disapproval of specific viewpoints will become a proxy for what is offensive – "the censor is set adrift upon a boundless sea . . . with no charts but those provided by the most vocal and powerful orthodoxies." *Joseph Burstyn*, 343 U.S. at 504-05. And that risk is not lessened because minors are involved. *See Interstate Circuit*, 390 U.S. at 688 (striking down law restricting speech to minors where "[t]he only limit on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable, or proper'" (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 701 (1959) (Clark, J., concurring in result)).

The briefing in this case illustrates the danger. California and its *amici* focus considerable attention on a single game, *Postal 2*. But as the Ninth Circuit observed, it is impossible to assess the entirety of *Postal 2* based on the few snippets of game play submitted by California. Pet. App. 9a-10a. In fact, *Postal 2* is a satire that was designed to be "over the top" and offensive to mainstream sensibilities. Regardless, what is obviously motivating California's attacks on *Postal 2* is not its level of violence – as compared, for example, to the game *Medal of Honor's* portrayal of the landing on Omaha Beach. The differentiating factor is the game's *message, i.e.*, the fact that the protagonist may behave criminally rather than heroically, while uttering racist and sexist comments. *Cf. R.A.V.*, 505 U.S. at 394. The conduct and views expressed in the *Postal 2* excerpts submitted by California may be offensive, but they do not justify a new exception to the First Amendment that would allow the government to pick and choose among portrayals of violence using criteria that virtually guarantee viewpoint discrimination.

C. There Is No Support For The Claim That Minors' Access To Violent Video Games Is A Significant Societal Problem Justifying Exempting Them From Constitutional Protection.

California does no better when it focuses specifically on violent video games as the target of needed regulation. In fact, its efforts to show that there is a significant social problem meaningfully addressed by the Act are fruitless.

First, California's emphasis on assisting parents, while allowing them to make final choices about the games their children will play, means that the State has no regulatory interest unless parents are in fact experiencing difficulty monitoring their children and making those choices. But California has not even attempted to make such a showing. And the facts show otherwise.

Second, the evidence that video games cause any real harm to minors is paltry at best. The research cited by California has been resoundingly rejected by every court to have looked at it, and it both underproves and overproves the State's claims: it does not show that video games cause actual harm to minors, and it purports to find the same measured effects for a wide array of stimuli, including games designed for small children, television cartoons, or even a picture of a gun. If evidence of this sort were sufficient to justify treating expression as unprotected, the First Amendment would mean very little.

Third, history teaches that every new form of media is met with concern that it will undo the youth of the nation. Pulp novels, movies, and the Internet have all been subject to similar attempts at censorship, complete with purported social science support. In each case, this Court has refused to take the "starch" out of strict scrutiny review, and has treated the regulations as presumptively unconstitutional. *Ashcroft*, 542 U.S. at 670; *Playboy*, 529 U.S. at 830-831 (Thomas, J., concurring). California's request for special dispensation for video games should be similarly rejected.

1. California Has Failed To Show That Parents Need Government Involvement In Monitoring The Video Games Their Children Play.

California has eschewed any interest in preventing minors from playing violent games that their parents have purchased or approved. And it offers no evidence of a serious problem with minors secretly disobeying their parents in this area. As noted above, nearly all video games played by minors are purchased for them *by their parents*. *Supra* at p. 9. The exceptions presumably are confined to the oldest minors who have the necessary funds and the ability to get to stores without their parents. Even in those exceptional cases, minors are not necessarily attempting to buy games that would qualify as "violent video games" under the Act, nor are they necessarily acting without parental permission. And even when they attempt to do so, assuming the games are rated "M," the sale most likely will not go through because of voluntary retailer enforcement of the ESRB rating system.

Moreover, to cause the harm California claims, the very few "violent video games" clandestinely purchased by minors would have to be played over an extended period of time, providing further opportunity for parental supervision. And those games may be played on consoles, PCs, or handheld devices with technological controls that parents can enable to prevent such games from being played in their absence. *Supra* at p. 9. In sum, there are ample opportunities for parents to intervene if they so choose.

2. California Has Also Failed To Show That Violent Video Games Are Harmful To Minors.

California has vacillated as to precisely what harm it claims is at issue. Although the Act's preamble speaks of a need to prevent "violence" by minors, California has largely disclaimed a violence-prevention rationale, presumably because video games could not possibly be viewed as "incitement" as defined in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Instead, California focuses on a more amorphous harm – causing increased "aggressive thoughts and behavior" in minors. Pet. Br. 3, 42-45.

However the harm is defined, California has failed to demonstrate that it exists. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists closely affiliated with him. *See* J.A. 122-27, 133-43 (article bibliography from Legislature). Dr. Anderson testified before a district court considering a challenge to a similar law in Illinois, and his testimony is in the record here. J.A. 1206-1339. The Illinois district court, along with every court to have considered Dr. Anderson's and similar research, concluded that the research does not show that violent video games are harmful to minors in any material way. *See Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1063 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *see also* Pet. App. 63a-64a (district court below); *AAMA*, 244 F.3d at 578-79; *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 832-33 (M.D. La. 2006); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1070 (D. Minn. 2006), *aff'd*, 519 F.3d 768 (8th Cir. 2008); *Entm't*

Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 653 (E.D. Mich. 2006).[13]

As the Ninth Circuit described in detail, there are numerous flaws with these studies. *First*, most of the studies do not even attempt to prove that video games cause minors to act aggressively. Instead, they attempt to establish a correlation by asking participants to describe their level of aggressive behavior and also their frequency and degree of exposure to violent video games. Some studies have found a small degree of correlation between preference for violent games and aggressive personal behavior – though many other studies have not. *See* J.A. 1487, 1493-1504, 1507-10.[14] The problem with even those studies finding some correlation is that "it is impossible to know which way the causal relationship runs: it may be that aggressive children may also be attracted to violent video games." *Blagojevich*, 404 F. Supp. 2d at 1074. This shortcoming is conceded even by the studies in the record. *See, e.g.*, J.A. 632-33, 638, 706, 1052-53.[15]

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[13] Dr. Anderson has made public statements about the effects of video games that go much further than his own peer reviewed publications. For example, as the *amicus* brief of Senator Yee *et al.*, notes, at 10 & n.5, Anderson testified before a congressional committee in 2000 that "video games can cause increases in aggression and violence." That same year he published an article saying the "research to date on video game effects is sparse and weak," J.A. 147, and four years later he published another article pointing to a "glaring empirical gap" in video game research – the absence of the kind of longitudinal studies that can provide information about causation, J.A. 596.

[14] Since the district court's decision in this case, the number of studies finding no correlation has continued to grow, in part as a response to the flawed methodologies in the studies relied on by the State. *See, e.g.*, Christopher J. Ferguson *et al.*, *Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation?*, 35 Criminal Justice and Behavior 311 (2008); Christopher J. Ferguson *et al.*, *A Multivariate Analysis of Youth Violence and Aggression: The Influence of Family, Peers, Depression and Media Violence*, 155 J. of Pediatrics 904 (2009).

Second, the experimental studies cited by California are no more compelling. The cited experiments have participants play either a violent or a non-violent game and then seek to determine if they are feeling more aggressive in the next few minutes, using various proxies. For example, Dr. Anderson relies on "sound blast" studies, which measure the length or decibel level of a noise blast that a participant administers to a fake opponent immediately after playing different video games.[16] There is no evidence that these miniscule sound blast differences translate into any real-world effects. J.A. 1506-07. In fact, many experimental studies may be measuring excitement from playing the game, rather than aggression. J.A. 1414-16; *see* Christopher J. Ferguson *et al.*, *Violent Video Games, Catharsis Seeking, Bullying, and Delinquency: A Multivariate Analysis of Effects*, 56 Crime & Delinquency 1, 3 (2010).

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[15] For example, California highlights the Gentile *et al.* (2004) study. Pet. Br. 56. But the authors *explicitly* disclaimed any showing of causation in the study itself. J.A. 632-33. Further, the correlations in the study are weak, and when gender is taken into account, the correlation between violent video game exposure and physical fights or arguments with teachers is essentially zero. *See* Christopher J. Ferguson, *Media Violence Effects: Confirmed Truth, or Just Another X-File?*, 9 J. of Forensic Psychology Practice 103, 110 (2009).

[16] Other studies measure aggression by examining the letter a participant fills in to complete a word (*i.e.*, H_T could be "HIT" or "HAT"), Pet. Br. 53 – another poor proxy for actual aggression. J.A. 1490-92.

Third, Dr. Anderson and his colleagues have published a series of "meta-analyses," which combine these unpersuasive experimental and correlational studies together and calculate an overall effect size. But combining flawed studies does not make the flaws go away. J.A. 1147, 1429-30, 1517-18; *see also* Matthias Egger *et al.*, *Uses and Abuses of Meta-Analysis*, 1 Clinical Medicine 478, 480 (2001). Moreover, some meta-analyses show little to no effect from video game exposure, and one found a negative relationship between the amount of video game play and aggression. J.A. 1430, 1508. The Anderson meta-analyses have also been criticized for excluding studies that show no effect (and thus likely do not get published) and including studies that do not control for other variables like gender. *See* Christopher Ferguson *et al.*, *Violent Video Games and Aggression: Causal Relationship or Byproduct of Family Violence and Intrinsic Violence Motivation?*, 35 Criminal Justice and Behavior 311 (2008).

Fourth, even taking the "effect sizes" claimed by Dr. Anderson *et al.* at face value, they are both very small and no different from the results produced in studies of other media. Pet. App. 64a; *see, e.g.*, *AAMA*, 244 F.3d at 579; *Blagojevich*, 404 F. Supp. 2d at 1063; *Hatch*, 443 F. Supp. 2d at 1070. There is thus no support for the claim that video games, because they are interactive, somehow cause more significant problems than other media. In fact, Dr. Anderson conceded in his Illinois testimony that the "effect sizes" for television and video game "violence" are essentially the same. J.A. 1263. He also admitted that the increases in "aggression" he purported to measure would also result from a "very large number" of stimuli other than video games. J.A. 1315-16; *see also* J.A. 1511-12. Further, many of the sources cited by California, including the 2000 joint associational statement, *see* Pet. Br. 44, concern media violence generally rather than any particular harm associated with video games.[17]

Fifth, the credibility of Dr. Anderson's findings is further undermined by his statements that even playful images of violence such as those found in Bugs Bunny cartoons or E-rated games create the same "effect" sizes as more violent video games. J.A. 1270, 1304, 1313-15. Dr. Anderson admits that even *viewing a picture of a gun* has the same aggressive effect as playing a violent video game. J.A. 1315-16, 150. And one of his fellow researchers claims to find nearly identical links between aggressive behavior and *reading violent passages in the Bible*. *See* Brad J. Bushman *et al.*, *When God Sanctions Killing: Effect of Scriptural Violence on Aggression*, 18

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[17] That statement has been widely criticized by social scientists who are members of those very organizations for overstating the findings of the studies and failing to reflect any sort of member consensus. *See, e.g.*, Jonathan L. Freedman, *Media Violence and Its Effect on Aggression: Assessing the Scientific Evidence* 8-21 (2002).

Psych. Science 204, 206 (2007) (purporting to find "compelling evidence that exposure to a scriptural depiction of violence or to violence authorized by deity can cause readers to behave more aggressively"); J.A. 137-39 (legislative history citing Dr. Bushman's studies). Thus, the research does not justify focusing on only some subset of video games or any media. If the social science is to be believed, virtually any form of "violent" expression could be suppressed in the name of avoiding the marginal increases in aggressive thinking and behavior the State supposedly targets here.[18]

3. Instead Of Identifying A True Harm To Minors, California Is Repeating The Same Failed Arguments That Have Been Used In The Past To Attack New Forms Of Expression.

Rather than identifying a true harm to minors, California is replaying attacks that have been launched against new forms of media going back many decades. California's concerns that video games are different or dangerously "realistic," Pet. Br. 43, echo historical concerns raised about other new media that we now view as unwarranted.

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[18] The Legislature also made a finding that playing violent games makes it more likely that a person will experience "a reduction of activity in the frontal lobes of the brain," relying on research from the University of Indiana. J.A. 34, 1452. One of those researchers testified in the Illinois trial, however, leading the judge to find that "there is barely any evidence at all, let alone substantial evidence" of this supposed effect. *Blagojevich*, 404 F. Supp. 2d at 1074; *see* J.A. 1475-76.

For example, the 19th-century true-crime novel was claimed to cause emulation by young delinquents. Noted morals crusader Anthony Comstock wrote:

> The leading characters are youthful criminals, who revel in the haunts of iniquity . . . . Read before the intellect is quickened or judgment matured sufficient to show the harm of dwelling on these things, they educate our youth in all the odious features of crime . . . . What is the result? . . . . Our Court rooms are thronged with infant criminals – with baby felons.

Anthony Comstock, *Frauds Exposed; or How the People Are Deceived and Robbed, and Youth Corrupted* 437 (1880).

By the middle of the 20th century, the dime novel was thought relatively tame, but the comic book was seen as a new danger. *E.g.*, Sterling North, *A National Disgrace (And a Challenge to American Parents)*, Chi. Daily News, May 8, 1940, at 21 ("The old dime novels . . . were classic literature compared to the sadistic drivel pouring from the presses today. Badly drawn, badly written and badly printed – a strain on young eyes and young nervous systems – the effect of these pulp-paper nightmares is that of a violent stimulant." (*quoted in* David Hajdu, *Ten-Cent Plague: The Great Comic-Book Scare and How It Changed America* 40-41, 44 (2008), which notes that the article was reprinted in dozens of newspapers)). Highly publicized Senate Committee hearings highlighted the testimony of prominent psychiatrist

Frederic Wertham, linking comic books to juvenile delinquency. *Juvenile Delinquency (Comic Books): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary,* 83d Cong., 2d Sess. 79-96 (1954).

Movies have also been a focus of criticism, with the State of New York arguing to this Court in *Joseph Burstyn* that film presented a special danger to youth.

> [T]he vibrant, vivid, graphic portrayal in a motion picture has an impact that the lecturing voice of a speech, the cold type of the written page, the still picture in a magazine does not. Add to that the setting in which the movie is viewed – the darkened theatre, the relaxed receptive mood, the complete concentration on the presentation, the company of a sizable or even vast audience, all simultaneously silently focusing on the screen. Add also the vast numbers which the motion pictures reach . . . made up of men and women together, of teen age boys and girls together, of adolescent boys and girls together, and of children.

Brief of Appellee at 41, *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952) (No. 522), 1952 WL 82542.

This Court rightly rejected that argument, holding that "[e]ven if one were to accept" "that motion pictures possess a greater capacity of evil . . . it does not follow that [they] should be disqualified from First Amendment protection." *Joseph Burstyn,* 343 U.S. at 780. Today, the argument that depictions of violence in novels, comic books or movies should be deprived of First Amendment protection as to minors is untenable. Social science pronouncements theorizing great harm from these now-familiar media seem implausible. *See, e.g.*, Brandon S. Centerwall, *Television and Violence: The Scale of the Problem and Where to Go From Here*, 267 J. of Am. Medical Ass'n. 3059, 3061 (1992) (a much-publicized and later much-criticized article using comparison of U.S. and South Africa to "demonstrate" that minors' exposure to television in 1950s and 1960s was responsible for a doubling of violent crime in the U.S.); J.A. 265 (Anderson *et al.* acknowledging that Centerwall failed to consider "other factors that might have influenced national crime rates at the same time").

Video games are no different. Minors do not mimic the scenarios they observe in video games any more than they do with comic books. *See AAMA*, 244 F.3d at 578-79; J.A. 1518. They may engage in play based on video games, just as they have done with fantasy literature for ages, *cf.* Sharon Otterman, *At Camp, Make-Believe Worlds Spring Off The Page*, N.Y. Times, July 16, 2010, at A1, but that is not the same thing as engaging in violent or anti-social behavior. J.A. 1489.

The reality is that 67 percent of all American households now play video games. Since the emergence of graphically violent games 15 years ago, juvenile violent crime has *declined precipitously*. *See* Bureau of Justice Statistics, *Key Facts at a*

Glance, http://bjs.ojp.usdoj.gov/content/glance/offage.cfm (last visited Sept. 9, 2010). California should not be given free rein to regulate protected expression based on unfounded, and largely outmoded, fears.

III. THE ACT FAILS STRICT SCRUTINY.

As the Court of Appeals correctly held, the Act cannot survive strict scrutiny. Strict scrutiny requires that California articulate a compelling state interest, prove that the Act actually serves that interest and is "necessary" to do so, and show that the Act is narrowly tailored to serve that interest. *R.A.V.*, 505 U.S. at 395. California bears the burden of proof on each point, *see Playboy*, 529 U.S. at 818, and it cannot come close to carrying its burden.[19]

A. California Cannot Show That The Act Materially Advances A Compelling Interest.

1. California fails to show an actual harm to minors that the Act materially addresses. Some of its claimed goals are illegitimate: although the government has a compelling interest in protecting the well-being of minors, California does *not* have a compelling interest in shielding minors from constitutionally protected expression that it deems

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[19] The analysis below shows the Act would in fact fail to satisfy *any* form of heightened scrutiny, including intermediate scrutiny. The Act lacks a legitimate purpose, fails to "materially advance" its stated goals, and is more extensive "than necessary to serve the interests that support it." *Lorillard Tobacco*, 533 U.S. at 555-56 (quotation marks omitted).

offensive. *Supra* Part II.A-B. And to the extent that California seeks to regulate *conduct* resulting from expression, it must show that the regulation satisfies the *Brandenburg* standard, which it plainly does not. *See Brandenburg*, 395 U.S. at 447 (incitement limited to expression both intended and likely to cause imminent lawlessness).

California also focuses on preventing psychological injury to minors. However, as discussed above, California does not show a significant problem of minors playing violent video games without parental knowledge or approval, and its evidence of supposed harm to minors from playing such games is not credible. *Supra* Part II-C.

California claims that the Ninth Circuit improperly imposed a "heightened standard of proof requirement." Pet. Br. 48.[20] But the court merely applied the usual rigorous strict-scrutiny requirements, which would mean little if the State did not have to prove that the law actually addressed a specific harm. *See R.A.V.*, 505 U.S. at 382; *Playboy*, 529 U.S. at 813. For example, in *Playboy*, the Court closely scrutinized government evidence of "signal bleed" in sexually explicit programming, citing the lower court's finding that the government had "presented no evidence on the number of households *actually* exposed to signal bleed and thus has not quantified the *actual extent* of the problem of signal bleed." 529 U.S. at 820 (emphasis added; quotation omitted). The Court made clear that "the Government must present more than anecdote and supposition. *The question is whether an actual problem has been proved in this case.*" *Id.* at 822-23 (emphasis added); *see also Citizens United v. FEC*, 130 S. Ct. 876, 910 (2010) (requiring proof that expenditures actually lead to or create appearance of *quid pro quo* corruption); *Free Speech Coalition*, 535 U.S. at 250, 253 (rejecting argument that virtual child pornography caused actual child abuse in part because the "causal link is contingent and indirect" and holding that government must show "a significantly stronger, more direct connection").

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[20] California claims that experiments in support of its case would be "intrusive, unethical, and possibly illegal," but that concern is misplaced. Pet. Br. 56. Each day, millions of adults and minors play games depicting violence. The social science researchers cited by California regularly have children play violent games they claim cause aggressive effects. J.A. 1506-10. California's problem is not that harm is impossible to show under strict scrutiny, it is that there is no harm to be shown.

Unable to defend the evidence on its merits, California instead asks the Court to adopt a deferential approach to "legislators' predictive judgments of harm," essentially allowing the legislature to review a diverse array of social science studies and decide which ones to credit. Pet. Br. 48. Tellingly, California cites no strict-scrutiny cases here, and its plea for a lower burden of proof cannot be reconciled with that level of judicial review. *See Playboy*, 529 U.S. at 820; *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"); *Sable*, 492 U.S. at 129 ("[W]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law.").

California argues that this Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1995), requires "substantial deference" to the State's "predictive judgment" that certain violent video games cause harm to children. Pet. Br. 48-56. But that is wrong. To begin, *Turner* involved content-neutral regulations of speech, and thus the Court applied intermediate, not strict, scrutiny. 512 U.S. at 661-62.

Moreover, the regulations in *Turner* involved a "regulatory scheme[] of inherent complexity" and required Congress to make "assessments about the likely interaction of industries undergoing rapid economic and technological change." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997). Given this context, it is no surprise that the Court was willing to defer somewhat to Congress's "*predictive* judgments when enacting nationwide *regulatory* policy." *Id.* (emphasis added). This case is not comparable. A court is at least as well suited as a legislature to determine whether social science or any other evidence points to an "actual problem," *Playboy*, 529 U.S. at 822-23, that the restriction addresses.

This Court's decision in *Fox Television* also does not support the State's call for deference. That case did not address the First Amendment claims at all and, instead, applied the deferential arbitrary-and-capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *See Fox Television*, 129 S.

Ct. at 1811-12; *see also supra* at pp. 26-27 (discussing unique issues with broadcast regulation). *Fox* did not purport to weaken strict scrutiny and allow government to ban speech based on its content without proof of actual harm.

2. The Act fails under the material advancement prong for another reason: violent video games represent only "a tiny fraction of the media violence to which modern American children are exposed." *AAMA*, 244 F.3d at 579. California has singled out video games even though a broad set of media contain similar depictions of violence. Its *own evidence*, taken at face value, indicates that the effect of exposure to violent video games is the same as exposure to other media containing violence. *Supra* at pp. 41-42. But while the Act might ban a 16-year-old from buying or renting Tom Clancy's *Rainbow Six 3* video game, it would still allow him to buy or rent Tom Clancy's movies or books.[21] This selective treatment of similar speech underscores that California's ultimate purpose in enacting the law was to target and punish a disfavored speaker, rather than achieve its asserted purpose. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989).

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[21] In addition, the Act apparently does not apply to games that are acquired or played online. If not, then it is underinclusive for that additional reason, and is likely to become nearly useless in a few years. On the other hand, any effort to regulate access of minors to violent games online would raise the same kinds of problems that have limited regulation of sexual content on the Internet. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997).

B. The Act Is Not Narrowly Tailored.

The Act fails strict scrutiny for the additional reason that it threatens to censor a wide range of fully protected expression. Even if there were some subset of extreme depictions of violence that could be restricted as to minors – which California has not come close to showing here – the Act's sweep is so broad that it would reach a huge range of expression that has never been thought inappropriate for minors. *See Stevens*, 130 S. Ct. at 1592 (striking down animal crush video ban because even if depictions of "extreme animal cruelty" could be constitutionally regulated, the law in question reached other, protected depictions). This significant overbreadth necessarily means that the Act is not narrowly tailored.

The Act's overbreadth is most clear in the case of 17-year-olds. Because the Act prohibits the sale of games that are offensive to "minors," a game deemed "offensive" to a very young minor presumably must be labeled with an "18" sticker and restricted from sale to an older minor. The one-size-fits-all system thus draws no distinctions between a 17-year-old and a pre-schooler, in contrast to the ESRB system. Even California's brief does not go so far as to claim an interest in shielding 17-year-olds from exposure to descriptions and portrayals of warfare (historical and contemporary) and violent crime in the days or weeks before they become eligible to vote and enlist in the military. That is another reason for striking down the Act. *Cf. Reno*, 521 U.S. at 875 (holding that the government cannot restrict speech for adults based on what is appropriate for young children).

C. The Act Is Not The Least-Restrictive Means Of Accomplishing California's Goals.

California also fails to carry its burden of proving that no less-restrictive alternatives exist for achieving its stated goals. *Playboy*, 529 U.S. at 823-24; *Ashcroft*, 542 U.S. at 670.

1. As the courts below noted, California failed to show that current voluntary ESRB ratings efforts are ineffective, much less to consider whether an educational campaign reinforcing them would be a better alternative than outright suppression of speech. In fact, the current self-regulatory regime is highly effective at limiting sales to minors, and the FTC studies show both that parents are involved in monitoring what video games their children buy and play, and that they understand and utilize the ESRB rating system. *Supra* at pp. 7-9. California has not remotely met its burden to show otherwise. *Playboy*, 529 U.S. at 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").

California also has ignored the availability of technological solutions that enable parents to limit a child's access to video games based on the intensity and amount of violent content they contain, thereby enhancing parental supervisory authority. *Supra* at p. 9. Filtering at the console level affords far more precision than even Internet filtering systems that the Court has identified as less-restrictive means of protecting minors from inappropriate content. *See Ashcroft*, 542 U.S. at 668-69; *see also Playboy*, 529 U.S. at 815 ("[s]imply put, targeted blocking is less restrictive than banning"). California suggests that clever children may be able to disable the controls, Pet. Br. 58, but provides no evidence to support this suggestion and carry its burden. *See* 542 U.S. at 669; *Playboy*, 529 U.S. at 824; *Sable*, 492 U.S. at 130-31; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality) (identifying less-restrictive alternatives, such as an "educational campaign" or "counterspeech").

2. The Act supplants a uniform and familiar voluntary rating system, which provides information to adults and draws distinctions among minors of different ages, with a novel and unpredictable standard that cannot be interpreted in advance. J.A. 48. Indeed, California's "18" label may physically obscure some of the ESRB ratings and content information on game packaging, and will create consumer confusion regarding the existing ratings. J.A. 47-48. The Act will therefore have the perverse effect of undermining the quality and availability of information currently provided to parents and minors about game content.

Moreover, the Act could result in self-imposed restrictions on the game content made available to adults. A retailer who faces substantial civil penalties in the event that a clerk intentionally or negligently sells a proscribed game to a minor may simply not carry the game in the first place. Likewise, video game creators will be induced to create games that do not contain expression that risks running afoul of the Act, further narrowing the range of expression available to adults. J.A. 63-64. And that problem will only worsen as other states and localities pass their own laws with their own proscriptions and different terminology to describe the games being regulated.

IV. THE ACT IS UNCONSTITUTIONALLY VAGUE.

The Act is unlawful for an independent reason: it is unconstitutionally vague and will broadly result in the chilling of protected speech. The Act is therefore unacceptable under the First Amendment and Due Process Clause.

A. This Court Has Repeatedly Struck Down As Vague Statutes That Purport To Regulate Offensive Expression.

Restrictions on protected expression must be clear in their scope to comply with the First Amendment. *See Reno*, 521 U.S. at 871-72 (the vagueness of a "content-based regulation of speech . . . raises special First Amendment concerns because of its obvious chilling effect on free speech"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967). Thus, the Court has frequently struck down on vagueness grounds speech bans aimed at protecting minors, recognizing that:

> [i]t is essential that legislation aimed at protecting children from allegedly harmful expression – no less than legislation enacted with respect to adults – be clearly drawn and that the standards adopted be reasonably

> precise so that those who are governed by the law and those that administer it will understand its meaning and application.

Interstate Circuit, 390 U.S. at 689 (quotation omitted; alterations in original); *see also Winters*, 333 U.S. at 518-19; *Joseph Burstyn*, 343 U.S. at 497, 504-05 (striking down restriction on "sacrilegious" film). Indeed, in *Interstate Circuit*, 390 U.S. at 683, the Court described a long line of cases striking down as unconstitutionally vague attempts by states and localities to classify and restrict films. *E.g.*, *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam); *Superior Films, Inc. v. Dep't of Educ. of Ohio*, 346 U.S. 587 (1954); *Commercial Pictures Corp. v. Regents of Univ. of N.Y.*, 346 U.S. 587 (1954) (per curiam); *Holmby Prods., Inc. v. Vaughn*, 350 U.S. 870 (1955) (per curiam).

The law struck down in *Winters* was aimed at books containing "criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes." 333 U.S. at 518. The legislature expressed the same kinds of concerns that California asserts here – that provocative descriptions of true crime would be psychologically harmful and stimulate destructive behavior by minors. *See id.* at 529-31 (Frankfurter, J., dissenting). The Court struck down the law as "too uncertain or indefinite" to be constitutional, noting that it could be applied to "[c]ollections of tales of war horrors, otherwise unexceptionable." *Id.* at 519-20.

Likewise, in *Interstate Circuit*, the statute targeted films "[n]ot suitable for young persons," including a category of films "[d]escribing or portraying brutality, criminal violence or depravity in such a manner as to be, in the judgment of the Board, likely to incite or encourage crime or delinquency on the part of young persons." 390 U.S. at 681. The statute imposed a monetary penalty on any distributor showing a film "not suitable" to those under 16. *Id.* at 680. The Court found the definition of prohibited speech to be unconstitutionally vague, and made clear that a law intended to protect minors has no special leeway in this regard. *Id.* at 689 ("The permissible extent of vagueness is not directly proportional to . . . the extent of the power to regulate or control expression with respect to children.").

B. The Act Is Inherently Vague.

The Act is no clearer than those in *Winters* or *Interstate Circuit*. It uses terms – including "killing, maiming, dismembering, or sexually assaulting an image of a human being," and "appeal[ing] to the deviant or morbid interest of minors" – that are vague and ambiguous, and provide little guidance to game creators and distributors.[22]

First, it is not clear what would constitute "killing, maiming, dismembering, or sexually assaulting an image of a human being" in an often fanciful medium. Games often include zombies, aliens, demi-gods, or cartoonish characters like Super Mario, all of whom may appear human but then transform into other beings (and vice versa) over the course of the game. J.A. 68-69, 72, 75-76 (noting examples in record in *Resident Evil 4*, *Jade Empire*, and *God of War*). Moreover, in many cases it will not be clear whether the "image of the human being" can be harmed in a way that falls within the statute. Does "killing" a character who immediately springs back to life count? If the game allows the player to crush a super villain with a boulder, has a maiming occurred if the villain regenerates his strength? It is impossible to answer these questions by examining the statutory text.

---

[22] Though the Court of Appeals did not need to address this issue, other courts have expressed concerns about the vagueness of similar laws attempting to regulate video game violence. *E.g.*, *Blagojevich*, 404 F. Supp. 2d at 1077; *Granholm*, 426 F. Supp. 2d at 656; *Foti*, 451 F. Supp. 2d at 836.

Second, although the Act uses language that attempts to mirror the *Miller* standard, its application to depictions of violence is unclear and provides no meaningful guidance to game creators and distributors. Sexual obscenity is a narrowly defined category that has accrued meaning over time, but the meaning of "deviancy" and "morbidity," for example, in the context of violent expression is entirely undefined. *See Winters*, 333 U.S. at 518 (noting that there may be a "permissible uncertainty" in using language to describe sexual obscenity that is "well understood through long use in the criminal law"). Is it deviant or morbid to blow up an attacking zombie; to kill a rebel soldier using a sniper; to break the arm of an opponent in a fighting game? Is it deviant or morbid for the fictional Jack Bauer from the television show and video game *24* to torture terrorists to extract time-sensitive information? Is it patently offensive to have a game that allows the character to chop off the head of an enemy? And would it be less patently offensive if that game depicted the myth of Perseus and Medusa, as opposed to some other less famous act of violence? There is no obvious answer.[23]

Likewise, the Act's requirement that the game "as a whole" lack "serious literary, artistic, political, or scientific value for minors" will be hard to apply when violence is part of the story. Would unusually beautiful depictions suffice to create "artistic value"? *Cf.* Nicholson Baker, *Painkiller Deathstreak,* New Yorker, Aug. 9, 2010, at 53-54 (describing a "visual glory hallelujah of a game"). Is it enough for the game to refer to political controversies about violence?[24] We are left to wonder.

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[23] California suggests that "realistic" depictions of violence may be more inappropriate. Pet. Br. 43. But another State or prosecutor may believe that violent depictions that *fail* to show the consequences of violence are worse – and some have. *See, e.g., Entm't Merchants Ass'n v. Henry,* No. CIV-06-675-C, 2007 WL 2743097, at *1 (W.D. Okla. Sept. 17, 2007) (striking down an Oklahoma statute that defined and restricted violent video games based, *inter alia,* on whether game "trivializes the serious nature of realistic violence"). The standard is not predictable.

[24] Such a possibility is far from speculative. *Postal 2,* which California describes but did not introduce into the record in its entirety, contains various attempts at satire. For example, the player's character visits a video game studio where citizens protest with anti-video game signs, and a real-world politician is mocked for his stance on video game violence. *See* Espen Aarseth, *The Game and its Name: What is a Game Auteur?, in*

Indeed, California itself has no clear idea which games are or are not covered by the Act. It asserts it is regulating only a "narrow category of material," Pet. Br. 6, but it invokes research that draws no distinctions among violent games (including cartoonish games designed for small children). California refused in the lower courts to say whether the six games introduced into the record by Respondents would be covered by the Act. J.A. 1549-50, 1572. And in this Court, it is only willing to say, even with regard to the games *it* submitted (including the much-discussed *Postal 2*), that they "*may* be covered by the Act." Pet. Br. 3 (emphasis added).

Thus, it will be impossible for game makers to know which games will trigger the law's restrictions. The availability of public enforcement in multiple jurisdictions and the possibility of private suits will create substantial pressure to rate more and more games as appropriate only for those 18 and older. Choosing not to impose such limits, in any borderline case, would risk massive civil penalties of up to $1,000 per game sold in California. As a result, minors would soon be deprived of independent access not just to the most violent and controversial games but to many other more mainstream products currently intended for teenagers or even younger players.

Visual Authorship: Creativity and Intentionality in Media 261, 267-68 (Torben Kragh Grodal, Bente Larsen, & Iben Thorving Laursen eds. 2004); John Breeden II, *Review, Postal 2*, Wash. Post., Apr. 20, 2003, at H9.

The chilling effect on speech will only be exacerbated under the laws that will come next if "offensively violent" speech is declared to be outside the protection of the First Amendment as to minors. Although the Act gives some protection to retailers who rely on a publisher's or distributor's determination that a given game can be sold to minors, the next law may not. Requiring retailers to view all the content of a product that contains dozens of hours of game play and is accessible only to a skilled player, to try to apply amorphous standards to the "range of options" available to a player, would impose a nearly impossible burden. J.A. 92. The only rational response might well be to stop selling video games to minors altogether. Movies and books have been targets before, *see Winters, Interstate Circuit, supra,* and will likely come next. The Court should not go down this road.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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September 10, 2010

REPLY
BRIEF

No. 08-1448

In The
Supreme Court of the United States

◆

ARNOLD SCHWARZENEGGER, Governor of the
State of California, and EDMUND G. BROWN Jr.,
Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION
and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

PETITIONERS' REPLY BRIEF

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The statute attacked by respondents shares nothing in common with the statute at issue in this case. Respondents and their amici paint an alarming picture of government censorship of both classic and contemporary art and literature, ignoring the level of extreme violence depicted in the narrow category of video games that is actually covered by the Act.[1] The Act narrowly targets a distinct audience susceptible to unique harms through use of an established three-prong test that carefully ensures that speech with serious literary, artistic, political, or scientific value for minors will *not* be regulated. Just as with laws governing the regulation of obscenity and offensive sexual depictions, the Act's reach is narrowly circumscribed by its express terms.

Petitioners ask this Court to permit states to regulate minors' ability to independently purchase a narrow category of offensively violent material, just as the Court has done for sexual material. This material represents either depictions that are not within the area of protected speech as to minors, *cf.*, *Ginsberg v. State of New York*, 390 U.S. 629 (1968), or depictions that may be regulated in respect to minors "because of their constitutionally proscribable content" for minors, *cf.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992), or both. The important point is that the First Amendment should not be understood either to guarantee retailers a constitutional right to sell offensively violent video games to unaccompanied minors, or to guarantee minors the right to independently purchase this limited class of video games.

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[1] As has been the case in petitioners' earlier filings, the word "Act" refers to California's statutory scheme in issue, Cal. Civ. Code § 1746-1746.5.

◆

ARGUMENT

I. The *Ginsberg* Standard Should Be Extended to Validate California's Regulation of the Narrow Category of Violent Video Games Covered by the Act

A. The Act Only Covers Video Games Depicting Violent Content That Is Patently Offensive for Minors, Appeals to Their Deviant or Morbid Interest, and Causes the Game to Lack Serious Redeeming Value for Them

In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), this Court held that parents' authority to direct the rearing of their children, along with a state's independent interest in protecting the well-being of those children, fully supported New York's restriction on the commercial sale of sexually-explicit material to minors that the legislature determined to be harmful.[2] California asks this Court to extend this standard to the commercial sale of offensively violent video games to minors and uphold the Act. Such an extension is fully supported by the governmental and social interests reaffirmed by this Court in *Ginsberg*. The terms employed by the Act to accomplish this extension are more than adequate to inform a reasonable person of the level of video game violence that is covered.

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[2] Defined as patently offensive, appealing to a minor's prurient, shameful or morbid interest in sex, and lacking any redeeming social importance for minors. 390 U.S. at 631.

As in *Ginsberg*, the Act covers only commercial transactions entered into by minors outside the presence of parents. It does not ban adults from purchasing any expressive material, and it prohibits no one from viewing it. The only material covered by the Act represents the violence equivalent of sexual obscenity; video games sold to minors that are not offensively violent will retain their full First Amendment protection. Respondents themselves go to great lengths to ensure that minors cannot purchase these games on their own, insisting that parents make the informed purchase for them by including descriptions of the level of violent content contained in rated games. And the Act will, as respondents acknowledge, target only the 8 to 17 percent of minors who purchase video games outside the presence of a parent. Resp. Br. 9 (noting that evidence suggests parents are present when minors purchase video games between 83 to 92 percent of the time). So for the vast majority of minors whose parents purchase video games for them, the Act will have no impact whatsoever. In the limited context of these commercial transactions, the Act simply advances the fundamental right of parents to direct their children's development in a manner best suited to the individual needs of the child.

The Act does not prohibit minors from purchasing the Bible, *Harry Potter*, children's stories such as *Snow White*, or other literary writings and media. The Act patently protects such works when sold to minors and adults alike. Petitioners agree that the literature discussed in Respondents' brief is fully protected by the Constitution, and it will remain so under the Act. The material covered by the Act cannot be fairly analogized to the types of speech that have been historically protected. In truth, the video games subject to the Act's restrictions have no historic parallel other than obscenity. It would not be a misnomer to refer to the material covered by the Act as "obscene violence."[3]

The Act applies, first, only to violent gaming content that includes the killing, maiming, dismembering, or sexually assaulting of an image of a human being in a manner that a reasonable person would find appeals to a deviant or morbid interest of minors. Cal. Civ. Code § 1746 (d)(1)(A)(i). Application of this prong of the Act is straightforward. A reasonable person can make this judgment through application of a common understanding and definition of the applicable terms. Does the violent content appeal to a minor's interest in violence that is abnormal or departs from established norms or social customs as to what level of violence is appropriate for minors?[4] As respondents note, and petitioners concur, common understandings can indeed play a significant role in First Amendment jurisprudence. There is no reason to believe these common understandings of the terms employed by the Act cannot be applied to violent content depicted in video games.

---

[3] As this Court noted in *Miller v. California*, obscenity is commonly defined as "'1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle'" and "'[o]ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.'" 413 U.S. 15, 20, n. 2 (1973). Violent material can surely be depicted in a manner that meets these definitions.

Second, and only if the first prong is satisfied, the Act will apply to a game if the violent content, as defined, is patently offensive to prevailing standards in the community as to what is suitable for minors. Cal. Civ. Code § 1746 (d)(1)(A)(ii). Again, application of this element is straightforward. This Court has applied limiting constructions to the types of actions that a jury may find "patently offensive" under the sexual obscenity test, including "descriptions of ultimate sexual acts, normal or perverted, actual or simulated," "descriptions of masturbation," etc. *See Miller v. California*, 413 U.S. 15, 25 (1973). Here, the Act places limiting terms in the text of the statute itself, namely, killing, maiming, dismembering, or sexually assaulting an image of a human being. Cal. Civ. Code § 1746 (d)(1). The Act operates only within this narrowly defined, identifiable context.

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[4] *See* Black's Law Dictionary 462 (7th ed. 1999) (defining "deviance" as "[t]he quality or state of departing from established norms, esp. in social customs.").

Finally, if the first two prongs are satisfied, the Act will apply only to games where the patently offensive, deviant level of violence causes the game as a whole to *lack serious literary, artistic, political, or scientific value* for minors. Cal. Civ. Code § 1746 (d)(1)(A)(iii). Like the law governing the regulation of obscenity, this third prong, drawn from *Miller*, ensures that the societal value of violent video games will be judged by a national standard, and will not be subject to the degree of local acceptance by an individual community. This Court noted in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), that the third prong of the test "is particularly important because, unlike the 'patently offensive' and 'prurient interest' criteria, it is not judged by contemporary community standards." *Id.* at 873. Thus, "the serious value requirement allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 579 (2002) (internal quotations omitted). Respondents can therefore be assured that, so long as the video games they import into or distribute within California can reasonably be said to meet a national minimum for socially redeeming value for minors, no labeling is required under the Act.

The terms employed by the Act to accomplish its purpose were developed through decades of litigation and numerous decisions of this Court. Although the Act replaces "prurient" interest in sex with "deviant" interest in violence, the social interests served through the use of these terms are the same when a state acts to protect minors. Parents are in the best position to judge whether material that appeals to minors' deviant interest in violence is appropriate for their child's particular stage of development, no less so than with sexual material appealing to minors' prurient interest in sex. Both categories of expressive material can negatively impact a child's development. In these two specific categories, the rights of parents must take precedence over both the preferences of minors and the asserted rights of commercial retailers.

B. The Historic Prevalence of Violent Depictions in Art and Literature Provides No Basis to Shield the Material Covered by the Act from Regulation in Respect to Minors

Respondents suggest that because there is a level of violence that has historically played a role in children's literature, no level of violent content exists which could justify regulations upon the direct sale of violent video games to minors. This argument misses the point. As noted above, Petitioners agree that violent content has historically played an important role in literature, movies, art, and even in some video games. While stories such as "How the Children

Played Butcher with Each Other" by the Brothers Grimm often depict incredibly brutal violence, as amici First Amendment Lawyers Association themselves note, "The Brothers Grimm utilized extreme violence in their stories in the attempt to deter bad behavior in children." First Amendment Lawyers Ass'n Br. 14. Such literature often attempts to teach children important life lessons, such as not mimicking the violent behavior they witness, whether real or fantasy. While the level of violence in such literature can be intense, it enjoys constitutional protection because it has literary and artistic value. In contrast, violent video games that satisfy all three prongs of the Act will, by definition, lack such value for minors and represent an adult invasion of children's culture, no less so than the sexually-explicit magazines at issue in *Ginsberg*. In such situations, no constitutional principles are served by allowing minors to purchase this material without parental involvement.

As with violent content, sexual content has also played a significant role in great art and literature throughout history. Such material forms an important part of American culture, even for purposes of educating minors in the classic works of Renaissance artists and writers. In fact, a short trip to the National Gallery of Art will reveal many nude paintings and other art work involving sex. And many famous literary works contain graphic depictions of sex. John Cleland's *Fanny Hill* contains numerous, graphic descriptions of the characters of the book engaged in various sexual acts, often with highly evocative language. Yet the proliferation of sexual material throughout society has never been accepted by this Court as an excuse to protect the commercial sale of offensively sexual material to minors.

Despite the prevalence of obscene literature since at least 1821, *see Roth v. United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting), it was not until 1968 that the Court recognized society's compelling interest in protecting minors from material that is sexual but not obscene. The prevalence of sexually-explicit material in society did not serve to protect it from regulation as to minors, and neither should the prevalence of violent material do so today.

Instead, it must be recognized that, just as with sex, violent material can be depicted in a manner that falls outside the protection of the First Amendment in respect to minors. This is certainly true in the context of video games. In fact, one "Top 10" list published online in 2009[5] rates the top 10 "most violent video games." Number three on the list is the video game *Manhunt*. The author describes the level of violence in the game quite bluntly: "[T]he player sneaks around a 3-D environment and commits heinous acts of murder as part of a sadistic form of entertainment. Decapitation, steel-object-to-the-brain impaling and even the ability to jam a sickle up an unsuspecting victim's ass was part of the Manhunt experience.

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[5] *See* http://www.askmen.com/top_10/videogame/archive1.html.

Violence indeed."[6] Number four on the list is *MadWorld*, which the author describes as follows:

> What's black and white and red all over? Your victims as they're splattered against the wall after being skewered on a lamppost. Or perhaps the answer could include disposing of your enemies in a meat grinder, or playing darts using only your opponents and a baseball bat. Whatever the stylish kill, this video game means serious business on the violence factor. Maybe the blood splatter on a black-and-white backdrop really highlights the ferociousness and gratuitous violence, but any game with flavors of *The Running Man* and a protagonist with a chainsaw on his arm usually have violent potency.[7]

While there is certainly a level of violence available in video games that is not patently offensive, appealing to a minor's deviant interest, it should be beyond argument that there is also a level that is. Far from representing a "fundamental part of our history, culture, and politics" for minors (Resp. Br. 20), no societal or constitutional interest is served by ensuring to minors the right independently to purchase, or to respondents the right to sell to minors, games meeting the Act's narrow definition. The important place in American culture that is occupied by expression depicting violence provides no basis for overturning California's narrow prohibition on the commercial sale of offensively violent video games to minors. As with sex, depictions of violence can go so far as to lose all constitutional protection with respect to minors.

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[6] http://www.askmen.com/top_10/videogame/top-10-most-violent-video-games_3.html.

[7] http://www.askmen.com/top_10/videogame/top-10-most-violent-video-games_4.html.

C. The First Amendment Should Not Be Used to Frustrate State Efforts to Ensure that Parents Have The Opportunity To Direct The Development and Upbringing of their Children in Respect to the Purchase of Violent Video Games

At its core, the Act does no more than regulate a commercial transaction between video game retailers and minors when the game meets the Act's narrow definition. Society is best served by an interpretation of the Constitution that leaves the responsibility of directing the development and upbringing of minors with the parents, not one that allows the profits of video game manufacturers and retailers to take precedence.

Respondents cannot identify any constitutional value that is served by permitting them to engage in a commercial transaction with an unaccompanied minor for the sale of an offensively violent video game. Yet under respondents' reasoning, the Constitution must be interpreted in a manner that guarantees them a right to engage in such a transaction. Presumably, this newly crafted right – finding its existence in the First Amendment – would trump even a parent's right to object to the sale. A proper interpretation of the First Amendment rejects such an absurd result.

Respondents have failed to identify any historical evidence supporting their assertion that the Constitution guarantees them the right to sell offensively violent material to minors. Instead, they rely upon the notion that shielding minors from access to such violence will prevent them from becoming "well-functioning, independent-minded adults and responsible citizens. . . ." Resp. Br. 25, quoting *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 576-77 (7th Cir. 2001). This line of reasoning fails for at least two reasons.

First, and most importantly, it is the role of parents, not respondents or the marketplace – nor indeed, the state – to determine whether a patently offensive violent video game that lacks serious redeeming value is suitable for an individual minor. Such a decision is best left to the parents, who can make this determination based upon the child's relative maturity and phase of development. The Act assists parents by ensuring they are informed of the level of offensive violence depicted in the games through the labeling requirement, which allows parents to then make informed decisions as to whether to purchase and allow their children to play a covered game.

Second, respondents' apparent view that the development of minors is promoted by unfettered access to offensively violent video games is directly contradicted by their own efforts to prevent minors from purchasing even M-rated games. Under the rule of law proposed by respondents, they would have a constitutional right to sell minors an offensively violent video game, over the objection of a parent, even though their own rating system recommends they refrain from doing so. Respondents cite to no precedent that could support such an application of the Constitution.

Applying the *Ginsberg* framework to the Act's regulation of commercial transactions with minors ensures that parents, and not minors or retailers, can carry out their important role of directing the development of children. This Court should extend the standard established in *Ginsberg* to the material covered by the Act.

II. Minors Occupy a Special Place in Civil Society, Which Demands that Constitutional Principles Be Applied with Sensitivity and Flexibility

Notably absent from respondents' brief is *any* discussion of the well-established principle that minors occupy a truly unique place in our civil society, such that application of the law must take into account fundamental differences between adults and minors. Instead, respondents ask this Court to treat minors no differently than adults. But as this Court has repeatedly recognized, scientific and sociological studies show that youth under the age of 18 lack maturity and have an underdeveloped sense of responsibility. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010). And minors are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . ." *Roper*, 543 U.S. at 569. Ultimately, we know that there are fundamental differences between juvenile and adult minds. *Graham*, 130 S. Ct. at 2026. These differences are not rendered meaningless when First Amendment concerns are at issue. To the contrary; it is in the realm of consumption of expressive material that the Court has relied upon these differences to craft sensitive, flexible rules that permit parents to direct the upbringing of children while empowering governments to aid parents in this important endeavor. *See Ginsberg*, 390 U.S. at 638; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Morse v. Frederick*, 551 U.S. 393 (2007); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

Respondents do not address the impact unsupervised consumption of offensively violent media can have on a minor's developing mind. Instead, they make two bold, yet entirely unpersuasive assertions. First, they claim that minors' unfettered access to the violent video games covered by the Act is not a "significant societal problem." Resp. Br. 35. Second, they claim that parents do not need the assistance of the State in helping protect children in their absence. *Id.* at 36-37. Not so. Indeed, in contrast to respondents' position, the political branches of the federal government are acutely aware of parents' need for governmental assistance in protecting minors from the societal problems posed by the increase in violent media.

For over a decade, the federal government has been investigating the marketing and sale of violent media to our country's youth. In 1999, President Clinton asked the Federal Trade Commission and the Department of Justice to undertake a study of whether the movie, music recording, and computer and video game industries market, advertise, and sell products with violent content to our youth. *See* FTC, Marketing Violent Entertainment To Children, p. i (Sept. 2000), *available at* http://www.ftc.gov/reports/violence/vioreport.pdf (FTC 2000 Report). The FTC Report aptly describes the concerns acted upon by the State of California in 2005:

> Scholars and observers generally have agreed that exposure to violence in entertainment media alone does not cause a child to commit a violent act and that it is not the sole, or even necessarily the most important, factor contributing to youth aggression, anti-social attitudes and violence. Nonetheless, there is widespread agreement that it is a cause for concern. The Commission's literature review reveals that a majority of the investigations into the impact of media violence on children find that there is a high correlation between exposure to media violence and aggressive, and at times violent, behavior. In addition, a number of research

> efforts report that exposure to media violence is correlated with increased acceptance of violent behavior in others, as well as an exaggerated perception of the amount of violence in society.

Id. at i-ii. Yet to date, despite having introduced multiple bills dealing with the marketing and sale of violent video games to minors,[8] Congress has failed to pass any legislation responsive to these concerns. But where Congress has failed, the State of California has succeeded.

Respondents dismiss the country's decade-long concern about the impact of violent media on children as simply a waste of resources on a problem that does not exist. This glib dismissal of the legitimate concerns of countless parents and legislators is not surprising. There is no reason to believe that the video game industry's profit motives would be aligned with the concerns of parents and elected representatives who believe parents should have the tools to guide the development of their children.[9]

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[8] *See, e.g.*, Video Game Rating Act of 1994, S. 1823, 103rd Cong. (1994); Video Game Rating Act of 1994, H.R. 3785, 103rd Cong. (1994); Protect Children from Video Game Sex and Violence Act, H.R. 669, 108th Cong. (2003); Video Game Decency Act of 2007, H.R. 1531, 110th Cong. (2007); Children Protection from Video Game Violence and Sexual Content Act, H.R. 2958, 110th Cong. (2007); Truth in Video Game Rating Act, S. 568, 110th Cong. (2007); Parents' Empowerment Act, H.R. 3899, 110th Cong. (2007).

The 2009 FTC Report found that, for the first time, video game marketing plans included "cross-promotional arrangements with quick service restaurants." FTC 2009 Report, p. 26, *available at* http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf. Such plans call for the marketing of violent video games with quick service restaurants, whereby the M-rated (for violence) game Halo 3 "was heavily cross-promoted with Burger King, Mountain Dew, and 7-Eleven Slurpees." *Id.* The FTC found that these types of promotions "likely appeal to many teens under age 17." *Id.* The FTC also reported that evidence demonstrated that "40% of twenty top-selling M-rated games (with a content descriptor for violence) were advertised on websites highly popular with children 2-12 or teens 13-16." *Id.* at 25.

In the face of these aggressive, indeed unprecedented, marketing techniques, Respondents' assertion that parents need no assistance in protecting minors from offensively violent video games is remarkable.

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[9] A 2010 poll conducted by Zogby International surveying 2,100 adults shows that "72 percent of adults support a ban on the sale of ultra-violent video games to minors; 65 percent of parents say that they're concerned about the impact of ultra-violent video games on their kids; [and] 75 percent of parents would give the video game industry a negative rating when it comes to how they protect kids from violent video games." (*Results available at* http://www.zogby.com/Soundbites/ReadClips.cfm?ID=19412).

Given the unique vulnerabilities of minors and the child-centric marketing efforts being employed by the respondents' industry, parents need the State's assistance now more than ever.

III. The Act Is the Least Restrictive Means of Serving the State's Compelling Interests

California has a compelling interest in preventing minors from purchasing video games covered by the Act without the involvement of a parent. In this regard, California's interest is no different than that of New York at issue in *Ginsberg*. The Act's direct sales restriction serves to assist parents in screening their children's access to offensively violent video games. Respondents ignore these important interests served by the Act. Permitting direct sales to minors directly undercuts the interests sought to be promoted by the State, as voluntary industry efforts have been shown to fail for a significant portion of minors.

There is no evidence in the record demonstrating the percentage of minors who purchase the limited class of offensively violent video games covered by the Act. Of course, this is because these games had yet to be identified as such. The industry's own ratings fail to differentiate between violence and the offensive violence covered by the Act, combining both under the rating "M" for mature. So when California passed the Act, the legislature considered the best evidence then available, including multiple FTC reports, which showed that, even for M-rated games, unaccompanied minors were able to make purchases between 69 percent and 85 percent of the time from 2000 to 2004. JA 130, 140, 746, 816.

The California Legislature was fully aware that well over half of all unaccompanied minors under 17 years of age were able to purchase M-rated video games in violation of the industry's voluntary policies. This non-compliance rate is a far cry from achieving the State's interest in ensuring offensively violent video games are not sold to minors. But even if that percentage has dropped to 20 percent today after over a decade of industry efforts (Resp. Br. 9), the State's interest in helping parents protect these minors is no less compelling. Moreover, the 20 percent non-compliance rate may well understate how many minors can purchase M-rated video games. As the FTC reported in 2009, Toys 'R' Us failed to enforce the sales restriction 44 percent of the time. FTC 2009 Report, p. 28. Minors can certainly learn which vendors are more likely to sell offensively violent video games without checking identification. A 20 percent non-compliance rate could thus mean that many more video games are being improperly sold to minors than this figure would suggest. More importantly, even a 20 percent non-compliance rate is far from inconsequential.

Respondents and amici also point to parental involvement as a way of achieving California's goals. California, of course, welcomes the active involvement of parents in determining which games are suitable for their children; aiding these parents when they cannot be present for the purchase is a principle purpose of the Act. Indeed, in the 83 percent of cases where a parent accompanies a minor to a store to buy a video game (Resp. Br. 9), the Act is effectively inapplicable, since the parent can purchase the game for the minor. It is only where a parent is *not* present that the Act has any effect, and that is precisely the point: to ensure that minors do not have access to the most violent video games unless approved by their parent. The fact that parents and guardians are often involved in minors' purchase and use of a video game thus does not render the Act invalid; rather it underscores how the Act is narrow in its application.

The fact that some game consoles may now have parental controls that permit a parent to attempt to restrict the types of games played is insufficient to protect the interests served by the Act. First and foremost, there is no evidence in the record as to the efficacy of such controls, as these controls were still under development at the time of the Act's passage in 2005. It appears that only one console containing such controls emerged at the end of the year following the Act's passage.[10] Moreover, there is substantial

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[10] According to the ESRB, gaming consoles containing parental controls include the Microsoft Xbox 360, Nintendo Wii, and Sony Playstation 3. (*See* A Parent's Guide To Video Games, Parental Controls, and Online Safety, *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf.) None of these consoles were available at the time the Act was signed into law in October of 2005. *See, e.g.*, http://www.joystiq.com/

(Continued on following page)

reason to believe that such controls will not adequately address the interests promoted by the Act. A quick search on Google reveals that a user has to simply press a series of buttons on the controller of an Xbox to reset the password needed to override the parental settings.[11] Similar searches produce written instructions for the Sony Playstation 3 and Nintendo Wii.[12] In fact, multiple video clips demonstrating how to bypass parental controls on gaming consoles appear on YouTube.[13] Put simply, once a minor purchases a game, the parental controls are of limited use, especially for a minor with even modest technological aptitude.

Ultimately, there is no less restrictive means to ensure parental control of access to offensively violent video games by their children than prohibiting the direct sale of those games to minors. No other available alternative adequately serves California's interest.

2005/09/15/all-xbox-360-launch-dates-announced-in-us-on-nov-22/ (noting Xbox 360 not available until November 22, 2005).

[11] http://www.biline.ca/xbox-faq.htm#1.

[12] *See, e.g.*, http://www.gamespot.com/pages/forums/show_msgs.php?topic_id=26467378 (Playstation 3); http://wii.marcansoft.com/parental.psp (Wii).

[13] *See, e.g.*, http://www.yutube.com/watch?v=CFIVfVmvN6k&sns=em (Xbox 360); http://www.youtube.com/watch?v=Samf3N0J4&feature=youtube_gdata_player (Wii).

IV. To the Extent the Act Applies to Online Sales, Its Reach Is Properly Limited to Commercial Transactions with Minors; It Permits Adults To Purchase Games for Minors; and It Leaves Adult Access Unrestricted

Although application of the Act has yet to be construed by a state or federal court, the language and purpose of the Act indicate that its restrictions apply to online sales of violent video games. Section 1746 defines a video game as any "electronic amusement device that utilizes a computer, microprocessor, or other similar electronic circuitry." The definition would appear to include both video games purchased online and physically shipped to a purchaser's home, as well as games that are purchased and downloaded or played online. Thus, under the Act an online game that meets the definition of violent video game may not be sold to a minor. Cal. Civ. Code § 1746.1(a). Notably, however, the Act only covers the "sale" or "rental" of a violent video game to a minor; noncommercial transactions are not regulated. Section 1746.1 provides affirmative defenses for alleged violations. For example, a retailer who demands and is shown evidence of a purchaser's age may reasonably rely upon such evidence as a defense to prosecution under the Act. *Id.* Such evidence may include, but is not limited to, "a driver's license or an identification card issued . . . by a state or the Armed Forces of the United States." *Id.*

In a footnote, respondents argue for the first time on appeal that, should the Act be construed to apply to online sales, it "would raise the same kinds of problems that have limited regulation of sexual content on the Internet" citing *Ashcroft* and *Reno*. Resp. Br. 51 n. 21. Not so.

The federal statute at issue in *Reno* prohibited any transmission (commercial or not) of obscenity, as well as "indecent" and "patently offensive messages" to persons under 18 years of age. 521 U.S. at 858-60. The statute had no exemption for parents wishing to obtain indecent material for their children, was not limited to commercial transactions, and did not contain the three narrow prongs of the *Miller* test. *Id.* at 865. The Court ultimately found that the statute would bar even adult access to protected speech on the Internet: "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." *Id.* at 874.

The federal statute at issue in *Ashcroft* flatly prohibited the "posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'" 542 U.S. 656, 661 (2004). In affirming the preliminary injunction, the Court held that such a blanket prohibition, carrying penalties of up to $50,000.00, would likely restrict all adult access to protected speech and that less restrictive means such as "filters" could serve the government interest in protecting children. *Id.* at 667-70.

Here, the Act carries none of the risks presented by those federal regulations. First, the Act is limited in reach through the use of the *Miller* test. Second, the Act only applies to commercial transactions with minors. And third, the Act permits parents to purchase covered video games for their children. Respondents' half-hearted claim that no regulation can be crafted that can permissibly protect minors from harmful material sold via the Internet is, as this Court noted in *Ashcroft*, 542 U.S. at 672 wrong: "On a final point, it is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials."

Here, online retailers can comply with the Act by taking simple age-verification measures for sales shipped to California and online transactions. Importantly, as this Court noted in *Reno* thirteen years ago, age verification for Internet sales is possible and practical for commercial sales – the only activity covered by California's Act: "Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password." *Reno*, 521 U.S. at 856; *see also* Jack L. Goldsmith, Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 809-12 (March 2001) (noting the ease with which Internet content providers can implement age and geographic location verification measures). Thus, to the extent the Act applies to online sales, it properly restricts only minors' access to the covered games through a commercial transaction in which age and location can easily be verified, while leaving adult access to such games unfettered.

* * *

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

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ARNOLD SCHWARZENEGGER, GOVERNOR OF THE STATE OF CALIFORNIA, AND EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION AND ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ACTIVISION BLIZZARD, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Activision Blizzard, Inc. is a California-based video game publisher whose game portfolio includes best-sellers such as the record shattering first-person shooters in the *Call of Duty* series; the *Guitar Hero* franchise; action sports titles including champion skateboarder Tony Hawk's *Tony Hawk: RIDE*; adventure games utilizing comic-book and motion-picture licensed characters and plots including *Spider-Man: Friend or Foe*, *X-Men Origins: Wolverine*, and *James Bond: Quantum of Solace*; family entertainment titles such as *Shrek Forever After*; and massively multiplayer online role-playing games such as *World of Warcraft* and *StarCraft*.

Activision Blizzard and its subsidiaries employ thousands of creative and skilled artists and innovators – writers, animators, visual designers, software architects, programmers, actors, set designers, sound and lighting technicians, and other professionals – in the United States and abroad, including well over 3,000 in California alone. The company's products are unique, with audio and visual elements, richness, and complexity often far in excess of comparable offerings from competing entertainment fields such as books, films, and music. The company's products combine "bleeding edge" technological developments, vivid and engrossing storytelling, and creative implementation to form works of art with true worldwide appeal.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

Activision Blizzard's success in this regard is reflective of the accomplishments of the entertainment software industry as a whole. The company's growth from $40 million in annual fiscal revenues in 1995 to $5 billion in 2010 speaks volumes for the popularity of its products among millions of its consumers. *Call of Duty: Modern Warfare 2* garnered over $550 million in retail sales in the first five days of its 2009 release (more than any entertainment product to date, whether film, music record, concert, or book), and went on to become the top-selling console game of the year in both the United States and Europe. *Modern Warfare 2* and *Guitar Hero III: Legends of Rock* each have earned well over $1 billion in retail sales revenues. So too has *World of Warcraft*, which is the world's most popular online game, with approximately 11.5 million subscribers worldwide. One of Activision's wholly owned development studios, Neversoft, has created video game products with combined gross revenue sales since 1998 that exceed the entire domestic and international theatrical box office receipts of the *Star Wars* film franchise since the 1970s. Similar examples can be found throughout the entire video game industry.

The entertainment software industry has been an engine for U.S. economic growth, especially in California, and has contributed billions of dollars to national gross domestic product during the recent recession. It remains the most economically successful American cultural export in the Far East and is emerging as the future of popular culture worldwide.

Some of the games that Activision Blizzard publishes could be subject to the sales restrictions, labeling requirements, and attendant sanctions provided in California Civil Code §§ 1746-1746.5. For example, the company will release the next installment of the *Call of Duty* series, *Call of Duty: Black Ops*, on November 9, 2010. This is a first-person shooter game in which players assume the identities of American operatives involved in covert activities during the Cold War. The scenario of this game is similar to those found in many movies and books written in the past 40 years. Evil Nazi scientists controlled by mad men of the military elite prepare for world domination. It is up to the brave American elite soldiers to save the world from destruction. The game features realistic scenes of combat operations, not unlike those found in a typical *Rambo* or *James Bond* film, a Tom Clancy novel, or even a prime-time television series such as *24* or *Alias*.

As with previous titles in the *Call of Duty* franchise, Activision Blizzard expects to sell millions of units of *Call of Duty: Black Ops*, including in California, which alone is the largest U.S. video game market. Activision Blizzard therefore is a "speaker" potentially affected by the California statute at issue here, with a direct and concrete interest in this Court's resolution of the constitutional questions this case presents.

SUMMARY OF ARGUMENT

This brief explains the origins, mechanics, and effectiveness of the video game industry's self-regulation through the Entertainment Software Rating Board ("ESRB"), an independent entity established in the 1990s by respondent Entertainment Software Association ("ESA").[2] The ESRB's rating and enforcement scheme – which the Federal Trade Commission ("FTC") has held up as a model of self-regulation for other media – provides two grounds for holding that California's statute is unconstitutional.

First: California asserts an interest in "helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games." Pet. Br. at 56. Because, however, the pre-existing ESRB rating and enforcement scheme effectively empowers parents to make informed decisions regarding the games their children play, the California statute - which flatly prohibits the sale to minors of games that meet the statutory definition – does not materially advance that interest beyond what the ESRB system already provides.

Speech restrictions can be upheld only if they "in fact alleviate . . . harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). The ESRB's rating system, as the FTC itself has concluded, is effective, vigorous, nimble, and responsive. California cannot demonstrate that its sales prohibitions materially advance its asserted interest any more effectively than the ESRB's rating system, and so the speech restriction fails at the outset.

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[2] Although no longer a member of the ESA, Activision Blizzard was a member during the ESA's formative years and championed the development of the ESRB's rating system.

Second: Even if California were correct that current self-regulation is not sufficiently effective, the proposed sale restrictions and labeling requirements are unconstitutional because they are not the "least restrictive" means to achieve the State's goal. If strict scrutiny applies – as we believe it does – the California statute "is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (citation omitted).[3] Here, California could have adopted any number of measures – such as encouraging or conducting advertising campaigns designed to ensure even higher rates of parental understanding of, and reliance on, the ESRB's rating system – that are less restrictive than California's outright ban on sales to minors and accompanying labeling and penalty provisions.

This brief describes the aspects of the ESRB's rating and enforcement system that support these two grounds for invalidating California's statute. As discussed below, the video game industry established the ESRB, and designed and implemented its rating and enforcement system, in response to the threat of federal legislation and a series of joint congressional hearings in the early 1990s. Satisfied that the ESRB, as established, addressed its concerns, Congress took no action to regulate the industry.

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[3] Five times in the last two decades, this Court has emphasized that free-market solutions designed to provide parents greater control over children's access to adult content are preferable to government bans on sales or distribution. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Denver Area Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

Since its establishment, the ESRB has augmented and improved its rating system and advertising guidelines to ensure that parents have ready access to information about game content. These measures include: (1) simple, easy-to-use rating icons that indicate age appropriateness; (2) "content descriptors" that indicate the types of content that influenced the rating category assigned or which may be of interest or concern to parents; and (3) beginning in 2008, plain-language rating summaries that provide specific examples of content that influenced assignment of the content descriptors displayed on the game's packaging (and which are available on the ESRB's website and mobile website). The ESRB vigorously enforces its rating system and advertising guidelines, and partners with retailers to help ensure that they, too, enforce their store policies not to sell or rent Mature-rated games to anyone under age 17 unaccompanied by a parent.

Finally, this brief provides evidence reflecting the remarkable effectiveness of these measures in ensuring that parents are involved in decisions about their children's gaming. Indeed, the FTC, in a report to Congress issued in December 2009, gave the ESRB's rating and enforcement system high marks for its effectiveness and trustworthiness in the eyes of parents.[4] Given this, there is no need for the California statute.

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[4] *See* FTC, *Marketing Violent Entertainment to Children* at 29-30 (Dec. 2009), *available at* http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf (hereafter "FTC 2009 Report").

ARGUMENT

I. THE ESRB'S RATING SYSTEM WAS DESIGNED TO MEET CONGRESSIONAL CONCERNS IDENTICAL TO THOSE THAT PROMPTED PASSAGE OF CALIFORNIA'S STATUTE.

Legislative interest in protecting children from the allegedly harmful effects of video game violence is not a new phenomenon. Congress voiced precisely such concerns in a series of hearings during the early 1990s, and called on the video game industry to create a voluntary rating system of its own as a means of providing parents with the information needed to make informed judgments about which video games to allow their children to play.

In December 1993, Senators Joseph Lieberman and Herb Kohl convened joint hearings before the Senate subcommittees they chaired in response to release of Ed Boon and John Tobias' *Mortal Kombat* and Sega's *Night Trap*, video games which the Senators believed contained depictions of violence inappropriate for young children. *See Rating Video Games: A Parent's Guide to Games*, Joint Hearings Before the Senate Subcomm. on Juvenile Justice and the Subcomm. on Regulation and Government Information, 103d Cong., S. Hrg. 103-887, at 2-3 (1993-1994) (hereafter "Joint Hearings"). Concerned that parents were purchasing these and similar games for their children without adequate information about what the games contained, Senators Lieberman and Kohl advised key members of the video game industry that they intended to introduce legislation mandating parental advisories with respect to video games if the industry did not establish an effective self-regulatory rating system of its own. Both Senators acknowledged the threats to First Amendment freedoms that such government-mandated parental advisories would pose, and they therefore urged the industry to create a voluntary rating system that would address the concerns they had raised. *See id.* at 73.

In February 1994, Senator Lieberman introduced the Video Game Rating Act of 1994. *See* S. 1823, 103d Cong. (Feb. 3, 1994); *see also* H.R. 3785, 103d Cong. (Feb. 3, 1994) (House version of the bill). The Act would have created the Interactive Entertainment Rating Commission as a new Executive Branch agency charged, during its first year, with evaluating the video game industry's efforts to create a voluntary rating system. S. 1823, § 4(a). If the Commission determined that such efforts were insufficient "to adequately warn parents and users of the violence or sex content of video games" (*id.*), the Act would have empowered the Commission to "promulgate regulations requiring manufacturers and sellers of video games to provide adequate information relating to violence or sexually explicit content of such video games to purchasers and users." S. 1823, § 4(b).

Following introduction of this legislation, leading members of the video game industry pledged to develop a voluntary rating system that would obviate the need for government regulation. In July 1994, industry representatives returned to Congress to announce the results of the industry's efforts to develop a self-regulatory system similar in concept to the one adopted by the motion picture industry but tailored to the new medium of video games.

The central component of the industry's proposed rating system was the creation of an independent rating board – the ESRB – with the power to determine final ratings for games before they reached store shelves. Under the direction of Dr. Arthur Pober, an educator and former head of the Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus, the ESRB conducted extensive focus groups with parents to test different rating concepts and gauge the type of content parents viewed as appropriate for different age groups. *See* Joint Hearings at 132. In addition, the ESRB consulted with a wide range of nationally recognized experts in child development and education and reviewed rating systems used in other countries and for other media. *Id.* at 132, 136-37, 140. Based on that research, the ESRB adopted a rating system (described in greater detail below) that includes both age-based rating categories and content descriptors - words or short phrases which indicate elements that may have triggered a rating or which may be of interest or concern to parents.

The proposed ESRB rating system met each of the criteria Senators Lieberman and Kohl had identified as essential to effective industry self-regulation. First, the ESRB was established as an independent entity separate from the ESA. *See* Joint Hearings at 132. No ESRB rating assignment has ever been subject to review by the ESA's board or its member companies. Game ratings, from the start, have been determined by a minimum of three, demographically diverse raters with no ties to the industry and whose identities remain anonymous, to insulate them from outside pressure.

Second, the rating system recognized differences in age between very young children and those who are older. *See* Joint Hearings at 133. Third, the system required prominent display of a game's rating on all packaging, advertising, and promotional materials, and included an effective enforcement plan with strong penalties and sanctions. *Id.* Fourth, the system provided sufficient information to parents in the three areas that were the focus of the congressional hearings – violence, sex, and language – and indeed went further by providing information about alcohol use, tobacco use, and gambling as well. *Id.* The ESRB's rating system also included an advertising code developed by Dr. Pober designed to ensure, among other things, that advertisements did not target audiences for whom a given game might not be appropriate. Finally, the industry agreed to undertake an intensive public education campaign to inform consumers about the new system. *Id.*

After hearing details of the proposed rating system, Senators Lieberman and Kohl stated that if the industry followed through with its plans, "then we can shelve the legislation that we have prepared to force a rating system into existence." Joint Hearings at 126 (statement of Senator Lieberman). The Senators commended the industry for having "met the challenge that we set out before you," and Senator Lieberman specifically praised the industry's effort as "the most informative and comprehensive rating system for any entertainment medium in this country that I am aware of." *Id.* at 145.

II. THE CURRENT ESRB RATING SYSTEM TAKES A COMPREHENSIVE APPROACH TO INFORMING PARENTS ABOUT GAME CONTENT AND REGULATING THE INDUSTRY'S INTERACTIONS WITH MINORS.

Since its inception in 1994, the ESRB's rating system has continued to evolve, becoming even more robust and responsive to parental concerns than it was upon launch. The ESRB's process for rating video games ensures consistency and reliability in the ratings it assigns. That process starts with trained, demographically diverse "raters" who have experience with children and who are not affiliated with any entity in the video game industry. They review materials submitted by the game publisher and reach consensus on a rating. The rating information provided for each game is highly informative, including: (1) a rating category indicating age appropriateness; (2) one or more of 30 different content descriptors indicating elements that may have triggered the rating or that may be of interest or concern to a parent; and (3) rating summaries that embellish upon the content descriptors by giving specific examples of content that triggered those descriptors, including the most extreme examples in each content area.

The ESRB's rating system is also comprehensive. It includes enforcement of a wide-ranging set of advertising guidelines – including guidelines that prohibit targeting advertisements to children (in print, on television, and online) for whom the game advertised would be inappropriate – and a rigorous system of points, fines, and sanctions to ensure compliance with its content disclosure and advertising policies. Finally, the ESRB partners with retailers in support of their efforts to prevent the sale of Mature-rated games to unaccompanied minors.

A. The Process By Which Games Are Rated[5]

Video games are rated by the ESRB *before* they are released to the public. Typically, a publisher will begin the process of obtaining an ESRB rating while a game still is in the final stages of development.

Publishers must submit to the ESRB responses to a detailed questionnaire about the game, often supplementing those responses with lyric sheets, scripts, etc. The responses must affirmatively disclose "pertinent content," a term of art defined by the ESRB to include any material that could bear upon the rating and content descriptors assigned to the game, including the most extreme examples of sexual content, violence, language, alcohol and tobacco use, as well as content that demonstrates the game's context, such as setting, storyline, and game objectives. Publishers must also submit a DVD that captures all "pertinent content."

These materials are first assessed by ESRB staff to ensure they are complete and accurate. Once that is confirmed, they are reviewed by at least three raters, who are employed by the ESRB as full-time staff and who have prior experience with children. The ESRB protects the anonymity of these raters, who must remain free from ties to individuals or companies involved in the video game industry.

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[5] *See generally* http://www.esrb.org/ratings/ratings_process.jsp.

After reviewing the rating materials, each rater first individually assigns the game a tentative rating category and content descriptors. The raters then discuss their tentative ratings and deliberate with one another to reach consensus, taking into account prior ratings of games with similar content in order to maintain parity and consistency. ESRB staff then conducts a "parity review," comparing the raters' recommendation to ratings historically assigned for games with similar content. Once the parity review is complete, the ESRB issues a rating certificate to the publisher with the game's official rating. The publisher may either accept the rating as final or revise the game's content and resubmit it to the ESRB, at which time the process starts anew.

B. Age-Specific Ratings, Content Descriptors, And Rating Summaries[6]

ESRB ratings have two equally important parts: (1) the rating symbol; and (2) the content descriptors.

The rating symbols indicate the ESRB's recommendation as to the appropriate minimum age for players of a particular game. Game publishers must display a game's rating by printing the ESRB's official rating icon on the front of the game packaging.

There are six rating categories:

- **EC** for Early Childhood, *i.e.*, ages three and older
- **E** for Everyone, *i.e.*, ages six and older
- **E 10+** for Everyone 10+, *i.e.*, ages ten and older

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[6] *See generally* http://www.esrb.org/ratings/ratings_guide.jsp.

- **T** for Teen, *i.e.*, ages 13 and older
- **M** for Mature, *i.e.*, ages 17 and older
- **AO** for Adults Only, *i.e.*, ages 18 and older

Publishers in addition must display the assigned content descriptors (together with the rating icon) on the back of the packaging. The ESRB currently uses approximately 30 different content descriptors designed to inform parents of the nature of the material and the basis for the assigned rating. These include: "Blood," "Crude Humor," "Drug Reference," "Intense Violence," "Nudity," "Sexual Content," "Simulated Gambling," and "Use of Tobacco." Again, the ESRB mandates that publishers place content descriptors next to the official ESRB rating icons, making them instantly identifiable to consumers and parents. Both rating categories and content descriptors must also be displayed in all marketing materials as well.

In addition, in 2008 the ESRB began providing "rating summaries" for each video game assigned a rating. These summaries – which can range from a few sentences to several paragraphs, depending on the game content – provide straightforward descriptions of the specific content that led to the rating assignment, thereby alerting parents to content they might want to consider in determining whether a particular game is appropriate for their child. Unlike the rating symbol and content descriptors, these summaries are not on the game packaging. Parents can view them at the ESRB's websites (traditional and mobile), through the ESRB rating search widget (a downloadable application found on numerous websites, including parenting.org), or through use of a free iPhone application.[7]

C. Advertising Guidelines[8]

The ESRB, through its Advertising Review Council ("ARC"), also regulates industry advertising and marketing. Publishers agree by contract to abide by ARC Principles and Guidelines with respect to all games with ESRB ratings, and ARC can enforce compliance by requiring corrective actions and imposing fines.

ARC developed a number of "Principles" in support of its advertising guidelines that make clear that advertising campaigns should not market games to age groups for whom the game might be inappropriate: "[c]ompanies must not specifically target advertising for entertainment software products rated 'Teen,' 'Mature,' or 'Adults Only' to consumers for whom the product is not rated as appropriate." ARC's Principles also require truth-in-advertising: "An advertisement should accurately reflect the nature and content of the product it represents . . . i.e., an advertisement should not mislead the consumer as to the product's true character." Furthermore, ARC's Principles help ensure that the content included in game advertisements does not offend the general public.

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[7] The Rating Summary for Activision's E10+ rated *Shrek Forever After*, for example, notifies parents that: "Punches, kicks, belly flops, and sword slashes are used to defeat enemies; power-ups and special skills are employed to stun enemies in the melee-style combat. Dialogue includes references to a 'Magnus Rumpus,' strange odors (a bean joke), and the line 'Er, if it's yesterday's underwear, don't sniff 'em?' One song contains the work 'damn' in the lyrics (e.g., 'I don't give a damn about my reputation . . . ')." *See* http://www.esrb.org/ratings/synopsis.jsp?Certificate=28774.

[8] *See generally* http://www.esrb.org/ratings/principles_guidelines.jsp.

ARC issues detailed "Guidelines" that reflect and support the above Principles. The guidelines address various topics: violence, sex, alcohol and drugs, offensive expression, and insensitivity to religious beliefs and people with disabilities. The violence Guidelines, for example, prohibit the same sorts of depictions in advertising that might lead the ESRB to rate a game as "M" for Mature. The Guidelines do not allow "[r]epeated blows or gun shots inflicted on people/creatures . . . exploding body parts . . . depictions of fatal injuries and/or suicide . . . kicks to the groin." Nor do they allow "[e]xcessive and gratuitous amounts of blood and/or fleshy body parts, blood spurting from wounds," "[a]llusions or depictions of violent or degrading behavior toward women," "cruelty to animals," "dismemberment, decapitation," "[a]ssassination of a president or celebrity," "[p]eople/creatures on fire," and "weapon/bomb making."[9]

D. Enforcement[10]

The ESRB maintains authority to enforce publisher compliance with the rating system's content disclosure requirements and the ESRB's advertising guidelines, and it does so frequently and vigorously.

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[9] These provisions in ARC's Principles and Guidelines cover many categories of potentially offensive content that the California statute (which does not purport to regulate marketing campaigns) does not even address.

[10] *See generally* http://www.esrb.org/ratings/enforcement.jsp.

For example, ESRB staff play-test games after they have been released to the public, in order to confirm that the publisher's disclosure of "pertinent content" during the rating process was accurate and complete. If the ESRB determines that a publisher failed to make complete disclosure it can initiate an enforcement proceeding, which can result in revocation of the original rating, the imposition of monetary sanctions, and the ordering of corrective actions. The ESRB has utilized all of these potential sanctions, and on more than one occasion has ordered a game publisher to re-label all unsold inventory, including inventory that has already shipped to retailers.

The ESRB, through ARC, also monitors and, according to the FTC, "regularly"[11] enforces compliance with advertising guidelines and product labeling requirements by imposing monetary and other sanctions. Indeed, the ESRB issues over one hundred violations each year.[12] Although the majority of these violations are minor or technical in nature, the sheer number demonstrates the seriousness with which the ESRB undertakes its regulatory obligations.

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[11] FTC 2009 Report at 29.

[12] FTC, *Marketing Violent Entertainment to Children* at 20 (Apr. 2007), *available at* http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf (hereafter "FTC 2007 Report").

E. Retail Partnerships[13]

The ESRB, through the ESRB Retail Council ("ERC") also partners with major retailers to help ensure that they support the rating system by informing their customers about ESRB ratings and refusing to sell or rent M-rated games to customers under 17 without parental permission.[14] Many of the nation's largest and most influential retailers are members of the ERC, including Best Buy, Blockbuster Video, GameStop, Sears/Kmart, Target, and Walmart, representing 80% of all games sold at retail.

ERC members all pledge to support and comply with a "Ratings Education and Enforcement Code."[15] This detailed document outlines procedures to ensure retailer compliance with their store policies, which cover displaying signs in conspicuous locations explaining the ESRB rating system, training managers and employees regarding the ESRB system and sales policies with respect to games rated "Mature" by the ESRB, and disciplining employees who do not comply with those policies.

ERC members also agree to participate in at least two "mystery shop" audits per year, administered by an independent auditor (the same company engaged by the FTC to administer its own mystery shops), in which customers under age 17, apparently unaccompanied by an adult, attempt to purchase or rent M-rated games in order to test the effectiveness of a retailer's enforcement policy. During these audits, "mystery shoppers" visit no fewer than 100 outlets of each member retailer. Overall results are shared among the ERC membership, including how a given retailer's level of enforcement compares to other (unidentified) ERC members, and individual ERC members are provided with store-level results for each of their respective outlets included in the audit. ERC members can thus use these audit results to modify their enforcement procedures and policies as necessary.

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[13] *See generally* http://www.esrb.org/retailers/retail_council.jsp.

[14] ERC retailers do not currently stock AO-rated games.

[15] *See* http://www.esrb.org/retailers/downloads/erc_code.pdf (hereafter "ERC Code").

Retailers who do not have the funds or the necessary number of outlets (at least 100) to participate in the mystery shop audits can still participate in the ESRB's Retail Partner program. Retail Partners commit to many of the same policies as ERC members, including the prohibition on sales of M-rated games to minors under age 17; the main difference is that they are not subject to the mystery shop audits.[16]

III. THE ESRB'S RATING SYSTEM EFFECTIVELY BLOCKS MINORS' ACCESS TO VIOLENT VIDEO GAMES.

California relies on outdated statistics in its effort to convince the Court that the ESRB's rating system is flawed and should not be deemed an appropriate less restrictive alternative to advance the State's interests. California claims an interest in "helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games." Pet. Br. at 56. Without conceding that video games cause any harm, Activision Blizzard submits that current statistics – including those from studies commissioned by the FTC – demonstrate that children cannot easily purchase violent video games and that California can easily advance its goals by supporting the existing ESRB system.

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[16] The ESRB cannot itself discipline retailers. The ESRB Retail Council's Rating and Education Enforcement Code, however, provides that the Council itself may issue notices of deficiency to retail members who have failed to fulfill the obligations set forth in that code, and may terminate the membership of retailers that fail to demonstrate compliance.

A. The ESRB And Its Retail Partners Effectively Prevent Unaccompanied Minors From Purchasing Violent Video Games.

California contends that the imposition of civil penalties is the "only effective" means available to prevent the sale of certain violent video games to minors without parental consent. Pet. Br. at 58-59. As explained below, however, the ESRB's partnerships with retailers, by which retailers commit to prohibiting the sale of M-rated games to minors, is a less restrictive and more effective alternative to the speech restriction California seeks to impose. It is exceedingly difficult for minors under the age of 17 to buy M-rated video games at the vast majority of game retailers unless accompanied by an adult. And it is virtually impossible for *anyone* – minors or adults – to buy AO-rated or unrated video games at brick-and-mortar retailers because (1) most such retailers – who are the only retailers covered by the California statute – refuse to carry AO-rated or unrated games, and (2) even more importantly, console manufacturers (*i.e.*, Microsoft, Nintendo, and

Sony) will not allow unrated or AO-rated games for their game systems to be published for retail distribution.

1. The vast majority of retailers prohibit the sale of M-rated games to minors.

California relies on statistics that are no longer accurate in an attempt to show that minors can purchase violent video games with relative ease. *See* Pet. Br. at 57. The most recent FTC report directly undermines the six- and ten-year-old statistics California cites.

In December 2009, the FTC reported that all eight of the major video game retailers it surveyed, which today represent 84% of the total market for games sold in the United States, employ policies preventing the sale of M-rated games to minors. FTC 2009 Report at 27, 44 n.179. Seven of the eight additionally employ a point-of-sale register system that prompts cashiers to ask for identification after scanning an M-rated game. *Id.* at 27-28. The FTC found broad compliance with the stated policy. In an FTC-commissioned mystery shop, retailers denied sales of M-rated games to 80% of unaccompanied underage shoppers. *Id.* at 28. GameStop, the largest game retailer in the United States – which accounts for 25% of video games sold nationally – attained a 91% denial rate. *Id.* at 28, app. § A-5 (Table 2E).

Retailers' stellar showing in the mystery shop audit led the FTC to commend video game retailers' "robust system of checking for age identification." *Id.* at 27. The FTC pointed to the video game industry as a model for other genres of entertainment, concluding that "the video game industry outpaces the movie and music industries" in, among other things, "restricting children's access to mature-rated products at retail." *Id.* at 30.

The compliance rate reported in the 2009 FTC report represents a 433% increase from the retailers' compliance level at the time of the FTC's first report in 2000. And the results of the ERC's most recent mystery shop, conducted in Spring 2010, reveal a continuing upward climb in compliance rates. ERC members denied purchase to minors 83% of the time (87% when the results are weighted by each participating retailer's respective market share).[17]

In other words, the vast majority of retailers already effectively prohibit the sale of M-rated games to unaccompanied minors. Accordingly, parents who choose to allow their children to play M-rated games typically must play a role in their purchase. Indeed, 89% of minors who play video games report that their parents are present when they purchase or rent any game. FTC 2007 Report at 28. The ESRB and its retail partners have thus largely achieved – voluntarily – the very goal that California hopes to further through its statute: limiting minors' access to violent video games without parental permission.

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[17] ERC Spring Audit 2010, *available at* http://www.esrb.org/retailers/retail_council.jsp.

2. Minors cannot purchase AO-rated games at retail because most retailers do not stock or sell AO-rated games and console manufacturers will not certify them.

As detailed above, retailers promote parental involvement in the purchase of M-rated games for children by requiring their presence at the point of purchase. With respect to AO-rated games, they go even further: they refuse to carry them in their stores.[18] Moreover, because manufacturers of the major consoles and handheld devices will not certify an AO-rated game to play on any of their systems, even a brick-and-mortar retailer who wanted to carry AO-rated games would be relegated to a *de minimis* number of titles published for the PC. As a result, no one – adult or child – can purchase AO-rated games at retail, and AO-rated games therefore constitute an infinitesimally small segment of the video game market.

Out of the close to 20,000 ratings assigned by the ESRB since its inception, less than 1% of those ratings were issued as AO for either sexual or violent content, and less than 0.15% were games that received a "final" rating of AO.[19] Moreover, not a single one of those games is available for sale at brick-and-mortar retailers.

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[18] The ESRB does not require or promote this policy, requesting only that retailers prohibit the sale of M- or AO-rated games to unaccompanied minors 17 years of age or 18 years of age or younger, respectively. *See* ERC Code at 1.5.

[19] Under the ESRB's rating system, game publishers can either accept an ESRB-issued rating or modify the game and resubmit it to the ESRB in an effort to obtain a less restrictive rating. Resubmissions are treated identically to initial submissions and go through the same process described above. Given the lack of

In short, the two limitations discussed above – console manufacturers' refusal to certify AO games and retailers' unwillingness to sell them – severely limit the commercial viability of AO titles, which accounts for the dearth of AO-rated games on the market today.[20]

3. The voluntary nature of the ESRB's rating system has no bearing on a minor's ability to purchase violent video games because most retailers will not sell unrated games.

California contends that retailers' restrictions on the sale of M-rated games to minors cannot effectively advance the State's interests because the ESRB's rating system is voluntary, and unrated games therefore remain problematic. Pet. Br. at 58. The State's argument misconstrues the current state of the video game industry. Parents – and the State – need not worry about children purchasing an

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commercial viability for AO-rated games, publishers often choose to modify a game that has received an AO rating and resubmit it to the ESRB, with the desire of obtaining an M rating. Some publishers receiving an AO rating have modified and resubmitted the game numerous times until they achieve a commercially viable M rating. Thus, the number of AO ratings issued by the ESRB is greater than the number of AO ratings that are accepted as the final rating for the game.

[20] For further discussion of adult gamers' limited access to AO-rated games, see Michael Thompson, *Manhunt 2's AO Re-Release Shows Problems With Highest Rating*, ars technica (Nov. 9, 2009), http://arstechnica.com/gaming/news/2009/11/manhunt-2s-ao-re-release-shows-problems-with-highest-rating.

unrated game at Walmart, Best Buy, or other traditional brick-and-mortar game retailers because they do not stock or sell unrated titles. Any person – minor or adult – would be hard-pressed to find a single unrated game available for sale at the brick-and-mortar retail stores covered by the California statute.[21]

The FTC does not consider the retail sale of unrated games a threat to children. The FTC mystery shop surveys do not measure the sale of unrated games (although they do measure sales of unrated DVDs of movies), nor does the FTC even mention the availability of unrated games at retail for the simple reason that such games do not exist. The only games not rated by the ESRB that the FTC briefly mentions in its most recent report are downloadable games for mobile phones. FTC 2009 Report at 28-29.

Furthermore, California's contention that parental control features are "useless" to stop children from playing unrated games on consoles is simply not true. *See* Pet. Br. at 58. Parental controls are included on all of the latest-generation game consoles and handhelds (Nintendo Wii, Nintendo DSi, Microsoft Xbox 360, Sony PlayStation 3, and Sony PSP), and are available for Microsoft Windows Vista and Windows 7 as well. The ESRB's website contains a resources page providing step-by-step instructions on how to set up and use the parental control settings on all of them, and includes a link to *A Parent's Guide to Video Games, Parental Controls and Online Safety*, an informational guide for parents jointly published by the ESRB and PTA.[22] The parental controls feature allows parents to select the maximum ESRB rating they deem appropriate for their children, which blocks a child from playing a game with an ESRB rating above that level unless a passcode is entered. The parental controls map all unrated content (games, movies, TV shows, etc.) to the most restrictive rating available, so that if a parent sets his or her parental controls to block out all Mature-rated games, an unrated game would be blocked as well.

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[21] Although the California statute would not cover any games other than those sold at brick-and-mortar retail stores, video games analogous to those sold at brick-and-mortar stores – which are available for purchase online through downloading services such as Direct2Drive (www.direct2drive.com), Steam (http://store.steampowered.com), or the websites of some major game publishers – all typically carry ESRB ratings.

The ESRB's voluntary rating system, as utilized and enforced by retailers and game console manufacturers, works. Parents do not need the California statute to help curb the sale of unrated games to their children at retail because no one can purchase unrated games at brick-and-mortar retailers.

B. The ESRB's Rating System Effectively Empowers Parents To Make Informed Decisions About The Games Their Children Can Play.

California contends that the statute at issue here is a necessary means of "allowing [parents] to direct the upbringing of their children in the manner they see fit." Pet. Br. at 41. The ESRB's rating system, however, gives parents more tools – and more effective tools – to "direct the upbringing of their children" than California's sales restrictions and labeling requirements, which are devoid of the nuance and communicative power of the ESRB system. Rather than simply preventing the sale of certain games to minors – which the ESRB system already accomplishes far better than the Act would – the ESRB's rating system educates and informs parents about the content of every video game their children might want to purchase at retail.

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[22] *See* http://www.esrb.org/about/resources.jsp.

1. Parents are aware of ESRB ratings, understand and trust the ESRB's rating system, and consistently use ESRB ratings to inform their purchasing decisions.

Surveys have consistently shown that parents are highly familiar with the ESRB's rating system. According to a March 2010 ESRB-commissioned survey of parents, administered by the independent research firm Peter D. Hart Associates, 86% of parents with children who play video games are aware of the ESRB's rating system.[23] This result is consistent with a 2006 survey conducted by the FTC, which found that 87% of parents were aware of ESRB ratings. FTC 2007 Report at 27. The FTC also found a high degrèe of confidence in the ESRB's ratings, with 87% of parents reporting that they were "very satisfied" or "somewhat satisfied" with the ratings. *Id.* at 29.

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[23] *Consumer Research, ESRB Survey: Parental Awareness, Use & Satisfaction, available at* http://www.esrb.org/about/awareness.jsp (hereafter "ESRB Parent Survey 2010").

In its brief in support of Petitioners, *amicus curiae* Eagle Forum Education & Legal Defense Fund argues that parents cannot trust the ESRB because it is not privy to ultra-violent or sexually-explicit content hidden by video game developers, citing the 2005 "Hot Coffee" incident. Eagle Forum Br. at 20. The Hot Coffee incident, however, proves just the opposite.

After the ESRB discovered an unauthorized, third-party modification to *Grand Theft Auto: San Andreas*, the ESRB quickly determined that this third-party modification allowed access to game code that had been "locked out" by the publisher (*i.e.*, not intended to be playable by purchasers of the game).[24] Although ESRB submission policies at the time did not specifically reference "locked out" content on the game disc, the ESRB revoked the game's M rating and assigned the game a rating of AO, causing a de facto $24.5 million recall when retailers pulled the game from shelves.[25] The ESRB then clarified its content disclosure policies to unambiguously require publishers to disclose in their submission materials any pertinent content contained on the game disc, whether or not such content was intended to be playable.[26] Publishers who fail to do so can now be subject to fines of up to one million dollars in addition to corrective actions, including but not limited to product recall.[27]

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[24] When video games are created, game developers frequently "lock out" game code they ultimately do not wish to be part of final game play. They do this rather than "delete" such code since doing so increases the risk of compromising the stability of the remaining code.

[25] http://www.gamespot.com/news/6152490.html.

[26] http://www.esrb.org/about/news/7202005.jsp.

Far from damaging the ESRB's reputation, the Hot Coffee incident, coupled with the ESRB's rapid and effective response, increased the ESRB's standing with parents. In a survey taken just after the Hot Coffee incident, 91% of parents said their trust in the ESRB's ratings either stayed the same or increased.[28]

Because the ESRB has cultivated a high level of trust in its rating system, today's parents rely heavily on ESRB ratings when making purchasing decisions for their families. Ninety-eight percent of parents who are aware of ESRB ratings find them either "very helpful" (76%) or "somewhat helpful" (22%) in choosing games for their children.[29] As a result, 75% of parents regularly check a game's rating before making a purchase, and 53% check every time. Even among parents who do not check the rating every time, only 7% cite disagreement with the ESRB ratings as the reason for their failure to check.

The FTC reported that 73% of parents who are aware of ESRB ratings use them "most or all of the time." FTC 2007 Report at 27. The FTC also found that parents who allow their children to play T- or M-rated games are more likely to use the ESRB's rating system than those who do not. *Id.* This finding demonstrates that parents who actively screen for inappropriate content find the ESRB's rating system especially helpful.

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[27] http://www.esrb.org/about/news/downloads/pvtestimony_6_14_06.pdf, p. 6.

[28] http://www.esrb.org/about/news/downloads/pvtestimony_6_14_06.pdf, p. 9.

[29] ESRB Parent Survey 2010, *available at* http://www.esrb.org/about/awareness.jsp.

2. A state-sponsored program to further educate parents about the ESRB's rating system would be a less restrictive and more effective means of achieving California's stated goal of parental empowerment.

The Ninth Circuit correctly held that "an enhanced education campaign about the ESRB rating system" is a less restrictive alternative means of empowering parents to guide their children's upbringing. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 965 (9th Cir. 2009). The overwhelming majority of parents are aware of and use ESRB ratings regularly in their purchasing decisions. A state-sponsored educational campaign could increase awareness and use of the ESRB's rating system to near-universal levels, giving parents all of the tools they need to make informed decisions about the games they allow their children to play.

As discussed above, every video game sold at retail displays one of the six ESRB age-rating categories on the front of the box. The rating category is repeated on the back of the box alongside, when assigned, one or more content descriptors. Of the 30 official ESRB content descriptors, almost a third (nine) describe violent content. Upon reading these descriptors, parents know immediately whether a game they are considering contains, for example, "cartoon violence," "intense violence," "fantasy violence," or simply contains "violent references."

Parents can also easily access more in-depth information about the content in a particular game by reviewing its ESRB rating summary (which is posted online at www.esrb.org) or, when shopping, by using their mobile device to search for the game on the ESRB's mobile website or rating search application. The FTC recently hailed the ESRB's rating summaries, stating in its report to Congress, "The Commission commends the ESRB for its new online ratings summaries . . . . This tool should enhance parental understanding of the ratings and the ratings process." FTC 2009 Report at 31. The ESRB introduced rating summaries relatively recently, but parents already rely on them in significant numbers.[30]

The best way to illustrate how effectively the ESRB communicates information about game content to parents is to consider a specific example. For parents considering whether their children should play *Modern Warfare 2*, Activision Blizzard's highest-grossing 2009 release, the ESRB rating system provides ready access to the following information. The game's M-rating figures prominently on the front of the box.[31] On the back of the box, ESRB content descriptors further indicate that the game contains "Blood, Drug Reference, Intense Violence, Language."

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[30] In 2009 alone, esrb.org recorded 530,000 rating summary views.

[31] *See Game Box Shot, Call of Duty: Modern Warfare 2*, GameSpot, http://www.gamefaqs.com/ps3/951943-call-of-duty-modern-warfa re-2/images/box-109829. Activision Blizzard fully supports the ESRB's M-rating for *Call of Duty: Modern Warfare 2*, which indicates that the material may be suitable for persons 17 years of age and older.

Id. The ESRB's rating summary additionally provides a far more specific level of detail, including the following description of the game's most violent content:

> This is a first-person shooter in which players assume the roles of members of an elite squadron on the trail of a Russian ultranationalist. Players defend the U.S. from Russian armed forces, engage in skirmishes and combat missions, and track the ultranationalist in an attempt to discover his true motivations and co-conspirators. Players use machine guns, sniper rifles, grenades, and missiles to kill enemy soldiers throughout the battlefields. Realistic gunfire, explosions, and cries of pain are heard during the frequent and fast-paced combat. The most intense depiction of violence occurs during a "No Russian" mission where players take on the role of an undercover Ranger: Several civilians are gunned down at an airport as players are given a choice to participate in the killings (e.g., players can shoot a wounded civilian that is crawling on the ground), or walk by and observe without opening fire. In either case, civilians scream and emit pools of blood as they are shot to death. Within the multiplayer portion of the game, players can unlock "emblems" to be used on their player name cards. Some of these emblems contain images that reference drugs (e.g., a cannabis leaf; a name card with a depiction of a joint).

> Dialogue in the game contains profanity in both English (e.g., "sh*t") and Russian (e.g., "f**k" and "motherf**ker").[32]

From the clear age rating to the numerous content descriptors to a detailed rating summary, the ESRB's rating system ensures that parents who are considering whether to allow their children to play *Modern Warfare 2* have all of the information they need to make an informed decision. By contrast, California's flat prohibition on the sale of certain violent video games at retail does not empower parents to guide their children's upbringing as effectively as giving parents the information they need to make educated decisions about which games they should allow their children to play.

In sum, the ESRB's rating system is a less restrictive alternative to achieving California's stated goal of protecting children and empowering parents. As demonstrated above, the ESRB's rating system provides parents with the tools they need to make informed purchase and rental decisions for their children. Moreover, because the ESRB's rating system is coupled with retailer restrictions on the sale of M-rated games to minors, the California statute's reliance on civil penalties alone cannot possibly prove as effective in achieving California's goals as would state support of the existing ESRB system and retail partnerships.

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[32] *Rating Information, Call of Duty: Modern Warfare 2*, ESRB, http://www.esrb.org/ratings/synopsis.jsp?Certificate=27566.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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BRIEF

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IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,

Petitioners,

—v.—

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, ASSOCIATION OF AMERICAN PUBLISHERS, FREEDOM TO READ FOUNDATION, NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, RECORDING INDUSTRY ASSOCIATION OF AMERICA, AMUSEMENT & MUSIC OPERATORS ASSOCIATION, ASSOCIATION OF NATIONAL ADVERTISERS, PEN CENTER USA, AND THE RECORDING ACADEMY AS *AMICI CURIÆ* IN SUPPORT OF RESPONDENTS

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American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Freedom to Read Foundation, National Association of Recording Merchandisers, Recording Industry Association of America, Amusement & Music Operators Association, Association of National Advertisers, PEN Center USA, and The Recording Academy respectfully submit this *amicus* brief in support of Respondents.[1]

INTEREST OF *AMICI*

Amici's members ("*amici*") write, create, publish, produce, distribute, sell, advertise in, and manufacture books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining.[2] Libraries and librarians represented by *amicus* Freedom to Read Foundation provide such materials to readers and viewers.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, their counsel, or Media Coalition Inc. (a 37-year old trade association of which most of the *amici* are members) made a monetary contribution to its preparation or submission. Respondents are members of Media Coalition and pay general membership dues.

The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

[2] A description of *amici* is attached as Appendix A.

Amici have a significant interest in preventing the imposition of unconstitutional governmental limitations on the content of their First Amendment-protected communicative materials, both textual and visual.

Many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws that infringe First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut,* 771 F.2d 323 (7th Cir. 1985), *aff'd,* 475 U.S. 1001 (1986); *PSInet, Inc. v. Chapman,* 167 F. Supp. 2d 878 (W.D. Va. 2001), *aff'd,* 362 F.3d 227 (4th Cir. 2004); *American Booksellers Found. v. Dean,* 202 F. Supp. 2d 300 (D. Vt. 2002), *aff'd,* 342 F.3d 96 (2d Cir. 2003); *ACLU v. Johnson,* 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd,* 194 F.3d 1149 (10th Cir. 1999); *Big Hat Books v. Prosecutors,* 565 F. Supp. 2d 981 (S.D. Ind. 2008); *American Libraries Ass'n. v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997); *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520 (Tenn. 1993).

Amici have also filed *amicus* briefs in this Court to address First Amendment issues, including the impact of the regulation of speech on mainstream creators, producers, distributors, and retailers. *See, e.g., United States v. Stevens,* __ U.S. __, 130 S. Ct. 1577, 1585 (2010); *Beard v. Banks,* 542 U.S. 406 (2004); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *City News and Novelty, Inc. v. City of Waukesha,* 531 U.S. 278 (2001); *United States v. Playboy Entm't Group,* 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium v. F.C.C.*, 518 U.S. 727 (1996); *United States v. X-Citement Video,* Inc., 513 U.S. 64 (1994).

SUMMARY OF ARGUMENT

Contrary to the contention of the State of California, this Court has consistently, and properly, declined to make exceptions to the protections of the First Amendment for visual depictions or textual descriptions of violence. In *Winters v. New York*, 333 U.S. 507 (1948), the Court struck down a New York statute criminalizing the distribution of printed material "devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." 333 U.S. at 508. More recently, in *Hudnut v. American Booksellers Ass'n, Inc.*, 475 U.S. 1001 (1986), the Court summarily affirmed the Seventh Circuit's finding that an Indianapolis ordinance making unlawful the distribution of pictures or words depicting physical or psychological violence being imposed on women (which the ordinance had defined as "pornography") was unconstitutional. 771 F.2d 323 (7th Cir. 1985).

Similarly, California's contention that "many states have regulated violent material" (Pet. Br. at 34) is misleading. Many such laws "have lain dormant for decades." *Winters v. New York*, 333 U.S. at 511. Other cited state laws have been found unconstitutional, repealed, or both. Thus, *e.g.*, Ohio Rev. Code § 2907.01(E)(3), which California asserts includes "extreme or bizarre violence, cruelty or brutality" in its definition of "harmful to juveniles" (Pet. Br. at 35) was amended in 2002 to delete that language after it was found unconstitutional in *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 947 (S.D. Ohio 2002). The reference to "excess violence" in Tenn. Code Ann. § 39-17-901 (Pet. Br. at 35-36) was found unconstitutionally void for vagueness seventeen years ago in *Davis-Kidd Booksellers, Inc.*

v. McWherter, 866 S.W.2d 520 (Tenn. 1993).

According First Amendment protection to textual descriptions and visual depictions of violence recognizes the fact that such descriptions and depictions, both fictional and real, have always been a part of our civilization's art, history, and literature, both for children and for adults. Classic fairy tales such as Hansel and Gretel, Pinocchio, Little Red Riding Hood and Sleeping Beauty are replete with violence. The witch is burnt alive, the grandmother is devoured by the wolf, and Sleeping Beauty was not tired, she was poisoned. Even the popular Punch & Judy shows featured Punch, who "beats up a neighbor, throws his baby out, bludgeons his wife to death, kicks and kills a doctor, thrashes a beggar, knocks a policeman down, hangs a hangman and successfully wards off the devil."[3] Dorothy kills the Wicked Witch. In many instances, violent fairy tales were toned down by publishers and movie makers without government intervention. Older minors have long been exposed to graphic violence in classical works such as the Iliad and Shakespeare's plays, as well as in history and the news of the day.

All viewers of broadcast and cable news, including minors, have, in recent years, been exposed to violent images in greater measure than previously. An entire nation, including minors, watched the horror of 9/11, and continues to view images from the wars in Iraq and Afghanistan.

In short, the exposure of minors to visual depictions and textual descriptions of graphic violence is nothing new.

---

[3] Twitchell, Preposterous Violence: Fables of Aggression in Modern Culture 79 (Oxford 1989).

California proposes two new and troublingly "flexible" exceptions to the First Amendment protection accorded to descriptions and depictions of violence: (1) that a state should be able to regulate any material that its legislature deems likely to harm the ethical or moral development of minors (Pet. Br. at 30); and (2) that, to "reinforce" parental authority, a state should be able to deny minors direct access to materials protected by the First Amendment, as long as parents can choose to provide such items to their minor children (Pet Br. at 38). Both proposed exceptions are content-based; both are subjective in application; both are potentially vast in scope; and both are antithetical to First Amendment values.

The task of defining violence is not simple. The statutes at issue in *Winter, Hudnut, Davis-Kidd* and *Bookfriends* each were held to be unconstitutionally vague. The California definition is similarly vague; it attempts to incorporate the *Miller/Ginsberg*[4] paradigm, but that test was never intended to cover violent content and is unsuitable to do so for many reasons, including that there is no common understanding as to what descriptions or depictions of violence have serious value for children of a given age or maturity. That issue must be determined based not on community standards but on "whether a reasonable person would find such value in the material taken as a whole." *Pope v. Illinois,* 481 U.S. 497, 501 (1987).

---

[4] *Miller v. California,* 413 U.S. 15 (1973), *Ginsberg v. New York,* 390 U.S. 629 (1968).

Finally, through its emphasis on the attributes of video games, California appears to concede that the law would be unconstitutional if applied to other media. The First Amendment does not permit such distinctions.

The proposed new First Amendment exceptions would open a large hole in the First Amendment. They should be rejected, and the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I. THERE ARE NO EXCEPTIONS TO FIRST AMENDMENT PROTECTION FOR DEPICTIONS OR DESCRIPTIONS OF VIOLENCE

California cites no case law—and there is none—permitting the regulation or prohibition of First Amendment materials based on their violent content.

A. This Court's Precedents Accord First Amendment Protection to Depictions and Descriptions of Violence

This Court has directly dealt with this issue twice.

Winters v. New York, 333 U.S. 507 (1948), involved a conviction under a New York statute for possession with intent to sell a magazine "principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime," namely "Headquarters Detective, True Cases from the Police Blotter, June 1940." The New York Court of Appeals upheld the conviction, noting that:

> The contents are nothing but stories and

> pictures of criminal deeds of bloodshed and lust. * * * The stories are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators.

People v. Winters, 294 N.Y. 545, 551 (1945). This Court reversed, noting that the statute "does not limit punishment to the indecent and obscene, as formerly understood," and that the statute was unconstitutionally vague. 333 U.S. at 519.

Hudnut v. American Booksellers, 475 U.S. 1001 (1986), *summarily affirming* 771 F.2d 323 (7th Cir. 1985), struck down an Indianapolis ordinance making unlawful the distribution of "pornography." Pornography was defined in an unusual way, namely material that contains the "graphic sexually explicit subordination of women, whether in pictures or in words, that also includes" one of six other factors.

In holding the Indianapolis statute unconstitutional, the Seventh Circuit directly addressed the possibility that the premise of the statute—that depiction of violence against women promoted such violence—was correct:

> People often act in accordance with the images and patterns they find around them. * * * Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. * * *
>
> Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how

> some Germans saw Jews. Communism is a world view, not simply a Manifesto by Marx and Engels or a set of speeches. * * *
>
> Many people believe that the existence of television, apart from the content of specific programs, leads to intellectual laziness, to a penchant for violence, to many other ills. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent.

771 F.2d at 328-29.

And while this Court has often spelled out the few limited exceptions to some or all of the protection of the First Amendment, such as fighting words, obscenity, and defamation (*see e.g. R.A.V. v. City of St. Paul,* 505 U.S. 377, 383 (1992), it has neither included depictions and descriptions of violence among them, nor included violence within the definition of obscenity. *Miller,* 413 U.S. at 24. Similarly, every state and lower federal court decision to date has found that depictions and descriptions of violence are protected.[5]

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[5] *E.g. Entertainment Software Ass'n v. Swanson,* 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software (cont'd)*

California's argument that *Ginsberg v. New York,* 390 U.S. 629 (1968), supports a violence exception ignores this Court's explicit statement that its decision was limited to "sex material":

> We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, *cf. In re Gault,* 387 U.S. 1, 13, 87 S. Ct. 1428, 18 L. Ed. 2d 527. It is enough for the purposes of this case that we inquire whether it was constitutionally impermissible for New York, insofar as § 484-h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.

Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003); *American Amusement Machine Ass'n v. Kendrick,* 244 F.3d 572 (7th Cir. 2001); *Eclipse Enterprises, Inc. v. Gulotta,* 134 F.3d 63 (2d Cir. 1997); *Interstate Circuit, Inc. v. City of Dallas,* 366 F.2d 590 (1966), *vacated on other grounds,* 391 U.S. 53 (1968); *Video Software Dealers Ass'n v. Maleng,* 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Video Software Dealers Ass'n. v. Webster,* 968 F.2d 684 (8th Cir. 1992); *Bookfriends v. Taft,* 223 F. Supp. 2d 932 (S.D. Ohio 2002); *Sovereign News Co. v. Falke,* 448 F. Supp. 306 (N.D. Ohio 1977), *remanded on other grounds sub nom. Sovereign News Co. v. Corrigan,* 610 F.2d 428 (6th Cir. 1979); *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W. 2d 520 (Tenn. 1993); *State v. Johnson,* 343 So. 2d 705, 710 (La. 1977); *Police Comm. of Baltimore v. Siegel Enterprises, Inc.,* 162 A.2d 727 (Md. 1960); *Adams v. Hinkle,* 322 P.2d 844 (Wash. 1958).

390 U.S. at 636-37.

B. There Is No History of States Regulating First Amendment-Protected Material Based on Their Violent Content

California's contention that "many states have regulated violent material as well" (Pet. Br. at 34) is, at best, highly misleading. While some such laws may still be on the statute books, as this Court recognized (more than sixty years ago) in *Winters*, many of them "have lain dormant for decades." 333 U.S. at 511. For example, Mich. Con. Laws § 750.142 (2004) (Pet. Br. at 34) includes in a single statute prohibitions on providing "obscene" materials and on providing materials "devoted to the publication of criminal news, police reports, or criminal deeds." There are reported decisions of prosecutions for the former, *see, e.g., People v. Steiner*, No. 276821, 2008 WL 2437533 (Mich. Ct. App., June 17, 2008), but not for the latter.

In fact, a number of the laws cited by California either were repealed, held unconstitutional, or both.

Ohio Rev. Code § 2905.34 (1963 Supp.) (Pet. Br. at 34), which prohibited showing, to a minor, material "principally made up of criminal news, police reports, or accounts of criminal deeds...." was repealed in 1970. Ohio Rev. Code § 2907.01(E)(3) was amended in 2003 to delete the language California erroneously states is still in effect "even today" (Pet. Br. at 35) ("extreme or bizarre violence, cruelty or brutality") after that "harmful to minors" definition was found unconstitutional in *Bookfriends, Inc. v. Taft*, 223 F. Supp. 2d 932, 947 (S.D. Ohio 2002).

The cited reference to "excess violence" in Tenn. Code Ann. § 39-17-901 (*see* Pet. Br. at 35), was found unconstitutionally void for vagueness seventeen years ago in *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

The Rhode Island Legislature's "declaration" of the "relationship between sex and violence" (*see* Pet. Br. at 35) is not embodied in any statute. The Rhode Island statute to which the quoted "declaration" relates is limited to "explicit representations of 'sexual conduct', 'sexual excitement', [and] 'nudity'" which meet *Miller/Ginsberg* standards. R.I. Gen. Laws § 11-31-10.

C. Depictions and Descriptions of Violence Have Always Been Part of Our Civilization's Art and Expressions

The First Amendment protection accorded to depictions and descriptions of violence accords with these basic facts:

> Violence, both fictional and real, has always caused uneasiness in civilized audiences. Yet, violence has always been an essential part of our civilization's art and expression, just as violence has always been a part of the reality of human existence.

"Violence in the Media," 52 Record of Ass'n of Bar of City of New York 275 (1997) ("*Violence in Media*").

To be insulated from depictions and descriptions of violence, one would have to be insulated from the great works of religion, history, art, literature, and culture.

The Bible describes the jealous murder of

Abel whose blood cries out from the ground,[6] the destruction of the Egyptians in the Red Sea,[7] the direction of the Lord to destroy the Amalekites, "man and woman, infant and suckling" concluding with the hewing of the king, Agag, into pieces.[8] It recounts how a man chops his violated concubine "together with her bones, into twelve pieces."[9] The Bible could be regarded as one of the most violent works of all time, expressing the darker side of human emotion as well as the positive. The *Iliad,* like all effective accounts of war, reeks with blood, death and mutilation. Homer describes how "Menelaus hacked Pisander between the eyes, the bridge of the nose, and bone cracked, blood sprayed and both eyes dropped at his feet to mix in the dust—he curled and crashed," and how "Little Ajax ... lopped the head from the corpse's limp neck and with one good heave sent it spinning into the milling fighters like a ball ... tumbling in the dust."[10] Aeschylus in *Agamemnon* describes how Atreus made his brother Thyestes "a feast of his own children's flesh. He cuts the extremities, feet and delicate hands into small pieces, scatters

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[6] Genesis 4:8-12.

[7] Exodus 14:26-28.

[8] Samuel 15:33.

[9] Judges 19:29.

[10] Homer, *The Iliad,* Book 13, lines 708-711, and 241-245 (Robert Fagles trans., Viking Penguin 1990).

> them over the dish and serves it ...."[11] Elizabethan playwrights dramatized street violence, social disorder, military conflict and "the most inhumane horrible mutilations of the body."[12] Violence pervades much of Shakespeare's work, *Macbeth* drips with blood, and Titus Andronicus was "one of the bloodiest plays" of a bloody period.[13]
>
> Violence is a central subject of many great works of visual art, such as Hogarth's *The Four Stages of Cruelty,* Delacroix's *Medea,* Cezanne's *The Rape,* and Picasso's *Guernica.*[14] Violent depictions in many of these works are central to their meaning and impact. As one commentator states, "A great work of art is likely to be subversive of almost anyone's peace."[15]

Violence in Media at 275-76. Just as depictions and descriptions of violence have been part of literature and art which have attained great acclaim, they also have been an important part of popular culture.

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[11] Aeschylus, "*Agamemnon,*" lines 1623-1627 (Robert Fagles trans. Penguin Books 1966).

[12] Gerald Levine, *Violence and Sensationalism in Elizabeth England* 146 (N.Y.U. Doctorate Thesis, Gd. Schl. Arts & Sciences, June 1968).

[13] Id.

[14] James B. Twitchell, Preposterous Violence: Fables of Aggression in Modern Culture (1989). See also John P. Sisk, Our Savage Spectacles: New Performers in the Theater of Cruelty, Harper's Magazine, July 1985, at 64.

[15] David Denby, "*Does Homer Have Legs,*" The New Yorker, Sept. 6, 1993, at 68.

Soon after its inception in 1897, the Grand Guignol theater in Paris became internationally famous for its horror and comedy shows. Violent scenes included "a Frenchman's hands being cut off at the wrists," "the flesh being cut off a young girl," and "a bottle of sulfuric acid being thrown in a character's face.[16] What today would be called "violent children's programming" existed well before the age of television and film. The Punch and Judy puppet show featured a main character, Punch, who "beats up a neighbor, throws his baby out, bludgeons his wife to death, kicks and kills a doctor, thrashes a beggar, and knocks a policeman down."[17]

[C]inema has been filled with violence since its inception. In 1893, the Edison Company produced a film entitled "The Execution of Mary Queen of Scots," a one-and-one-half minute film that depicts Mary being beheaded and her head rolling off.[18] Another early film, "The Great Train Robbery," ends with a striking image of a six-shooter being aimed into the camera.[19]

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[16] John M. Callahan, *The Ultimate in Theater Violence*, in *Violence in Drama*, 165, 170 (James Rudman ed. 1991.)

[17] *Twitchell*, supra n.9.

[18] Philip French, *Violence in the Cinema*, in *Violence in the Mass Media* 59 (Otto N. Larsen ed. 1968).

[19] Charles Champlin, Critic at Large: Film Violence: Is It Time to Shoot the Messenger? Los Angeles Times, October 13, 1987 at part 6, page 1.

Violence in the Media at 277.

Even works directed at children, such as classic fairy tales, are extremely violent. "Hansel and Gretel," "Little Red Riding Hood," "Snow White." and "Sleeping Beauty" are replete with violence. The witch is burnt alive. The grandmother is devoured by the wolf. Sleeping Beauty was poisoned. In fact, the distribution of "Snow White" and a collection of Grimm's fairy tales were restricted in schools in Arizona and Florida recently because of their violent content. Doyle, *Banned Books: Challenging Our Freedom to Read* 211 (American Library Association 2010).

And the fairy tales that were read to us, that we read to our children, and that we watch on television, on DVD, and in movie theaters have been substantially sanitized by the media without government intervention. Earlier versions were far more violent. Little Red Riding Hood and her grandmother are both eaten by the wolf; a passing hunter cuts the wolf open and both tumble out alive.[20] Sleeping Beauty is raped by the prince while sleeping and gives birth to twins.[21] And in "Snow White," the Queen, having stranded Snow White in the cold, asks a hunter to kill her and bring back her heart, lungs and liver for the queen to cook and eat. In the end, after Snow White is poisoned by the Queen and recovers, the Queen is killed by being forced to dance in red-hot metal shoes.[22]

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[20] Andy Kaiser, *Original versions of classic fairy tales* (October 27, 2008), http://www.dbskeptic.com/2008/10/27/original-versions-of-classic-fairy-tales (accessed 9/16/10)

[21] *Id.*

Many popular children's cartoons are violent. Tom and Jerry spend short after short physically attacking each other. Superman and Spiderman deal violently with their foes. Yosemite Sam is a gunslinger with a "Hare Trigger" temper intent on killing Bugs Bunny. Slapstick films, from the Marx Brothers to the Three Stooges, highlight physical violence.

Video games may be new, but there is nothing new about the depiction and description of violence in works of literature and art for both adults and children.

II. THE EXCEPTIONS PROPOSED BY CALIFORNIA WOULD CREATE A VAST NEW AND UNWARRANTED INROAD ON FIRST AMENDMENT RIGHTS

A. California's Proposed Exceptions Are Content-Based, Subjective, and Antithetical to the First Amendment

In an attempt to circumvent existing First Amendment protection, California proposes to the Court two new "flexible" exceptions that would deprive depictions and descriptions of violence of the protection of the First Amendment. Both are content-based; both are subjective; both are potentially vast in scope; and both are antithetical to

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[22] Andy Kaiser, *More original versions of classic fairy tales* (November 17, 2008), http://www.dbskeptic.com/2008/11/17/more-original-versions-of-classic-fairy-tales (accessed 9/16/10)

First Amendment values.

The first proposed exception would give a state the right to regulate anything that its legislature deems likely to harm the ethical or moral development of minors. (Pet. Br. at 30). The second proposed exception, intended to "reinforce" parental authority, would give a state the right to prevent minors from having direct access to any category of First Amendment-protected content, as long as parents could provide such materials to their minor children. (Pet. Br. at 38). California proposes that judicial review under either exception be limited to a highly deferential "rational basis" test.

As to the first exception, California posits that "a legislative body should be permitted to act cautiously in the interests of society if it rationally determines that offensively violent video games depicting brutal and sadistic acts committed by the game player are *likely* to harm the development of a child." (Pet. Br. at 30) (emphasis added) Throughout the years, arguments have been made that comics, television shows, television news, serious literature and movies harm the development of children.[23] Under this proposed exception, a legislature could restrict children's access to any of these media—without reference to the First Amendment—solely on a determination that the content of that medium harms the ethical or moral development of children. For all practical purposes, this exception would deprive children of their First Amendment rights.

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[23] *See* Michael Bamberger, *Reckless Legislation: How Lawmakers Ignore the Constitution* 35-37 (Rutgers 2001); Wertham, "Is TV Hardening Us to the War in Vietnam?" in Larsen (ed.), *Violence and the Mass Media* 50 (1968); Murrell, "The Greater Cincinnati Committee on the Evaluation of Comic Books" in Larsen, *supra*, at 182.

As to the second exception, California states that to support "parental rights over minors" it "may properly limit minors' access to the offensive violence in certain video games so long as it is not irrational for the legislature to determine that the video games covered by the Act are harmful to minors. *Ginsberg*, 390 U.S. at 641." (Pet. Br. at 41)[24] California thus suggests that so long as there is *some* basis for believing that harm may result, *i.e.*, that the legislature has not been arbitrary and capricious, access by minors can be prohibited.

While such a minimal standard has been applied in determining whether a statute is within the constitutional power of Congress or whether the Equal Protection Clause has been violated,[25] this "most relaxed and tolerant form of judicial scrutiny," *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989), is inappropriate when fundamental First Amendment rights are at issue. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 640 (1994). California would, in effect, subject a content-based speech restriction to an even more deferential standard of review than this Court applies to content-neutral speech restrictions.

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[24] While California cites *Ginsberg*, it is clear that the games are not "harmful to minors" (*i.e.*, obscene as to minors) under *Ginsberg* because *Ginsberg* applies only to "sex materials" and California's statute applies to materials that contain depictions of violence, whether or not there is a sexual component.

[25] *See, e.g.*, *United States v. Comstock*, 130 S. Ct. 1949, 1956-1957 (2010)

The fact that, under California's scheme, a minor may have access to First Amendment-protected video games with his or her parent's approval does not cure the violation of the First Amendment. Because of parental absence, parental disinterest, parental lack of involvement or an antagonistic relationship between parent and minor, a teenager may be deprived of his or her First Amendment right to a video game appropriate to him or her. More generally, all of a minor's First Amendment rights cannot be subordinated to a parent's right of approval.

California seeks to justify applying a "rational basis" test rather than strict or even intermediate scrutiny by denigrating the value of the speech embodied in video games. For example, California argues that video games as a category

> add nothing to the free exchange of ideas for minors, do not represent a step to the truth, and any benefit to be derived . . . is clearly outweighed by the societal interest in order and morality.

(Pet. Br. at 40) To the contrary, video games, like books and music, are regularly reviewed by the mainstream press in terms that make it clear that they are considered to have serious literary and artistic value.[26] Moreover, the Court has repeatedly disavowed such a value balancing approach to removing categories of speech from the protection of the First Amendment. In *Winters*, for example, the Court made clear that the level of First Amendment protection accorded to depictions of violence did not turn on literary merit

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[26] *See, e.g.*, Victor Godinez, *Video game review: "Halo: Reach"*, Dallas Morning News, September 13, 2010 ("But the team at Bungie took a literal suicide mission and crafted into a story of courage and determination"), *(cont'd)*

> Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

333 U.S. at 510. Last term, in *United States v. Stevens*, _ U.S. __, __, 130 S. Ct. 1577 (2010), the Court stated:

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http://www.dallasnews.com/sharedcontent/dws/ent/stories/DN-halo_0914gd.State.Edition1.515253d.html

Seth Schiesel, *Grand Theft Auto: The Story Continues, as Gritty as Ever*, N.Y. Times, February 18, 2009 ("the new episode conveys a humor, wit, intelligence and sense of cultural satire"), http://www.nytimes.com/2009/02/18/arts/television/18gta.html?_r=1&pagewanted=print

Lou Kesten, Review: *'Halo: Reach more fun with more than 1*, Wash. Post, September 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/13/AR2010091302410.html

Eric Gwinn, *Is 'Grand Theft Auto IV' the greatest writing of the century?*, Chi. Trib., January 25, 2009 ("'In GTA IV, the radio is speaking more to the player and not so much the avatar,' says Miller, 'and in San Andreas, you could hear the radio really speaking to the avatar, and that, I thought, was an incredible achievement.'") http://articles.chicagotribune.com/2009-01-25/news/0901230326_1_grand-theft-auto-iv-gta-iv-rockstar-games (each site accessed 9/14/2010).

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. * * *
>
> [In *Miller,* we did not] determine that serious value could be used as a general precondition to protecting other types of speech in the first place. Most of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation.

130 S. Ct. at 1585, 1591

Indeed, California goes so far as to argue that one of the beneficial aspects of its statute is that it *is* content-based, stating:

> The Act also serves to eliminate the perceived societal approval of minors playing offensively violent video games—a distinct developmental harm recognized by this Court. In *Ginsberg,* the Court cited the Columbia University Psychoanalytic Clinic in reporting on the independent harm to developing egos when minors perceive a societal approval of viewing pornography: "Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice * * * The child is

> protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved."

(Pet. Br. at 40). California's description of *Ginsberg* is inaccurate. The Court did not "recognize" any "distinct developmental harm." Instead, in a footnote, the Court stated that:

> [D]espite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct, a medical practitioner recently *suggested* that the *possibility* of harmful effects to youth *cannot be dismissed as frivolous.*

390 U.S. at 642 n.10 (emphasis added). The quoted study attributed this possibility to the views of "some psychiatrists." *Id.* The Court's acknowledging that there has been a *"suggestion"* of the *"non-frivolous" "possibility"* of harm is hardly the equivalent of recognizing that "distinct developmental harm" is caused.

One of the lessons learned by children who are fortunate enough to grow up in a free society is that books, magazines, newspapers, movies, television programs, video games, and other forms of expression do not need "societal approval." By contrast, children who grow up in repressive societies, in which only government-approved publications are permitted, well understand that the availability of such works connotes such approval. California's effort to jettison the free-speech rights of minors by creating a new category of unprotected speech in a misguided effort to protect them cannot be squared with the First Amendment.

The statute at issue is clearly content-based; as such, it is presumptively invalid. *R.A.V. v. St. Paul*, at 391, and can be upheld only if it survives strict scrutiny. *See United States v. Playboy Entm't Group., Inc.*, 529 U.S. 803, 813 (*citing Sable Comm'ns of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). Since the California statute cannot survive strict scrutiny, California proposes that this Court abandon its precedents in a way that would substantially weaken the traditional protection of the First Amendment. *Amici* urge the Court not to do so.

B. California's Proposed Exceptions Rely on an Extremely Broad and Unconstitutionally Vague Definition of Violence

In proposing these unwarranted exceptions to the First Amendment, California proffers a definition of violence of astonishing breadth and unconstitutional vagueness.

When they have attempted to ban depictions and descriptions of violence, legislatures have found that the extent of violence in our literature and art makes it extremely difficult to define violence. The statutory definitions of violence at issue in *Winter, Hudnut, Davis-Kidd* and *Bookfriends* all were held unconstitutional on a range of grounds, including vagueness.

California drafted two alternative definitions of violence, but has conceded that one of the definitions is unconstitutional, and it relies on the remaining definition:

> "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an

> image of a human being, if those acts are depicted in the game in a manner that * * * :
>
> (A) Comes within all of the following descriptions:
>
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
>
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
>
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

Cal. Civ. Code § 1746.

This definition has two components.

The first component simply requires that the video game include one of the options of "killing" or "maiming" or "dismembering" or "sexually assaulting" an image of a human being. Thus, the video game equivalent of a "Cowboys and Indians" movie of the American Old West would meet the first component, if it allowed players to shoot guns or use bows and arrows to "kill" an "image of a human being." So would a video game based on war (whether historical or fictional), or on "the battle between good and evil" personified in human form. The first component of the definition is thus of extraordinary breadth.

The second component—appeals to "deviant or morbid" interest, is "patently offensive to prevailing standards in the community as to what is suitable for minors," and "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value"—is adapted from the *Miller/Ginsberg* standards. But those standards—developed to address "sex materials"—do not work when applied to depictions or descriptions of violence.

California cannot show, and does not attempt to show, that there is a "prevailing standard" in the community as to what violent video games may be "suitable for minors." To the contrary, by seeking to defend its law as supporting "parental choice," California recognizes that adults disagree vehemently on what video games are "suitable for minors." How, then, can California rely upon a statutory definition grounded in a non-existent community consensus on what is suitable?

Nor does the "lacking serious value" element of the *Miller/Ginsberg* paradigm work when used to evaluate violent video games under this statute. Serious value varies based on the age and maturity of the minor. There is no common understanding as to what descriptions or depictions of violence have serious value for children of a given age or maturity. Under *Miller*, serious value is not to be determined based on community standards but rather on "whether a reasonable person would find such value in the material taken as a whole." *Pope v. Illinois*, 481 U.S. 497, 501 (1987). Evaluating whether a particular video game, which includes violence, would have value to minors would be wholly subjective.

Some schools and libraries have deemed books ranging from "Snow White" and "Complete Fairy Tales of the Brothers Grimm" to Ellen Alderman and Caroline Kennedy's "In Our Defense: The Bill of Rights in Action" as lacking serious value for minors. Appendix B lists books challenged or restricted for minors based on violent content at schools and libraries over the last 20 years. If there can be no consensus on the value of such works, then how can California presume that there is a "reasonable person" standard on what video games have "serious value" for minors?

California compounds the problem by emphasizing the attributes of video games, and thus appearing to argue that similar violent content in a different medium might not be subject to regulation. (*E.g.*, Pet. Br. at 6, 40). Thus, a "Cowboys and Indians" video game could be banned, but not a John Wayne movie. A "Grand Theft Auto" video game could be banned, but not a "Grand Theft Auto" movie. A video game based on World War II could be banned, but not "Saving Private Ryan"—which had more scenes of "serious violence" than any other mainstream movie that year (1998).[27] The First Amendment permits no such distinctions.

California also appears to suggest that the new technologies represented by video games require a reassessment of First Amendment principles. Technological change usually causes fear and uncertainty. In the twentieth and twenty-first centuries, technological change has repeatedly revolutionized entertainment media and communications, as well as the storage, retrieval, and distribution of information. Each of these technological advances—movies, television, the Internet, and now handheld, interactive electronic video games—has brought with it the fear that the new technology would corrupt the young.[28] But there is no reason to permit fear of novel technologies to diminish fundamental constitutional rights such as the First Amendment

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[27] Judith Levine, "Shooting the Messenger: Why Censorship Won't Stop Violence," p. 10, available at www.mediacoalition.org/reports/stm_full.pdf.

The proposed exceptions would open a large hole in the protection of the First Amendment. They should not be embraced by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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[28] *See* Bamberger, *supra,* at 35-38.

APPENDIX

APPENDIX A

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AMICI CURIÆ

The following *amici curiæ* join this brief..

American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

National Association of Recording Merchandisers (NARM) is a not-for-profit trade association that since 1958 has served the music and entertainment content delivery community in a variety of areas including networking, advocacy, information, education and promotion. NARM's general members consist of music wholesalers and retailers, including brick-and-mortar, online and mobile music delivery companies. Its associate members consist of distributors, record labels, multimedia suppliers, technology companies, and suppliers of related products and services. Individual professionals and educators in the field of music are also members.

Recording Industry Association of America ("RIAA") is the trade organization that supports and promotes the creative and financial vitality of the major music companies. RIAA members create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States. In support of this mission, RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conduct consumer, industry and technical research; and monitor and review state and federal laws, regulations and policies. RIAA also certifies Gold®, Platinum®, Multi-Platinum™ and Diamond sales awards as well as Los Premios De Oro y Platino™, an award celebrating Latin music sales.

Amusement & Music Operators Association ("AMOA") represents the owners, operators and distributors of coin-operated amusement machines, jukeboxes, video games, redemption equipment and similar devices in the out-of-home entertainment marketplace. The association was one of the lead plaintiffs in *AAMA v. Kendrick*, 244 F.3d 572 (7th

Cir. 2001), and maintains a substantial interest in the freedom of speech inherent in amusement devices and video games.

Association of National Advertisers ("ANA"), founded in 1910, leads the marketing community by providing its members with insights, collaboration, and advocacy. ANA's membership[1] includes 350+ companies with 9,000 brands that collectively spend over $250 billion in marketing communications and advertising. The ANA strives to communicate marketing best practices, lead industry initiatives, influence industry practices, manage industry affairs, and advance, promote, and protect all advertisers and marketers.

PEN Center USA (PEN USA) is an organization of over 700 novelists, poets, essayists, translators, playwrights, screenwriters, teleplay writers, journalists, and editors. As part of International PEN, PEN USA is chartered to defend free and open communication within all nations and internationally.

The Recording Academy is an organization of musicians, producers, engineers and recording professionals that is dedicated to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY® Awards—the preeminent peer-recognized award for musical excellence and the most credible brand in music—The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services programs. The Academy continues to focus on its mission of recognizing musical excellence, advocating for the well-being of music makers and ensuring music remains an indelible part of our culture.

APPENDIX B

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BOOKS CHALLENGED, RESTRICTED OR REMOVED BASED ON VIOLENT CONTENT, 1990-2009

Compiled from Doyle, *Banned Books: Challenging Our Freedom to Read* (American Library Association 2010).

Adoff, Arnold, *Poetry of Black America*	Challenged at the Fort Walton Beach, FL, school libraries (1996)
Alderman, Ellen, and Kennedy, Caroline, *In Our Defense: The Bill of Rights Action*	Challenged in Wisconsin Rapids, WI, schools (1998)
Allende, Isabel, *The House of the Spirits*	Challenged in Paso Dobles, CA, high school (1994)
Anaya, Rudolfo A., *Bless Me, Ultima*	Challenged at Porterfield, CA, high schools (1992) and Round Rock, TX, high school (1996); removed from Laton, CA, Unified School (1992)

Angelou, Maya, *I Know Why the Caged Bird Sings*	Challenged and removed in various schools across the nation (1990 - 2009)
Atkins, Catherine, *Alt Ed*	Challenged in Lake Oswego, OR, Jr. High School (2007)
Baldwin, James, *Go Tell It on the Mountain*	Challenged in Hudson Falls, NY, schools (1994)
Bishop, Claire H., *The Five Chinese Brothers*	Challenged at Colton, CA, elementary schools (1998) and Spokane, WA, school district (1994)
Block, Francesca Lia, *Baby Be-Bop*	Challenged in West Bend, WI, Community Memorial Library (2009)
Capote, Truman, *In Cold Blood: A True Account of a Multiple Murder and Its Consequences*	Banned but later reinstated in Savannah, GA, high school (2002)

Charyn, Jerome, *Billy Budd, KGB*	Challenged at Fairbanks, AK, Library (1992)
Cohen, Daniel, *The Headless Roommate and Other Tales of Terror*	Restricted from 4th and 5th graders in Tewksbury Twnshp., NJ (1993)
Cohen, Daniel, *Southern Fried Rat and Other Gruesome Tales*	Challenged in Waldorf, MD, middle school (1991)
Collier, James Lincoln, and Christopher Collier, *My Brother Sam Is Dead*	Challenged in schools in KS, CA, PA, CO, VA and IL (1993, 1994, 1996, 1998 and 2000)
Conroy, Pat, *Beach Music*	Suspended from Nitro, WV, high school honors and advanced placement courses (2007)
Conroy, Pat, *The Prince of Tides*	Suspended from Nitro, WV, high school honors and advanced placement courses (2007)

Cooke, John Peyton, *The Lake*	Challenged at the Multnomah County, OR, library (1991)
Cormier, Robert, *After the First Death*	Challenged in Manchester, CT, and Fauquier, VA, schools (2000)
Cormier, Robert, *Fade*	Challenged in Campbell County, WV, junior high schools (1990)
Cormier, Robert, *We All Fall Down*	Removed or restricted in school libraries in CA, FL and TX (1984, 2000)
Courtenay, Bryce, *The Power of One*	Challenged in Round Rock, TX, high school (1996)
de Jenkins, Lyll Becerra, *The Honorable Prison*	Challenged at Bainbridge Island, WA, middle school (1992)
Dorner, Marjorie, *Nightmare*	Removed from Winona, MN, middle school (1995)

Duncan, Lois, *Killing Mr. Griffin*	Removed in Bonsall, CA, middle school (1992) and challenged in PA schools (1995, 2000)
Ellison, Ralph, *Invisible Man*	Challenged in Yakima, WA, schools (1994)
Fuentes, Carlos, *The Death of Artemio Cruz*	Challenged in Yakima, WA, schools (1994)
Gardner, John C., *Grendel*	Challenged in GA, CO and OR (1993, 1997, 2008)
Gilstrap, John, *Nathan's Run*	Removed in Anneville-Cleona, PA, middle school (1998) and challenged in Everett, WA, School District
Golding, William, *Lord of the Flies*	Challenged in Bloomfield, NY, high school (2000)
Gordimer, Nadine, *July's People*	Challenged in Yakima, WA, schools (1994)

Grimm, Jacob, and Wilhelm K. Grimm, Translated by Jack Zipes, *The Complete Fairy Tales of the Brothers Grimm*	Challenged in Kyrene, AZ, elementary schools (1994)
Grimm, Jacob, *Snow White*	Restricted in Duval County, FL, public schools (1992)
Grisham, John, *The Client*	Challenged in Hillsborough, NJ, school (1996)
Hahn, Mary Downing, *The Dead Man in Indian Creek*	Challenged in Salem, OR, school (1994)
Haugaard, Erick C., *The Samurai's Tale*	Challenged at Wilsona, CA, School District (1995)
Hegi, Ursula, *Stones from the River*	Banned but later reinstated in Savannah, GA, high school (2000)

Hinton, S.E., *Tex*	Challenged at Daytona Beach, FL, middle school
Hosseini, Khaled, *The Kite Runner*	Challenged in Morgantown, NC, schools (2008)
Kehret, Peg, *Abduction*	Challenged in Apple Valley, MN, middle school and elementary schools (2006)
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BRIEF

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ARNOLD SCHWARZENEGGER, GOVERNOR OF CALIFORNIA, ET AL.,
Petitioners,

—v.—

ENTERTAINMENT MERCHANTS ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL COALITION AGAINST CENSORSHIP AND THE NATIONAL YOUTH RIGHTS ASSOCIATION FOR THE RESPONDENTS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and this nation's civil rights laws. The ACLU of Northern California, the ACLU of Southern California, and the ACLU of San Diego and Imperial Counties are regional affiliates of the ACLU. The ACLU has appeared before this Court in numerous First Amendment cases as direct counsel and *amicus curiae*, including *Reno v. ACLU*, 521 U.S. 844, 875 (1997), and *Ashcroft v. ACLU*, 535 U.S. 564 (2002); 542 U.S. 656 (2004), both involving statutes designed to block minors from accessing certain kinds of speech.

The National Coalition Against Censorship (NCAC) is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked through education and advocacy to protect the First Amendment rights of thousands of authors, teachers, students, librarians, readers, artists, museum-goers, and others around the country. Because of its concern that minors are particularly vulnerable to incursions on their freedom of speech and access to information, NCAC has established the Youth Free Expression Project, which works with young people and their teachers and parents to protect their right to read, speak, and think freely.

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[1] The parties have lodged blanket consents with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to this brief's preparation or submission.

NCAC has tracked countless incidents involving censorship in the name of protecting children. Opinions about what kind of material children should be protected from are highly subjective and varied. Some parents object to sex, others to violence, others to religious references, still others to material involving race, ethnicity, and national origin, depictions of historical events, and characters thought to be bad role models. These concerns are not limited to television and video games, but extend to books and art as well. California's contention that it can restrict young people's access to protected expression if it has a "reasonable basis" to believe that the expression might pose *some* harm to *some* minors thus threatens a wide range of material. NCAC joins this brief to assist the Court in understanding the dangers posed by the statute under review.[2]

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[2] NCAC's members include organizations such as the Authors Guild, College Art Association, Dramatists Guild, Lambda Legal, PEN American Center, and the Society of Children's Book Writers and Illustrators. The views presented in this brief, however, are those of

The National Youth Rights Association (NYRA) is a youth-led, non-profit organization committed to defending the civil rights and liberties of young people in the United States. NYRA believes certain basic rights transcend age or status limits, including those rights protected by the First Amendment, and previously joined an *amicus curiae* brief in *Safford Unified School District v. Redding*, 129 S.Ct. 2633 (2009).

STATEMENT OF THE CASE

This case is a First Amendment challenge to a California law designed to prevent minors from purchasing "violent video games." The law requires that any violent video game "that is imported into or distributed in California for retail sale" be labeled with a two inch by two inch label marked "18." Cal. Civ. Code § 1746.2 (2006). No person may then "sell or rent" a game with that label to a person under eighteen. Cal. Civ. Code § 1746.1(a) (2006).

Sellers may avoid liability if they "reasonably rely" on a driver's license or other government issued ID. Cal. Civ. Code § 1746.1(b) (2006). A sales clerk is not liable, only someone with an ownership interest in the store. Cal. Civ. Code § 1746.3 (2006). Parents, grandparents, aunts, uncles, and legal guardians of a minor may sell or rent

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NCAC alone and do not necessarily represent the views of any of its members.

violent video games to them. Cal. Civ. Code § 1746.1(c) (2006).

Violent video games are defined as:

> a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that ...
>
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant interest of minors.
>
> (ii) [I]s patently offensive to prevailing standards in the community as to what is suitable for minors. [and]
>
> (iii) [C]auses the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.[3]

Actions to enforce the statute may be brought by "any city attorney, county counsel, or district attorney." Cal. Civ. Code § 1746.4 (2006). The penalty is a fine of "up to one thousand dollars." Cal. Civ. Code § 1746.3 (2006).[4]

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[3] There is an alternative definition of "violent video games" but California has conceded it is unconstitutional. Pet. Br. 39 n.5.

[4] It is not clear whether this is a criminal statute or a civil statute. It is not in the criminal code, but involves prosecution by the DA and can lead to substantial fines. There is ancient California law that a statute that imposes a fine is criminal even if not found in the criminal code. *Dyer v. Placer County*, 27 P. 197 (1891).

The statute was challenged by plaintiffs who create and distribute video games. The district court declared the statute unconstitutional and its holding was affirmed by the court of appeals. *Entm't Merchs. Ass'n v. Schwarzenegger*, 410 F. Supp. 2d 1034 (N.D. Cal. 2005), *aff'd* 556 F.3d 950 (9th Cir. 2009). Similar statutes have been declared unconstitutional by other courts of appeals. *E.g. Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001). This Court granted *certiorari* on May 19, 2009.

SUMMARY OF ARGUMENT

1. California has written a statute that bans the sale of "violent video games" to minors without expressly addressing on-line sales, which represent a large and growing share of the market. Such online sales can take a variety of forms. For example, it is possible to purchase a box version of the game and have it shipped to the buyer. It is also possible to download the game electronically. And, increasingly, it is possible to play online without the need to download the game's software to your computer. Regardless of

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If it is a civil statute, then conviction can be based on a preponderance of the evidence, not guilt beyond a reasonable doubt. It is not clear if a defendant in a case under this statute would be entitled to a jury trial. *Compare* Cal. Penal Code § 19.6 *with People v. Anderson*, 191 Cal. App. 3d 207, 236 Cal. Rptr. 329, 332 (1987).

which method is used, however, it is not possible for the online seller or game host to know the age of the online buyer.

a. If the statute applies to online sales, it will inevitably burden the First Amendment rights of adults as well as minors, as this Court has found in related contexts. Unable to distinguish between adults and minors, a prudent seller can avoid the risk of liability only by ceasing all online sales. And, because it is not possible to determine the location of someone downloading a game or playing it online, those offering downloading or online game play must refuse service not only to all Californians, regardless of age, but everyone throughout the world. Under this Court's holdings in *Butler v. Michigan*, 352 U.S. 380 (1957), and *Reno v. ACLU*, 521 U.S. 844, 875 (1997), that result is clearly unconstitutional.

b. If the statute does not apply to online sales, downloading, and playing, then it is wildly ineffective in achieving any governmental purpose. Using their computers, minors can and do access video games, "violent" and otherwise, in numerous other ways. In addition, the statute does not prevent minors from accessing violent video games at their neighbor's or friend's, nor does it prevent minors from accessing violent images in other media. If limited to in-store sales, therefore, the California statute abridges First Amendment rights without advancing the state's asserted goal in any meaningful way. The violation of First Amendment rights is especially unjustified given ample evidence that the vast majority of parents do not need this statute (and may not want it) and that alternatives exist that are far more effective for those parents who do want to block their children from accessing violent games.

2. The California statute is also unconstitutional because its effort to define violent video games by reference to this Court's definition of obscenity is both legally unsupportable and unworkable in practice. Borrowing from obscenity law (while omitting the critical link to sex), California has defined a violent video game as one that appeals to the "deviant" interests of minors. If this definition is intended to distinguish a healthy interest in violence from an unhealthy one, it is clearly incapable of reliable application. Like obscenity law, the statute requires that the game be judged "as a whole." How is a game that can take up to 50 hours to play and has many different routes to the end (some of which any given player may not ever play) to be judged "as a whole?" And without the ability to judge the game as a "whole," how can the "value" of the game be assessed, as California law requires? Finally, the statute treats all minors (people under 18) as identical. But, there is a widespread recognition that material may be entirely suitable for a 17 year old but not for a child of five or 10 years old. If 17 year olds are deemed the appropriate reference point (and there is no basis for that conclusion under the law), then it is doubtful that any speech has value

for an 18 year old but lacks value for a 17 year old, depriving the statute of any practical application. Conversely, if the speech is judged by the standards applicable to a five year old, then 17 year olds will be deprived of speech to which they are constitutionally entitled. All of these problems lead inevitably to the conclusion that, even on its own terms, the statute will result in censorship that has no basis at all and is therefore unconstitutional.

3. Finally, California's argument that a statute may restrict First Amendment rights of minors if the legislature's acts are not irrational is both unprecedented and dangerous. This Court should forcefully reject it, just as it recently rejected a similar challenge to core First Amendment principles in *United States v. Stevens*, 130 S.Ct. 1577 (2010).

ARGUMENT

Throughout this litigation, petitioners have candidly acknowledged that the constitutional theory they are advancing can only be sustained by a judicial decision that goes "boldly . . . where no court has gone before." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009) (noting petitioner's concession). Having failed to convince the lower courts, they now ask this Court to recognize a new category of speech ("violent video games") and make illegal sale of that speech to a category of people ("minors"). The specifics of petitioner's claim may be novel, but attempts to create new exceptions to the First Amendment are hardly new. *See, e.g., United States v. Stevens*, 130 S. Ct. at 1585 (discussing Government's argument that depictions of animal cruelty "should be added to the list" of unprotected speech). This Court has been vigilant in rejecting such pleas and should do so here.

I. IF CALIFORNIA'S BAN APPLIES TO THE ONLINE SALE OR USE OF VIDEO GAMES, IT IS UNCONSTITUTIONAL PURSUANT TO *BUTLER V. MICHIGAN* AND *RENO V. ACLU*.

The statute challenged in this case provides that no one may "sell or rent" a "violent video game" in California to a minor. Cal. Civ. Code § 1746.1(a) (2006). There is nothing in the statute that exempts sale or use of video games online; nor is there anything that specifically includes online transactions. In a statute that severely penalizes constitutionally protected expression, that central ambiguity is troubling in its own right. But, to the extent that the statute may be interpreted to reach online sales or use, it is plainly unconstitutional for the same reason that this Court has struck down other efforts to regulate online speech to minors: it inevitably restricts the online speech of adults, as well.

A large number of online sites sell video games. A search of Amazon.com shows over 85,000 results in just the video game store. *Video Games*, amazon.com, http://www.amazon.com (select "Video Games" from "Search" drop-down menu; then follow "Go" hyperlink) (last visited Sept. 2, 2010). There are a vast number of other sites that also sell video games online. *See, e.g.*, *Video Games*, Toys "R" Us, http://www.toyarus.com/shop/index.jsp?categoryId=2255974 (last visited Sept. 10, 2010); *Game Downloads*, GameStop, http://www.gamestop.com/gamedownloads (last visited Sept. 10, 2010); purchasing video games, http://www.purchasing-videogames.com (last visited Sept. 10, 2010).

These sites carry video games such as Grand Theft Auto, mentioned by California and its *amici*. *See Video Software Dealers*, 556 F.3d at 955 (noting inclusion of Grand Theft Auto excerpts in video compilation submitted by Appellants); Br. of *Amicus Curiae* Eagle Forum Education & Legal Defense Fund In Support of Petitioners at 13, 20. Many will sell a video game on a disk in a box; many will also allow downloading of the game directly to the consumer. *See, e.g., Game Downloads*, GameStop, *supra*. Many of these sites will allow a user to rent a video game with a business model similar to that of Netflix.com, shipping video games to a renter for a monthly fee. *E.g.*, All Game Rentals .com, http://www.allgamerentals.com (last visited Sept. 2, 2010).

In addition, there are many sites that allow game users to play the games online. Steam, found at www.steampowered.com, is one example. Users join Steam and can then play popular games, including Grand Theft Auto, online. Typically, between 1 and 2.5 million people are playing games on Steam at any one time. *Steam & Game Stats*, Steam, http://store.steampowered.com/stats/ (last visited Sept. 2, 2010). The manufacturer of Halo asserts that there have been 1 billion games of Halo 3 played online. Urk, *One BILLION Served*, BUNGIE, (Mar. 2, 2009, 3:54 p.m.), http://www.bungie.net (follow "Top News" hyperlink on "About Us" drop-down menu; then follow "2009" hyperlink; then follow "March" hyperlink; then follow "One BILLION Served" hyperlink). The future is represented by sites such as onlive.com which are now offering online play that does not even require downloading of the game software but utilizes game software that remains on onlive.com's servers or "in the cloud."

On its face, the statute does not contain any requirement that the person selling or renting the game know that the buyer or renter is a minor. *See* § 1746.1(a)-(b). There is no way for online sellers to know the ages of buyers. *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 800 (E.D. Pa. 2007), *aff'd sub nom. American Civil Liberties Union v. Mukasey*, 534 F.3d 181 (3d Cir. 2008). Similarly, there is no way for an online seller of downloads or online game host site to know whether the buyer is in California. *Id.* at 808. As a result, online sellers must refuse to sell "violent video games" to anyone in California, including adults, if the game is being shipped to California. If the game is being downloaded or played online, to avoid potential liability, online sellers would have to refuse to sell or rent "violent video games" to everyone in the world, including adults.

That is precisely the effect, banning speech to adults in the name of protecting children, which this Court has repeatedly found renders a statute unconstitutional. *Butler v. Michigan*, 352 U.S. 380 (1957); *Reno v. ACLU*, 521 U.S. 844. If this statute does apply to online speech, it does precisely that and is therefore unconstitutional for the same reason.

II. IF THE STATUTE DOES NOT APPLY TO ONLINE SALES, IT SERVES NO PURPOSE EXCEPT TO ABRIDGE THE CONSTITUTIONAL RIGHTS OF MINORS.

The statute prohibits the sale or rental of a video game contained in a package to which a sticker labeling it "18" (signifying that it is a "violent video game") has been attached. §§ 1746.1(a), 1746.2. But, if a game is downloaded, or if the game is played online, there is no "package." There is no box for the manufacturer to label and no box for the seller to consult.[5] For this reason, and for the reasons suggested above, respondents reasonably assume that the statute applies only to store or online sales of boxed products, not to online downloads or online play. Resp. Br. 51 n.21. If so, the statistics cited above suggest that the statute will be wildly ineffective in its stated purpose. As noted previously, there are a multitude of ways that minors can access "violent video games" without actually purchasing a game in a box. This fact, combined with other problems in the statute, leads inescapably to the conclusion that the statute will not serve any useful purpose. At the same time, problems inherent in the effort to define a new category of unprotected speech will inevitably mean that the statute cannot be enforced without severely infringing the First Amendment rights of minors.

A. The Statute Fails to Serve Even Its Asserted Purpose If It Does Not Apply To Online Sales And Game Play.

California relies almost exclusively on the idea that the governmental purpose served by the statute is to assist parents in shielding their children from "violent" video games, as the state has defined that term. Pet. Br. 38-41. California does occasionally suggest that there is an independent state interest in protecting minors. *Id.* at 40. However, the claim that harm to minors is sufficient to justify independent government action, cannot be reconciled with the express language in the statute permitting parents and even aunts and uncles to sell or rent the games to minors, or the state's acknowledgment that parents can purchase the games for their children. § 1746.1(c); Pet. Br. 38-41. Recognizing this logical inconsistency in any assertion by the state of an independent interest in protecting children leads California to emphasize the assistance they believe the statute provides parents.

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[5] It is technologically possible to embed a label in the data stream of the game. Whether this would constitute compliance with the statute, which requires a two inch by two inch label, is doubtful.

What California ignores is that there are many parents who do not share the state's concern. Up to forty percent of parents familiar with the industry rating systems allow their children under seventeen to play games rated Mature. Fed. Trade Comm'n, *Marketing Violent Entertainment to Children* 28 (2007). For those parents, the statute does nothing but create another burden, requiring them to go with their children to buy or rent games they are willing to have their children play.

For the subset of parents who share California's views, some will not be affected because video games require hardware purchases (such as Xbox or PlayStation) that can cost $200 to $300 and parents would have to approve buying that hardware. What help has the statute provided to these parents? Very little. If the statute does not apply to online sales, downloading, or online game playing, it does not prevent minors from accessing "violent video games." Indeed such access is probably easier through online sources that do not require a trip to the local store. And, of course, the statute does nothing to prevent minors from playing "violent" video games outside the home with others who may have access to them. Given the statistics of online use and the other loopholes, the statute at best offers these parents a false sense of assurance.

Second, there is additional evidence that parents do not need or desire the assistance that California purports to provide. According to the most recent federal government statistics, eighty-five percent of parents are already involved in the decision to purchase a particular video game. Fed. Trade Comm'n, *supra*, at 29. Seventy-six percent report that they have played all or part of the game purchased in their family. *Id.* at 29. For parents who wish to limit the video games that their children play at home, video game hardware now includes parental controls that can be one hundred percent effective in blocking access to material according to an industry rating system. Under this Court's decisions, the state may not assume that the this alternative will be unsuccessful, *see United State v. Playboy*, 529 U.S. 803, 824-25 (2000), nor use the failure of some parents to activate parental controls, whether intentionally or inadvertently, as a basis for imposing a broad and indiscriminate censorship scheme. *See also Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004) ("The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative.").

In short, the assistance that the statute provides to parents, if any, is minimal at best.

B. The Statute's Definitional Terms Highlight The Threat To Minors' First Amendment Rights

To its credit, California has attempted to define the games it has banned for sale to minors. However, it has done so by borrowing (and often altering) terms created for and applied in very different contexts to ban a category of speech never before successfully made illegal. *Compare* § 1746(d)(1)(A) *with Miller v. California*, 413 U.S. 15, 24 (1973). In doing so, it has created terms that are so imprecise that they will inevitably lead to a chilling effect on the visual artists who create games, the manufacturers who produce them, and the retailers who sell them. The effect will be not only to restrict the rights of the visual artists who create the games, but also to deprive minors of a substantial amount of speech to which they are constitutionally entitled.

1. In *Miller*, the Court defined obscenity to be speech about sex that is "prurient." *Miller*, 413 U.S. at 24. Prurience connotes speech that is designed to or does sexually arouse. Prurience certainly presents difficulties. What is prurient to one person may well not be prurient to another. But, the

statute in this case attempts to reach speech that is not designed to and does not sexually arouse. California has modified the *Miller* language to prohibit speech that "appeals to a deviant or morbid interest of minors." § 1746 (d)(1)(A)(i). This is not an objective standard (violence that is deviant or morbid) but a subjective one (violence that "appeals to a deviant or morbid interest of minors"). It is not an individual standard (this child approaches the game with a deviant or morbid interest) but a standard applicable to all (or a majority of? or a significant number of?) minors. It is not a standard that has been applied by courts over the years so as to have achieved some precision. It is new and untested.

"Deviant" could be interpreted to be statistical, *i.e.* refer to speech about violence that appeals to a minority of the minors viewing or playing the game. If so, the criterion has nothing to do with any interest that California advances and it is inconceivable that any jury could determine that a game did or did not meet that criterion. It would also then definitionally prevent a majority of minors from accessing games that even California thinks would not harm them. "Deviant or morbid" could be interpreted to be synonyms for "unhealthy." Perhaps California is trying to distinguish a healthy interest in violence from an unhealthy interest in violence. That, of course, suggests there can be a healthy interest in very serious violence (see §1746(d)(1)), even for minors. If, California is conceding that some minors would play a particular violent game with a healthy interest and other minors would play the identical game with an unhealthy interest, then the statute's terms become impossible to apply. Even if someone could distinguish a healthy from an unhealthy interest in violence with respect to a particular minor, a jury could not make that distinction for all minors.

Finally, California may argue that the criteria can be inferred from the explicitness of the violent acts. And, perhaps California believes some depictions of violence are "deviant" or unhealthy for all minors. But, California has not made those arguments and each presents serious problems. For example, is viewing an explicit news video depicting a violent terrorist act deviant or morbid? And, if not, does it become deviant or morbid if that explicit video is embedded in a video game? How is a jury to make that determination? California has simply failed to provide a definition that is sufficiently precise to be applied with any consistency.

2. A second criterion of the statute is that its violence "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." § 1746(d)(1)(A)(iii). This criterion presents at least two problems: (1) how do you measure value "as a whole" with respect to a video game and (2) how do you measure the "value" of "violent video games?"

"As a whole." In *Miller*, this Court held that the obscenity of a book or magazine must be judged by determining that the work "as a whole" is prurient and lacks value. *Miller*, 413 U.S. at 24. If this requirement did not exist, an entire 300 page book could be made illegal just because it has one page or two pages that are prurient, offensive and seen as lacking value. Application of the "as a whole" requirement is thus critical, but also relatively simple to apply in the context of a book or magazine.

The statute in this case, tracking *Miller*, requires that game be "deviant or morbid" "as a whole" and lack value "as a whole." Justice Kennedy has noted the difficulty of applying the "as a whole" part of the *Miller* test in contexts other than books or magazines. *Ashcroft v. ACLU*, 542 U.S. at 592 (Kennedy, J., concurring). Applying it to video games is difficult, if not impossible. Video games often take hours to play to completion. Such play can last as long as fifty hours or more. Rio Waye, *The Longest Video Games To Beat of All Time*, Helium, http://www.helium.com/items/1757848-the-longest-video-games-to-beat-of-all-time (last visited Sept. 10, 2010). A game also usually has multiple story lines. A player who takes one action at one stage of the game will take one route forward and a player who takes a different action at the same stage of the game will take a different route forward, as this description of Grand Theft Auto makes clear:

> The open, non-linear environment allows players to explore and choose how they wish to play the game, the game involves choices you make, whether or not to kill someone, or steal, so the game involves choices. Although storyline missions are necessary to progress through the game and unlock certain content and parts of the city, they are not required, as players can complete them at their own leisure. When not attempting a storyline mission, players can free-roam, giving them the ability to do activities. Side missions such as locating and destroying criminals in the police car database or participating in street races can keep the player occupied for hours. Free-roaming also includes going around the city, and doing many, many things, like buying, driving, walking, etc.
>
> It is possible to have multiple active missions, as some missions run over the course of several days and require the player to wait for further instructions or events. The player can also attempt a variety of optional side missions.

Grand Theft Auto IV, Wikipedia, http://en.wikipedia.org/wiki/Grand_Theft_Auto_IV (last visited Sept. 3, 2010).

In addition, the progress of the game is affected by the skill of the player. Less skillful players may end up blocked or diverted; more skillful players may be able to move forward in various different directions. For many players, who do not successfully ever complete the game, they will never see the game "as a whole." Does the "whole" of the game include those portions that only some players encounter and other players never see? If one player successfully resolves a hostage crisis through negotiation and another player, taking a different path, responds with graphic violence that ends with the death of the hostages, how is the jury to decide the value or deviance of the game as a "whole," even assuming it concludes that the latter path is deviant in its explicit depiction of violence?

There are enormous practical problems with applying the "as a whole" language to a video game. It is unlikely that an average juror will be able to play the game to completion. Will the government hire an expert who can play every branch of the game in front of the jury day after day after day? Will the expert deliberately go down every route including those that dead-end? Will the expert make the mistakes and suffer the consequences that inexperienced gamers suffer? How will appellate courts review judgments of trial courts given that the appellate courts must review First Amendment factual findings de novo and given that presumably the "value" part of the statute's definition presents an issue of law? *E.g.*, *Pope v. Illinois*, 481 U.S. 497 (1987); *Bose Corp. v. Consumers Union*, 466 U.S. 485

(1984). Will appellate judges attempt to play the entire game?

The difficulty of applying the "as a whole" requirement to video games is vividly illustrated by California's submissions in this case. According to the Court of Appeals, California submitted "a videotape that contains several vignettes" from certain games. *Video Software Dealers*, 556 F.3d at 955. California has lodged with this Court a "video compilation," presumably the same game excerpts to which the Court of Appeals has referred. Pet. Br. 46. In other words, California has not even attempted to illustrate to any court in this case that there is a single video game that is violent (or "deviant or morbid") "as a whole." Instead, California appears to be relying on an interpretation of the statute directly contradicted by its language because of the recognition that the "as a whole" requirement in the statute cannot be reliably or practically applied.

"Value": The difficulty of judging the value of a video game is also far greater than the difficulty of judging the value of a book or magazine. There is a great deal of evidence that video games, including those that are violent, are valuable in a variety of ways, sometimes independent of the content and sometimes because of the content. For example, video games can play a role in making friends, in channeling competition, in peer-teaching, in regulating feelings, in achieving mastery, and in providing a safe outlet for anger or other strong emotions.

Cheryl Olson, *Children's Motivations for Video Game Play in the Context of Normal Development*, 14 Rev. Gen. Psychol. 180 (2010); *see also* Steven Johnson, *Everything Bad is Good for You* (2006) (video games prepare people for life by placing you in an environment where you don't know and must discern the rules in order to succeed); Gerard Jones, *Killing Monsters* (2002).

One of the *amici*, the National Youth Rights Association, asked readers of its website to comment on the value of video games and violent video games in particular. *Schwarzenegger v Gamers – Help Us Fight Back*, national youth rights association (August 11, 2010, 2:11 p.m.), http://blog.youthrights.org/2010/08/11/schwarzenegger_v_gamers_help_us_fight_back/#comments. The range of "value" seen by those who played the games while minors and are still playing them is impressive. Many of the contributors saw important political components to the games. The game Halo, for example, was described as involving enemies who are trying to destroy humans as a result of extreme religious beliefs. Success is achieved, in part, by learning teamwork. Ethical problems are raised by one of the enemy who sees the error of his ways and cooperates with humans. Narella, Comment to *Schwarzenegger v Gamers, supra* (Aug. 12, 2010, 5:16 p.m.).[6] One contributor described a portion of ModernWarfare 2 in which a soldier is asked by his commander to perform a horrible act. When he follows the order, the result is that he dies and war ensues, raising questions about following unjust orders. Adam, Comment to *Schwarzenegger v Gamers, supra* (Aug. 13, 2010, 12:02 p.m.). Another commentator defends the Grand Theft Auto games because they "Paint a brutal picture of street crime, gang violence, and drug abuse. Prominently feature corrupt politicians and law enforcement officials. Include parody and political commentary, particularly on the radio stations. Among the subjects that are criticized on the radio [heard in the game]: right-wing media, left-wing media, militarism, celebrity role models, Scientology, poverty, journalistic integrity, counter-terrorism measures, youth crime, immigration, homosexuality and heteronormativity, and more." Mikkel Paulson, Comment to *Schwarzenegger v Gamers, supra* (Aug. 13, 2010, 9:37 p.m.).

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[6] Halo, like many of the games, exists not only in game form but in book form as well (books which minors can freely buy in California). *E.g.*, Eric Nylund, *Halo: The*

Independent of content, contributors noted that, as one put it, "many strategy games (like Starcraft) are intellectually stimulating like chess. You have to develop strategies to beat your opponent, counter your opponent's strategies and occasionally recover from your own screw ups. You do this all on the fly too. It's a mental exercise really." Matt,

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Fall of Reach (2001). The fact that book versions are treated differently from video game versions further illustrates the difficulties with California's decision to single out video games from all forms of media.

Comment to *Schwarzenegger v Gamers, supra* (Aug. 12, 2010, 2:45 p.m.). Other contributors movingly asserted that they found a socially useful outlet for violent thoughts by playing such games. *See* Alexx Souter, Comment to *Schwarzenegger v Gamers, supra* (Aug. 15, 2010, 1:21 a.m.); SoulRiser, Comment to *Schwarzenegger v Gamers, supra* (Aug. 13, 2010, 2:29 p.m.).

This anecdotal reporting is supported by other sources, as well. For example, the *New York Times* found Grand Theft Auto IV to be "richly textured and thoroughly compelling work of cultural satire disguised as fun." Seth Schiesel, ***Forget it, Niko, It's Liberty City, a Dystopian Dream***, N.Y. Times, Apr. 28, 2008, at E1.

Postal 2, another often criticized game, contains a segment in which the protagonist has to vote and finds a confusing ballot with jokes about chads. Fwiffo, *Postal 2*, Game Over Online (Apr. 7, 2003, 1:07 p.m.), http://game-over.net/reviews.php?id=827. Reviewers have mixed views on the game. One reviewer thought that "it's almost as much a political product as a game product…something akin to, dare I say, the art house indie flicks in the film industry." *Id.* Another said the "game is obviously an attempt to poke fun at these issues but they are handled in such an unintelligent manner…." Richard Clifford, ***Postal 2: Decidedly Controversial FPS Gets the Ferrago Verdict***, play.tm (May 20, 2003), http://play.tm/review/1631/postal-2/.

Amici do not suggest that these games have value or do not have value, only that the question of determining value of something as multi-faceted and complex as a video game is at best difficult, and not easily subject either to objective determination or consistent application.

"for minors": Each of the definitional subsections in the statute includes the phrase "for minors." Thus, the game must appeal to the "deviant or morbid interest of minors," must be patently offensive "as to what is suitable for minors," and must lack "value for minors." § 1746(d)(1)(A). "Minors" includes anyone "under 18 years of age." § 1746(a). It thus includes five year olds and 17 year olds. It treats a six year old child living with his or her parents identically to a 17 year old person, emancipated and living with a spouse and raising children.

There is a wide societal consensus that there is material that is not appropriate for younger children but is appropriate for teens. Thus, video rating systems, like those for movies and television, distinguish older and younger minors, applying different standards to different age groups. *Game Ratings & Descriptor Guide*, Ent. Software Rating Board, http://www.esrb.org/ ratings/ratings_guide.jsp (last visited Sept. 3, 2010); *What Each Rating Means*, Motion Picture Ass'n Am., http://www.mpaa.org/ratings/what-each-rating-means (last visited Sept. 10, 2010) (movies); *About the TV Ratings and V-Chip*, TV Parental Guidelines, http://www.tvguide lines.org/ (last visited Sept. 10, 2010) (television). California's statute makes no such distinctions. Therefore, what standard should a jury apply? Can the jury find a game to be a "violent video game" because it is, for example, patently offensive for a five year old even if it is not patently offensive for a 17 year old? If so, the 17 year old is being deprived of speech to which he or she is unquestionably constitutionally entitled. If the five year old standard can be applied, the statute prevents older minors from seeing material that they have a constitutional right to see in order to protect much younger minors. That is precisely analogous to this Court's repeated holdings that adults cannot be deprived of material in order to protect minors. *Cf. Butler*, 352 U.S. 380; *Reno v. ACLU*, 521 U.S. 844.

Alternatively, are the standards to be judged by the standard of a 17 year old? If so, there are two consequences. First, there will be speech sold to minors and available to five year olds that many will think inappropriate for that age group. Second, it is virtually impossible to imagine a game that, for example, lacks value for a 17 year old but has value for an 18 year old. *Ashcroft v. ACLU*, 542 U.S. at 678 (Breyer, J. dissenting). Indeed, this precise issue arose in *Ashcroft*. On remand, the government asserted that the statute was to be judged as to the oldest minor. Asked to produce a single web page that lacked value for a 16 year old but had value for a 17 year old (and similarly for the other parts of the definition), the government conceded that no such web pages existed.[7] In effect, in *Ashcroft*, the government was conceding that any speech covered by that harmful to minors statute was also legally obscene. Here, however, if the statute is judged by the oldest minor (here a 17 year old), and if there is nothing that lacks value for a 17 year old but has value for an 18 year old, then older minors are being deprived of speech to which they are entitled. The paper-thin or non-existent border here is not between harmful to minors and obscenity but between alleged harmful to minors and fully constitutionally protected material.

There are certainly areas in which the law must make arbitrary distinctions on the basis of age. U.S. Constitution, Amendment 26. Indeed, in some contexts, categorical age limits are constitutionally compelled. *E.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment categorically prohibits the execution of juvenile murderers). Here, there is a strong societal consensus that minors are not a single group for purposes of accessing speech and that maturity levels differ widely. There is also a strong social consensus that parents are best situated to determine the maturity of their own children. The alternative of allowing parents to make the decisions rather than imposing a one-size-fits-all system is both feasible and more effective. Where everyone agrees that even older minors do have First Amendment rights, where the most likely interpretation of the statute either renders the statute a complete nullity or inevitably deprives minors of those rights, and where a more sensible and effective alternative exists, the statute cannot be justified. *Ashcroft v. ACLU*, 542 U.S. at 667. In a First Amendment context, where restrictions on speech inevitably produce chill, the harm from this statute to the rights of minors and to the visual artists who produce video games is obvious and renders it unconstitutional. *Reno v. ACLU*, 521 U.S. at 871-72.

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[7] The government's concession came in Answers to Interrogatories. Those answers are contained in the Joint Appendix submitted to the Court of Appeals for the Third Circuit in *ACLU v. Mukasey*, No. 07-2539 (534 F.3d 181 (3d Cir. 2008)) the last court of appeals decision in the case challenging the Child Online Protection Act (COPA). J.A. 1645-1678. *Amici* can lodge those pages of the Appendix with the Court upon request.

III. CALIFORNIA'S DEFENSE OF THE STATUTE EVISCERATES THE FIRST AMENDMENT FOR MINORS.

All parties appear to agree that minors have at least some First Amendment rights. *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503 (1969). The reasons for that protection were summarized by Judge Posner in another opinion striking down efforts to restrict the sale of "violent" video games to minors:

> Children have First Amendment rights. This is not merely a matter of pressing

> the First Amendment to a dryly logical extreme. The murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. ...Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware. To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

Am. Amusement Mach. Ass'n, 244 F.3d at 576-77 (citations omitted). Many of the lower courts, in evaluating curfew ordinances, have required that any curfew ordinance include a provision protecting the rights of minors to engage in First Amendment activity after curfew. *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004); *Nunez ex rel. Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997); *Johnson v. City of Opelousas*, 658 F.2d 1065 (5th Cir. 1981); *Qutb ex rel Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993).

California, however, proposes that the Court hold that everyone under the age of 18 has no First Amendment rights "so long as it was not irrational for the California legislature to determine that exposure to the [banned] material is harmful to minors." Pet. Br. 8. The "irrationality" standard, among the most lax imaginable, would largely eliminate any First Amendment rights for anyone under 18.

This Court has on numerous occasions applied strict scrutiny to viewpoint and content-based restrictions designed to protect minors. *Cf. Butler v. Michigan,* 352 U.S. 380 (1957); *Bolger v. Youngs Drug Products,* 463 U.S. 60 (1983), *Sable Comm. v. FCC,* 492 U.S. 115 (1989); *U.S. v. Playboy,* 529 U.S. 803 (2000); *Reno v. ACLU,* 521 U.S. at 875. These and other cases recognize that viewpoint and content discrimination is suspect in all circumstances and must be closely scrutinized. Indeed, a restriction directed solely at the speech rights of minors, if "based ... on viewpoint restrictions, raises a host of serious concerns." *Morse v. Frederick,* 551 U.S. 393, 426 (2007) (Breyer, J., concurring in the result). It is not sufficient to say that the speech at issue may cause harm. That "does not itself constitute a satisfying explanation...." *Id.* at 427. Because state imposed content and viewpoint restrictions on minors raise such serious constitutional concerns, it is up to parents to decide "what their children may say and hear." *Morse v.*

Frederick, 551 U.S. at 424 (Alito, J., concurring.)[8]

The Court has similarly rejected the argument that the government may justify a content or viewpoint-based restriction because parents might not adequately supervise their children. *Sable*, 492 U.S. 115; *Reno v. ACLU*, 521 U.S. 844; *Playboy*, 529 U.S. 803. Nor is it relevant that a regulation merely burdens but does not suppress certain speech: "When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Playboy*, 529 U.S. at 826. If that were not the rule, a public school could remove all books about sexual orientation if they were available in the public library or bookstore, on the theory that the material has not been suppressed and those who are interested can gain access to it. The school has nonetheless crossed the line drawn by the First Amendment, by making it more difficult for students to gain access to certain material because of its content and ideas.

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[8] In addition, parents have the right to direct their children's upbringing and education without state interference. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This represents another basis for rejecting the state's argument that it can make a decision about minors' access to protected expression and impose an affirmative obligation on parents to overcome the state's determination.

It is not difficult to find vast categories of speech that someone thinks need to be restricted in order to protect children. Marjorie Heins, *Not in Front of the Children* (2001); David Hajdu, *The Ten-Cent Plague* (2008); Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vanderbilt L. Rev. 427 (2000). Anthony Comstock, among the first and most vigorous proponents of banning certain kinds of speech to protect children, criticized "dime novels and serialized tales; story papers; books, theatrical performances and pictures (including the classics) that might 'arouse in young and inexperienced minds lewd and libidinous thoughts;' illustrated newspapers depicting crimes; information about contraception; stage plays of 'beastly character;' chewing gum containing prizes; and candy lotteries." Ross, *supra*, at 443. California cites a variety of statutes and ordinances passed to protect children from speech that would now be easily found unconstitutional. Pet. Br. 34-36 (immoral deeds; criminal deeds; stories...of crime; comic books "devoted to crime, sex, horror, terror...;" pocket books devoted to "immorality"). The MPAA rating system for movies not only rates for sex and violence, but also drug use. *What Each Rating Means*, *supra*. Rap music, more recently, was the subject of censorship efforts. *Luke Records Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992). Similarly, there have been efforts to limit trading cards and card games. Ross, *supra*, at 438 n.37. Parents in some schools have sought to ban Halloween or Harry Potter books or any other speech reminiscent of witchcraft as harmful. *See Top Ten Most Frequently Challenged Books of 2002*, American Library Association, http://www.ala.org/ala/issues advocacy/banned/frequentlychallenged/21stcen turychallenged/2002/index.cfm (last visited Sept. 10, 2010). There have been efforts to prevent children from being able to read many of the classics of literature, including *I Know Why the Caged Bird Sings*, *Beloved*, and *Of Mice and Men*. Heins, *supra*, at 4. Parents have sought to limit sex education, contraception, and information about homosexuality. Heins, *supra*, at 77, 137-156. This Court has been required to address statutes aimed, in part, at protecting children from speech about tobacco. *Lorrilard v. Reilly*, 533 U.S. 525, 566 (2001). One of the *amici*, NCAC, compiles a list of challenges to book censorship efforts, many of which are based on the desire to protect children. *Our Activities*, National Coalition Against Censorship, http://ncac.org/p.php?rel=3929 (last visited Sept. 10, 2010). One court, citing this Court's decision in *Ginsberg*, has found that it can restrict abortion protestors from chanting words such as "murder" when small children are present. *Bering v. SHARE*, 721 P.2d 918, 921 (Wash. 1986).

Each new medium of communications brings calls for censorship to protect children. This Court initially rejected First Amendment protection for movies as "capable of evil..." *Mut. Film Corp. v. Industrial Comm'n*, 236

U.S. 230, 243 (1915). In the early 1950s, supported by social science studies and Congressional reports, there was an extensive effort to prevent minors from accessing comic books. Hajdu, *supra*. Automated telephone services prompted litigation over efforts aimed at protecting children. *Sable*, 492 U.S. 115. Cable TV resulted in a flood of litigation over efforts to protect children. *Playboy*, 529 U.S. 803; *Denver Area v. FCC*, 518 U.S. 727 (1996). As California emphasizes, TV and radio have been the subject of efforts at censorship to protect children. *FCC v. Pacifica Fdt*, 438 U.S. 726 (1978); *Fox Television v. FCC*, No. 06-1760-ag, 06-2750-ag, 06-5358-ag., 2010 WL 2736937 (2nd Cir. July 13, 2010). More recently, Congress (and many states) passed laws attempting to censor speech on the Internet in order to protect children. *Reno v. ACLU*, 521 U.S. 844; *Ashcroft v. ACLU*, 542 U.S. 656. In most instances those efforts have failed, as they should, and there is no evidence that minors have suffered as a result.

Given the extensive evidence that there will always be new efforts to create categories of speech that can be banned (*United States v. Stevens*, 130 S. Ct. 1577) the standard proposed by California, that any speech can be banned to minors if the legislature's actions are not irrational, is dangerous indeed. Such a lax standard will inevitably lead to more and more laws preventing minors from various types of speech. That result cannot be reconciled with the First Amendment and should be vigorously rejected. *Id.*

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

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AMICUS CURIAE BRIEF

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ARNOLD SCHWARZENEGGER,
GOVERNOR OF CALIFORNIA, ET AL., PETITIONERS

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. Cato has a substantial interest in this case because the California law at issue, if upheld, has the potential to erode First Amendment rights and insert the heavy hand of government into the individual choices of consumers, businesses, and parents.

SUMMARY OF ARGUMENT

This case concerns a California statute that seeks to protect minors by making it illegal to sell a "violent video game" to anyone under the age of 18.[2]

---

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

[2] Under the statute,

> "violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:

According to petitioners, video games represent a uniquely violent entertainment phenomenon that merits unique restrictions on free speech. But the kinds of concerns raised against violence in video games are not unique or novel; they have been raised repeatedly in the past about other new entertainment forms, including dime novels, movies, radio drama, comic books, television, and popular music. Invariably, the best response has been industry self-regulation and parental involvement.

The most effective self-regulatory systems have been found to involve age-based ratings, detailed content description, and vigorous retailer enforcement. Such systems prevent minors from accessing mature content without parental consent while providing parents with the information necessary to decide for themselves the amount of exposure that is appropriate for their children.

> (A) Comes within all of the following descriptions:
>
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
>
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
>
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.
>
> (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim.

Cal. Civ. Code § 1746(d)(1).

The video game industry already has such a system, one that incorporates the most effective attributes of other entertainment industries' self-regulatory mechanisms while avoiding those elements that can limit their impact. Respected sources (including the Federal Trade Commission) have called the video game industry's ratings and enforcement regime the most effective industry self-regulation in the entertainment field today, and it is one that is continually improving. Moreover, most of the remaining shortcomings identified with the video game industry's system would not be addressed by the California statute. The current self-regulatory scheme is therefore a vastly preferable alternative to a restrictive law that impinges on free speech and would likely do more harm than good.

ARGUMENT

I. Recurring Controversies About Violence In Entertainment Demonstrate That Statutory Prohibition Is Not Warranted

Despite petitioners' attempts to depict video games as a new and uniquely violent entertainment phenomenon, many of the concerns and issues in this case are anything but new, but date back centuries, if not millennia. As Judge Richard Posner noted in rejecting an Indianapolis law restricting violent video games, violence has infused popular entertainment from our earliest days:

> Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial.
>
> * * * *

> * * * Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware.

Am. Amusement Mach. Ass'n v. *Kendrick*, 244 F.3d 572, 575, 577 (7th Cir.), cert. denied, 534 U.S. 994 (2001).

Indeed, a story in the first collection of *Nursery and Household Tales* by the Brothers Grimm, titled "How the Children Played Butcher with Each Other," reads in its entirety:

> A man once slaughtered a pig while his children were looking on. When they started playing in the afternoon, one child said to the other: "You be the little pig, and I'll be the butcher," whereupon he took an open blade and thrust it into his brother's neck. Their mother, who was upstairs in a room bathing the youngest child in the tub, heard the cries of her other child, quickly ran downstairs, and when she saw what had happened, drew the knife out of the child's neck and, in a rage, thrust it into the heart of the child who had been the butcher. She then rushed back to the house to see what her other child was doing in the tub, but in the meantime it had drowned in the bath. The woman was so horrified that she fell into a state of utter despair, refused to be consoled by the servants, and hanged herself. When her husband returned home from the fields

> and saw this, he was so distraught that he died shortly thereinafter.

Jacob Grimm & Wilhelm Grimm, *The Annotated Brothers Grimm* 372 (Maria Tatar, ed., Norton 2004) (1812).

Other nursery tales from the Brothers Grimm contain similarly graphic depictions. The Grimms' version of "Cinderella," for example, tells of Cinderella's stepsisters slicing off parts of their feet with a knife in order to fit into the slipper, only to have their deception discovered when the prince noticed that "blood was spurting" from the shoe. *Id.* at 125-26. At the story's end, the stepsisters' eyes are pecked out by doves, punishing them "for their wickedness and malice with blindness for the rest of their lives." *Id.* at 127.

The Grimms' tales were criticized for their content and some critics urged parents to keep the stories out of the hands of children. *Id.* at xxxix. In response, the Grimms toned down or removed many of the more lurid parts in later editions. *Id.* at xlii. The Grimms, however, did more to eliminate sexual references than depictions of violence, and sometimes increased the degree of violence suffered by wrongdoers to emphasize aspects of morality. *Id.* at xliii-xlv.

The Grimms' tales, of course, were far from the first entertainment to contain representations of violence. Homer's *Odyssey*, in Judge Posner words, contains "graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake," *Kendrick*, 244 F.3d at 577, and much of

Shakespeare's entertainment, in its non-bowdlerized form,[3] is not for the faint of heart. And for as long as there has been violence in popular entertainment, there has been criticism that violent content is inappropriate for minors.

It is not the purpose of this brief to discuss the validity of such concerns, but a brief summary of depictions of violence in entertainment through history demonstrates that there is nothing novel about the present controversy. Similar concerns in the past were largely addressed without legislation that restricted speech. In each instance, the controversial new medium was portrayed as petitioners attempt to portray video games: as a unique and grave threat to morals and safety.

A. Dime Novels and Penny Dreadfuls Were Thought to Corrupt the Young

In the mid-to-late 1800s, the "dime novel" and "penny dreadfuls" first brought inexpensive literary entertainment to the masses. They were decried as overly violent and harmful to young readers. Dime novels averaged, by one estimate, some twenty killings per novel, and were often blamed for antisocial conduct. Harold Schechter, *Savage Pastimes: A Cultural History of Violent Entertainment* 33 (2005). Newspaper articles of the time are replete with tales like that of 13-year old Ernest Rossies of Brooklyn, N.Y., who fired a gun during a robbery and whose "friends say that he is the victim of dime novel literature." *Thirteen Year Old Desperado*, N.Y. Times, Feb. 6, 1896, at 1. A similar newspaper account reports that "Daniel McLaughlin, fifteen years[,] * * * sought to emulate the example of the heroes of the dime novels and 'held up' Harry B. Weir in front of 3 James Street last night." *City and Suburban News, New York*, N.Y. Times, Jan. 27, 1890, at 2.

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[3] In 1818, Thomas Bowdler published *The Family Shakespeare*, an expurgated version of Shakespeare's work intended to be more appropriate for women and children.

In England, "penny dreadful" publications (so named because of their price and content) were condemned for glorifying criminals and reveling in graphic depictions of violent behavior. They were blamed for youthful delinquency by the media and parents alike. "'There isn't a boy or a young lad tried at our Courts of Justice whose position there is not more or less due the effect of unwholesome literature upon his mind," opined the recorder for the City of London in 1885. James B. Twitchell, *Preposterous Violence: Fables of Aggression in Modern Culture* 169 (1989) (quoting Sir Thomas Chambers in the periodical *The Boy's Own Paper*).

The popularity of such fare, and its perceived impact on the young, caught the attention of Anthony Comstock, renowned Post Office Inspector and member of the New York Society for the Suppression of Vice. While Comstock is better known for his vehement opposition to sexual content, he also campaigned against cheap popular literature out of fear that its violent portrayals would lead minors toward "corruption and criminality." Anthony Comstock, *Traps for the Young* ix (1883).

B. Movie Violence Was Initially Viewed as Even More Harmful Than Dime Novels

The arrival of moving pictures sparked similar concerns about their depictions of violence. As the *New York Times* wrote in 1909:

> The days when the police looked upon dime novels as the most dangerous of textbooks in the school for crime are drawing to a close. They have found a new subject for attack. They say that the moving picture machine, when operated by the unscrupulous, or possibly unthinking, tends even more than did the dime novel to turn the thoughts of the easily influenced to paths which sometimes lead to prison.

Moving Pictures as Helps to Crime, N.Y. Times, Feb. 21, 1909.

One of the very first films to feature a narrative storyline, *The Great Train Robbery*, was denounced for its violence and blamed for real-life imitators, even when there was no evidence that criminals had seen it. Schechter, *supra*, at 119. That film contained some seven killings in its roughly ten-minute length, including one victim who was struck repeatedly in the head with a lump of coal and thrown off a train, and another who was shot in the back at close range. *The Great Train Robbery* (Edwin S. Porter 1903).

Concern over depictions of sexual content and violence prompted several states to censor film content, restrictions that this Court upheld because such movies could "be used for evil." *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 242

(1915). Parental concerns, as well as the fear of additional censorship, prompted the creation of the Hays Code in 1930, which provided a seal of approval to films only in the absence of certain forbidden elements. Open-mouth kissing and verbal profanity, for example, were not allowed, and criminals were not permitted to escape justice. Under the Code, films were simply approved or disapproved based upon whether they were deemed "moral" or "immoral." Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 Colum.-VLA J.L. & Arts 69, 71 (1996-97).

In 1952, this Court overruled *Mutual Film* and extended full First Amendment protection to movies, declaring that even were the Court to "accept the hypothesis [that] motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression[,] * * * it does not follow that motion pictures should be disqualified from First Amendment protection." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952). Despite that ruling, in 1965, the City of Dallas enacted the first movie classification regulation designed solely to protect children. This Court, in *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676 (1968), struck down the City's ordinance as violative of the First Amendment. Justice Marshall, writing for the majority, expressed support in dictum for a voluntary age-based classification scheme for movies. *Id.* at 690.

Dissatisfied with the Hays Code, and following the suggestion of Justice Marshall, the Motion Picture Association of America ("MPAA"), in conjunction with the National Association of Theater Owners, created a voluntary age-based rating system. The MPAA system was designed to free filmmakers from the strictures of the Hays Code while enabling parents to decide for themselves whether a film's content is suitable for their children.

C. Radio Violence Was Considered Harmful Because Of Its Intensity And Audio-Only Format

Much like film, radio dramas were also criticized for bringing sensational fare into the home. *Radio Gore Criticized for Making Children's Hour a Pause That Depresses*, Newsweek, Nov. 8, 1937, at 26. In 1941, pediatrician Dr. Mary Preston released a study concluding that a majority of children had a "severe addiction" to radio crime drama. Mary I. Preston, *Children's Reactions to Movie Horrors and Radio Crime*, 19 J. of Pediatrics 145, 147-49 (1941). According to Preston, children obsessed over the horror and violence presented in such programs, often identifying with criminals and daydreaming about murder and mayhem.

Preston believed that exposure to this "indigestible mass forced into [a child's] mental craw" through radio and films had made children callous. *Id.* at 149. As proof, she quoted comments from 10-year-olds such as, "I don't mind killings now even when they are sawed up," and "Murders are best. Shooting and gangsters next. I liked the Vampire sucking out blood very much." *Id.* at 158, 163.

Others argued that the radio medium was even more harmful to children than movies because its aural-only character made young listeners visualize the horror in their heads. This interactivity, according to critics, resulted in depictions that were more intense, and made it more difficult for listeners to distinguish radio violence from reality. Schechter, *supra,* at 130 (citing Lyman Bryson in The Journal of Adult Education, 1932).

D. Comic Books Were Considered More Dangerous Than Previous Mediums

Just as depictions of violence in films and radio were decried as "different" and more damaging than those of earlier entertainment forms, similar claims were leveled against comic books in the 1940s and '50s. The crusade against comics was led by New York psychiatrist Dr. Fredric Wertham, who placed the blame for teenage degeneracy largely on comic book consumption:

> A thirteen-year-old boy in Chicago has just murdered a young playmate. He told his lawyer, Samuel J. Andalman, that he reads all the crime comic books he can get hold of. He has evidently not kept up with the theories that comic-book readers never imitate what they read. He has just been sentenced to twenty-two years in jail; while the comic-book publishers who killed his mind with thoughts and methods of murder, and their experts who say his reading was good for him, continue as before.

Fredric Wertham, *The Comics . . . Very Funny*!, Saturday Review, May 29, 1948, at 6, 8.

Wertham asserted that while youth may have always relished sensational entertainment, comics were "an entirely new phenomenon" because of their numbers, their extreme depictions of "violence, cruelty, sadism, crime, beating, promiscuity, sexual perversion, race hatred, contempt for human beings, descriptions of every conceivable crime, every method of concealing evidence, and every way to avoid detection," and their widespread acceptance by adults. Fredric Wertham, *It's Still Murder: What Parents Still Don't Know About Comic Books*, Saturday Review, Apr. 9, 1955, at 11, 12. Said Wertham, "Never before in the history of civilized countries have adults been more deficient in their duty to the young." *Id.* at 46.

Complaints by Wertham and others led to repeated Congressional hearings at which many witnesses attributed violent behavior to consumption of comics. One mother testified that her 16-year old son, who along with friends had murdered a gas station attendant, had been a "good boy" before falling under the influence of comic books and "girlie magazines":

> We definitely feel that these books were a contributing factor – if not more than that * * *. He never got into trouble. But a few months before this [murder] he started reading these things. He would just lie on the bed and read his comic books or just stare at the ceiling.

Crime of Boy Linked to Lurid Magazines, N.Y. Times, Dec. 9, 1952, at 38.

Despite such testimony, Congress's final recommendation was to rely on industry self-regulation. In response, the industry devised the Comics Code Authority in 1954. The Authority laid out voluntary guidelines prohibiting the use of certain violent images and words in comic books and requiring, among other things, that good always prevail over evil. Code of the Comics Magazine Association of America, Code for Editorial Matter, General Standards Part A (6) (1954).[4]

E. Television and Rock Music Also Have Been The Focus Of Great Concern

With the arrival of television came familiar concerns about the effects of violent content. As early as 1954, the U.S. Senate held hearings on the impact of television programs on juvenile crime. *Juvenile Delinquency (Television Programs): Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 83d Cong., 2d Sess. (1954). Congress has intermittently held hearings on this topic ever since. John P. Murray, *The Impact of Televised Violence*, 22 Hofstra L. Rev. 809, 809-10 (1993-94). Studies and reports on television violence have been conducted by, among others, the U.S. Surgeon General, the National Research Council, the National Commission on the Causes and Prevention of Violence, the American Psychological Association, psychiatry professor Albert Bandura, and psychology professors Robert Liebert and Robert Baron. *Id.* at 810-14.

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[4] Some efforts to create alternatives to contemporary comic books contain a note of irony. In 1948, a group of parents concerned about the content of popular crime comics began publishing their own comic books depicting the fairy tales of, among others, the Brothers Grimm. *New War Started on Crime Comics*, N.Y. Times, Dec. 5, 1948, at 65.

It would require hundreds of pages to summarize the myriad findings of those reports which are, unsurprisingly, not entirely consistent. But it suffices to say that numerous researchers concluded there was a correlation between children watching depictions of violence on television and aggressive behavior toward others. Despite that, the ultimate governmental response to violence on television has not been to impose censorship but to encourage the industry to establish its own voluntary system to enable parents to make decisions for their families.

In 1990, Congress passed the Television Program Improvement Act granting antitrust immunity to broadcasters in order to enable them to jointly set guidelines "designed to alleviate the negative impact of violence in telecast material." 47 U.S.C. § 303c. In the Telecommunications Act of 1996, Congress further required the television industry to devise a voluntary rating system, similar to that for film, to categorize programs based on the presence of violence or other sensitive content or allow the Federal Communications Commission to provide its own. Pub. L. No. 104-104, § 551(b), 110 Stat. 56, 140 (1996). The industry responded with the TV Parental Guidelines, a set of age-based ratings for television programs. The current version of the Guidelines went into effect on October 1, 1997.

In the 1980s, many parents and teachers became concerned about the effects of music with "explicit" lyrics, generally concerning sex, violence, and substance abuse. Tipper Gore and other parents founded the Parents Music Resource Center and persuaded the Senate Commerce, Technology, and Transportation Committee in 1985 to hold hearings on the lyrics of popular music. This led to the Recording Industry Association of America ("RIAA") adopting "parental advisory" logo standards, which encourage music producers to place warning stickers on packaging containing songs deemed to have explicit content. RIAA, *Parental Advisory Label ("PAL") Program*, at http://www.riaa.com/parental advisory.php.

The PAL program has not quelled criticism of popular music, however, and many continue to assert that rap and heavy metal music glorify violent crime and desensitize the young. For example, some critics have blamed the musician Marilyn Manson for school shootings after at least one perpetrator was found to be a fan. Andrew Gumbel, *Boy, 14, Kills Himself After Shooting Four In School Rampage*, Indep., Oct. 11, 2007.

F. Video Game Violence Is Not Materially Different From Depictions In Previous Mediums

Petitioners argue that regulation of video game content is warranted because the "level of graphic detail and realism contained in modern violent video games is without historic parallel," and the interactive nature of video games distinguishes them from other mediums depicting violence. Pet'r Br. 43, 55. Such a claim strikes a familiar chord and, in the words of Judge Posner, is "erroneous." *Kendrick*, 244 F.3d at 577. While critics of cheap fiction and movies and radio and comics claimed that each of those new mediums presented a unique potential for harm, the only real difference is the method of depiction. As Judge Posner observed:

> All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.

Id.

Most video games are, at bottom, creative stories. Some believe that video games more fully immerse the user in the story than other forms of entertainment, but all forms are, in one way or another, participatory. The fact that video games are different than earlier entertainment mediums does not by itself establish that they are more dangerous for youth or warrant regulation. Instead, criticism of video games is part of a recurrent cycle of initial denunciation before eventual acceptance of new entertainment mediums.

Harold Schechter, in the book *Savage Pastimes*, contextualized the current controversy over video game violence:

> That today's antipop crusaders denounce movie and video violence because it is visual – while

> their counterparts in the 1930s attacked radio crime shows because they were transmitted aurally – and Victorian reformers deplored the dime novel because it was written in a sensational, subliterate style – leads one to conclude that it doesn't really matter *what* the medium is. The real issue is that there will always be people who are incensed by violent entertainment, whether it is transmitted via sound or image, print or pixel; and that the current uproar over popular culture is simply part of a never-ending cycle of outrage that will undoubtedly go on into the future, when today's controversial cinematic and video shoot-'em-ups will come to seem as harmless as the average episode of *The Shadow* or *Captain Midnight*.

Schechter, *supra*, at 130.

Amicus curiae does not suggest that lawmakers are misguided in their efforts to safeguard California's children. We merely note that these kinds of concerns have been raised repeatedly in the past about new mediums, and the best response has invariably been industry self-regulation—particularly self-regulation that affords parents the ability to decide for themselves the amount of exposure to violence that is appropriate for their children.

The Federal Trade Commission has echoed this view, repeatedly affirming its support for "private sector initiatives by industry and individual companies" to address concerns about violence in films, music, and video games. Federal Trade Comm'n, *Marketing Violent Entertainment to Children: A*

Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress at v (Dec. 2009) ("*FTC 2009 Report*"); see also *id.* at 32 ("Although the Commission has identified areas where the entertainment industry can improve its self-regulatory programs, in light of First Amendment considerations, the Commission continues to support self-regulatory efforts to implement these recommendations."); see also Federal Trade Comm'n, *Marketing Violent Entertainment to Children: a Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report of the Federal Trade Commission* 52 (Sept. 2000) ("*FTC 2000 Report*") ("Because of First Amendment protections afforded to these products, industry is in the best position to provide parents with the information they need").

Indeed, the video game industry already has an effective self-regulatory system overseen by the Entertainment Software Ratings Board ("ESRB"). Before explaining the ESRB system and its effectiveness, it is worth briefly surveying other industries' voluntary rating regimes to show which aspects have been deemed most productive.

II. Voluntary Ratings Systems Successfully Help Parents Limit Their Children's Exposure To Violent Content

A. The MPAA Rating System Is Effective Because It Is Age-Based, Provides Specific Content Information, And Is Widely Used And Enforced

The ratings system most similar to the ESRB model is the film industry's MPAA system, which is well established as a useful tool to help parents make decisions about their children's movie viewing while protecting the free expression of ideas.

1. The MPAA Is An Age-Based System With Content Descriptors

The MPAA system is a judgment-neutral system designed to give parents information about a film's content and help them determine whether a movie is suitable for children of certain ages. Ratings are meant for parents only, and their purpose is not to promote certain behaviors or beliefs, serve as a guardian of morality, or pass judgment on whether a film is "good" or "bad." Classification & Rating Admin., *About Us*, at http://www.filmratings.com/filmRatings_Cara/#/about/ ("CARA, *Film Ratings*").[5]

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[5] The present system includes film ratings of G (all ages admitted); PG (parental guidance suggested; some material may not be suitable for children); PG-13 (parents strongly cautioned; some material may be inappropriate for children under 13); R (restricted; under seventeen requires accompanying parent or adult guardian); and NC-17 (no one under seventeen admitted). CARA, *Film Ratings*.

In response to criticism that letter ratings alone did not provide parents enough information, the MPAA added more detailed descriptors in 1990 for any rating beyond "G." There is no set list of descriptors, but examples include:

- *Piranha 3D* – "Rated R for sequences of strong bloody horror violence and gore, graphic nudity, sexual content, language and some drug use";
- *Eat Pray Love* – "Rated PG-13 for brief strong language, some sexual references and male rear nudity";
- *Alice in Wonderland* – "Rated PG for fantasy action/violence involving scary images and situations, and for a smoking caterpillar."

CARA, *Film Ratings*. The descriptors are required to appear in television ads and previews and in newspaper and magazine advertisements five inches or higher in size. *FTC 2009 Report, supra,* at 9.

Raters are parents unaffiliated with the film industry, and their job is to "reflect what they believe would be the majority view of their fellow American parents in assigning a rating to a film." CARA, *Film Ratings*. They view submitted films in their entirety and the rating is determined by vote. The film's producer can then accept the rating, appeal it to an industry board, revise and resubmit the film, or release it without a rating.

2. The MPAA Rating System Is Widely Used And Generally Effective

The MPAA system has been in place since 1968 and is now "well established with the American public." *FTC 2000 Report, supra,* at 6. Several examinations of the system have concluded that parents use the ratings in making decisions about their children's viewing habits. In 2002, a study found that 69% of parents "always" check the rating and 15% of parents "often" check before allowing their children to see a movie. Douglas A. Gentile & David A. Walsh, *A Normative Study of Family Media Habits,* 23 J. Applied Developmental Psychol. 157, 169 (2002). More recently, the FTC's 2009 report found that 76% of parents reported using the system all or most of the time when deciding whether to let their children view a movie. Only 9% of parents reported that they "rarely" or "never" use the rating system. *FTC 2009 Report, supra,* at 16.

While films can be released without a rating, MPAA members have pledged to submit all of their films and only release them in theaters as rated. CARA, *Film Ratings, supra.* Unrated films are generally given only limited release because about 85% of theaters participate in the MPAA system.[6] Richard M. Mosk, *Motion Picture Ratings in the United*

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[6] While 195 films were released without ratings in 2009, representing 37.4% of total film releases, they accounted for only 0.3% of gross film receipts because they were shown on fewer screens and had lower attendance. Box Office Mojo, *Yearly Box Office,* at http://www.boxofficemojo.com/yearly/?view2=mpaa&chart=byyear&yr=2009&view=releasedate&p=.htm.

States, 15 Cardozo Arts & Ent. L.J. 135, 138 (1997). Minors' access to NC-17 and R-rated films is restricted at these theaters.[7]

Since 2000, the FTC has tracked theater compliance through "undercover shops" to see if unaccompanied minors are able to obtain tickets to R-rated films. In 2009, the FTC found that theaters denied admission to R-rated movies to 72% of underage buyers, representing an 11% improvement over 2006 and an 18% improvement over 2000, *FTC 2009 Report, supra,* at 19, suggesting that enforcement and compliance are improving. See also Federal Trade Comm'n, *Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress* 8 (Apr. 2007) ("*FTC 2007 Report*").

3. The MPAA Rating System Has Not Been Free From Criticism

The MPAA system has been subject to some criticism. The primary complaints are that the raters are not as a statistical matter sufficiently representative of the American public; that ratings can appear inconsistent or arbitrary and the ratings method is not transparent; that ratings assignments are subject to "ratings creep," an increase in tolerance for mature content; and that ratings are not detailed enough and do not address many specific issues that concern parents—primarily depictions of alcohol and tobacco use. Although some concerns were addressed in 2007 when MPAA added tobacco use as a consideration in determining a film's rating, CARA, *Film Ratings*, *supra*, some contend that further progress could be made.[8]

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[7] G, PG, and PG-13 are considered parental guidance ratings and theaters thus do not enforce any age requirement. CARA, *Film Ratings, supra.*

Concerns about lack of detail may be due, in part, to the fact that while film content descriptors (such as those citing depictions of tobacco use) were added to film ratings in 1990, the descriptors were not included in most promotional material until the FTC urged the MPAA to do so in 2001.[9] The descriptors are still not included in small-print ads and may be difficult to read when displayed in TV advertisements. *FTC 2009 Report*, *supra*, at 9. As a result, parents are less aware of film content descriptors (and accordingly use them less) than simple letter ratings. Even so, the MPAA system is generally viewed as an effective alternative to government regulation, since it is well known, well understood, and commonly used by parents. Indeed, the only entertainment rating system considered as effective is the ratings system for video games. *FTC 2009 Report, supra,* at iii.

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[8] Depictions of smoking do not require assignment of a particular rating, and some critics contend that the system does not do enough for parents wishing to limit their children's exposure to tobacco content. Jennifer J. Tickle et al., *Tobacco, Alcohol, and Other Risky Behaviors in Film: How Well do MPAA Ratings Distinguish Content?*, 14 J. Health Comm. 756 (2009).

[9] See Federal Trade Comm'n, *Marketing Violent Entertainment to Children: A One-Year Follow-Up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report to Congress* 8-9 (Dec. 2001) ("*FTC 2001 Report*").

B. The Television and Music Rating Systems Still Have Room To Improve

The television and music industries have parental guidance systems as well, but theirs are less established and generally considered less effective than those of the MPAA and ESRB, due primarily to their methodology and lack of descriptive content information.

The present TV Parental Guidelines provides for seven categories, including

- TV-Y7 – program is designed for children age 7 and above;
- TV-PG – program contains material that parents may find unsuitable for younger children;
- TV-14 – program contains some material that many parents would find unsuitable for children under fourteen years of age; and
- TV-MA – program is designed to be viewed by adults and therefore may be unsuitable for children under seventeen.

TV Parental Guidelines, *Understanding the TV Ratings,* at http://www.tvguidelines.org/ratings.htm.

As with the MPAA system, ratings above the one appropriate for the youngest audiences (here, TV-PG, TV-14, and TV-MA) are supplemented with content labels indicating that a show contains violence, sex, adult language, or suggestive dialogue (designated by the letters "V," "S," "L," or "D"). *Id.* Ratings are presented using a ratings icon, usually located in the upper-left corner of the screen during a program's first fifteen seconds. TV Parental Guidelines, *Frequently Asked Questions*, at http://www.tvguidelines.org/faqs.htm.

The Guidelines are designed to be used in conjunction with the V-Chip (for "ViewControl"), a filtering device parents can use to block reception of rated programs. *Id.* All television sets sold in the United States since 2000 include V-Chip capability. When a parent blocks a particular age-based rating, all categories above that rating will also be blocked. *Id.*

The methodology for rating TV programs differs from the ESRB and MPAA systems. Rather than using a single independent board to assign ratings, TV programs are rated by individual broadcast networks, stations, or program producers. Their primary guidance for determining the appropriate rating is the ratings category descriptions themselves. *Id.* Ordinarily, a network provides a "pre-rating" for each show before sending it to a local affiliate. The local broadcaster can revise the network's pre-rating, although most simply accept it. Douglas A. Gentile et al., *Media Ratings for Movies, Music, Video Games, and Television: A Review of the Research and Recommendations for Improvements*, 16 Adolescent Med. Clinics 427, 432-33 (2005). The possibility exists, however, for different networks, and even different affiliates of the same network, to assign different ratings to the same program. *Id.*

While many parents find the ratings helpful, studies have also found that parents are often unaware of the TV ratings or the meaning of them. For example, a decade after the system's introduction, one report found that only 11% of parents knew that "FV" indicated violent fantasy depictions in children's programming. Victoria Rideout, *Parents, Children and Media: A Kaiser Family Foundation Survey* 8 (Kaiser Family Found. Publ'n No. 7638, 2007). Many parents thought "FV" denoted "family viewing." *Id.* See also Patricia M. Figliola, Cong. Research Serv., RL32729, *V-Chip and TV Ratings: Monitoring Children's Access to TV Programming* 8 (2005).

The system has also been criticized because of the complexity of using the V-Chip. A 2006 study found that fewer than 10% of parents use the V-Chip, with many finding it confusing to program. Ronda M. Scantlin & Amy B. Jordan, *Families' Experiences with the V-Chip: An Exploratory Study*, 6 J. Fam. Comm. 139, 139-40 (2006).

The RIAA's Parental Advisory Label Program, like the TV ratings system, does not rely on an independent ratings board. While the RIAA puts forth advisory standards, individual record companies and artists decide which releases should receive a "PAL," a notice affixed on packaging material indicating that the recording may contain strong language or depictions of violence, sex, or substance abuse. *"PAL" Program, supra.* PALs do not generally contain information about what specific content prompts the label, although some music companies use an "enhanced PAL" that provides additional descriptors such as "Strong Language" or "Sexual Content." *FTC 2009 Report, supra,* at 19. Participating merchants are not supposed to sell music with a PAL sticker to anyone under 17 unaccompanied by an adult.

The Federal Trade Commission has repeatedly criticized the PAL system for failing to rate material based upon age groups, failing to provide information about the type of content involved, and for inadequate enforcement at the retail level. *Id.* at 20-23. In FTC's 2009 undercover "shop," 72% of unaccompanied minors were able to purchase PAL-labeled music. *Id.* at 22.

III. The ESRB Voluntary Rating System And Parental Controls Are An Effective Alternative To Legislation

The ESRB rating system incorporates the most effective attributes of the MPAA ratings while improving on that system by furnishing additional information and stronger enforcement mechanisms. The ESRB system also avoids some of the elements that have limited the impact of the music and television ratings systems. The result is a system about which the FTC has recently observed, "[o]f the three entertainment sectors, the electronic game industry continues to have the strongest self-regulatory code." *FTC 2009 Report, supra,* at iii. Furthermore, the ESRB has continued to improve the ratings system in response to public concerns. As the FTC noted:

> the video game industry outpaces the movie and music industries in the three key areas that the Commission has been studying for the past decade: (1) restricting target-marketing of mature-rated products to children; (2) clearly and promi-

> nently disclosing rating information; and (3) restricting children's access to mature-rated products at retail.

Id. at 30. Moreover, most of the remaining shortcomings identified with the current ESRB system would not be addressed by the California statute. The ESRB is therefore a vastly preferable alternative to a restrictive law that impinges on free speech.

A. The ESRB System Provides Age Ratings, Content Descriptors, And Summaries

Much like the film and TV ratings systems, the ESRB system uses an age-based rating method, assigning every game one of the following ratings:

- EC (Early Childhood), which is suitable for ages three and over and contains no material that parents would find inappropriate;
- E (Everyone), which is for ages six and older and may contain minimal cartoon, fantasy, or mild violence and may infrequently use mild language;
- E10+ (Everyone 10+), which is for ages ten and over and may contain more cartoon, fantasy, or mild violence and mild language or minimal suggestive themes;
- T (Teen), which is for ages thirteen and older and may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and infrequent strong language;

- M (Mature), for ages seventeen and over and which may contain intense violence, blood and gore, sexual content, and strong language;
- AO (Adults Only), which is for ages eighteen and older and may include prolonged scenes of intense violence and graphic sexual content and nudity.

ESRB, *Game Ratings & Descriptor Guide*, at http://www.esrb.org/ratings/ratings_guide.jsp

In addition, the ESRB, like the MPAA system, provides detailed content descriptors, such as:

- Fantasy Violence - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life;
- Animated Blood - Discolored and/or unrealistic depictions of blood;
- Comic Mischief - Depictions or dialogue involving slapstick or suggestive humor;
- Simulated Gambling - Player can gamble without betting or wagering real cash or currency.

Id. Notably, there are content descriptors for depictions of (or references to) alcohol and tobacco use, *id.*, subjects on which many parents say they want information. See *supra* p. 23. Both the age rating and content descriptors are prominently displayed on packaging material, as well as on most video game retailer websites. ESRB, *supra*.

Furthermore, a more comprehensive description of game contents, the "rating summary," is available on the ESRB website, through a cell phone application, and in bimonthly parental emails. Such game summaries have been described as a "quantum leap" forward for parental guidance, offering "a level of information not provided by any of the other major media rating systems, and * * * they represent an unprecedented resource for parents." Nat'l Inst. on Media & Family, *13th Annual MediaWise Video Game Report Card* 8 (2008), available at http://www.crisisconnectioninc.org/pdf/2008_video_game_report_card.pdf. ("*Video Game Report Card*").[10]

B. An Independent Panel Rates Nearly Every Game And The System Is Well Enforced by Retailers

Although—as with the MPAA system—game producers are not legally required to submit games for rating, game consoles made by major manufacturers are designed so that they will not play a game without an ESRB rating. As a consequence, the vast majority of video games are submitted to ESRB. Adam Thierer, Progress & Freedom Found., *Parental Controls & Online Child Protection: A Survey of Tools & Methods* 88, 99 n.251 (2009). Once a game is rated, a game manufacturer is "legally bound, by contract, to disclose all pertinent content." See ESRB, *Enforcement*, at http://www.esrb.org/ratings/enforcement.jsp.

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[10] The following is an example of a summary for an "M" rated game:

> *Medal of Honor*: This is a first person shooter [game], set in the modern day, in which players join an elite army squadron hunting down enemy forces in Afghanistan. Players use machine guns, missiles, sniper rifles, and grenades to kill enemy soldiers and take out targeted facilities. Realistic gunfire, explosions, and cries of pain are heard during the frequent and fast-paced combat. Soldiers emit large splashes of blood when they are shot, enemies can be shot after they are killed, resulting in flailing motions and more blood effects. In multiplayer, players can choose to play as either coalition or enemy forces. Language such as "f**k" and "sh*t" can be heard in the dialogue.

ESRB, *Rating Information: Medal of Honor*, at http://www.esrb.org/ratings/synopsis.jsp?Certificate=29877.

As with the film system, ESRB's ratings are assigned by an independent panel of specially trained adult raters who are not themselves "gamers" and who "typically have experience with children through prior work experience, education or by being parents or caregivers themselves." ESRB, *FAQ*, at http://www.esrb.org/ratings/faq.jsp#14. ESRB raters review a video sample and written answers to a questionnaire submitted by the game manufacturer. *Id.* The sample must contain representative content from the game, including content not meant to be accessed by players. *Id.* After a rating is assigned, a manufacturer may accept the rating, refine the game's content and resubmit, or appeal to an appeals board consisting of publishers, retailers and other professionals. *Id.* They can also release a game without a rating but, as noted above, the game will then not play on most game consoles.

Following a game's release, ESRB staff and raters may follow up by playing the game to ensure that the video sample was accurate and complete. Unlike other rating systems, the ESRB can enforce the requirement of complete and accurate submissions through heavy fines (up to $1 million) and other sanctions against game manufacturers. See www.esrb.org/ratings/enforcement.jsp. The ESRB can also can change a game's rating post-release and require the manufacturer to recall and relabel packaging and promotional materials. *Id.* The ESRB has changed ratings post-release twice in recent years, and the risk of such a costly action creates a powerful deterrent to withholding information relevant to rating. The maker of *Grand Theft Auto: San Andreas* incurred some $24.5 million in recall costs when the ESRB changed the game's rating after discovering hidden mature content. Press Release, Federal Trade Comm'n, *Makers of Grand Theft Auto: San Andreas Settle FTC Charges* (June 8, 2006).[11]

Once games are in stores, the system depends on retailers' voluntary enforcement of the ratings for any purchaser of an M-rated game who appears to be under 17. The most recent FTC study found that retailers do so roughly 80% of the time, 8% higher than theater enforcement of R-rated film restrictions, and more than 60% better than enforcement of the music industry's PAL mechanism. *FTC 2009 Report*, *supra*, at iv. More importantly, according to the FTC, compliance is improving, and retailers now have a

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[11] Moreover, because ESRB ratings are included in advertising and marketing material, a false submission by a game manufacturer that results in an incorrect rating can subject the manufacturer to charges of unfair or deceptive trade practices under the Federal Trade Commission Act, 15 U.S.C. § 45(a). While rare, this also occurred in connection with the *Grand Theft Auto: San Andreas* game.

"robust system" in place "[t]o assist parents in their gate-keeping role." *Id.* at 13, 27-28.

C. The ESRB System Is Widely Understood, Accurate And Effective, Particularly In Combination With Parental Controls

As with the MPAA system, the ESRB system is well established and widely understood. The most recent FTC data indicate that 87% of parents are aware of the system; 73% of that number (61% of parents overall) said they review the rating most or all of the time before their child plays a video game for the first time. *FTC 2007 Report, supra,* at 27. Awareness levels of the ESRB system have risen significantly since 2000, when only 61% of parents were aware of it. *Id.* Although recognizing that "[u]niform agreement among parents about game ratings is unrealistic," *id.* at 31, the FTC found that 64% of parents familiar with the system agreed that "most or all of the time" the ratings matched their personal view of whether a game was suitable for children, and another 24% agreed with the ratings "some of the time." *Id.* at 29. The FTC found that parents "generally appear to be using ESRB ratings as a decision-making tool in conjunction with their own separate monitoring of their children's game-playing habits." *Id.* at 31.

The FTC has found striking consensus among parents about the utility of ESRB ratings. Sixty percent of parents familiar with the system considered it "good" or "excellent" at informing them about the level of violence in a game, and 87% reported being "very" or "somewhat" satisfied with ESRB ratings. *Id.* at 29. Meanwhile, 94% of parents found the ratings "moderately" or "very" easy to understand. *Id.*

In addition to point-of-purchase restrictions on sales of mature-themed games to minors, the computer and gaming industries have developed parental controls for current PC systems and major game consoles that allow parents to monitor and manage their children's game play. These controls allows parents to limit access to the Internet, limit games by ESRB age rating, and limit the amount of time the child can play.[12] And in contrast to V-chip technology, parents appear to understand and appreciate video game parental controls. The most in-depth survey of its kind (admittedly conducted by a private survey firm on behalf of respondent ESA), which gathered data from 1,200 households nationally, found that 76% of parents found video game parental controls "useful." Entertainment Software Ass'n, *Essential Facts About the Computer and Video Game Industry* 6 (2010) available at http://www.theesa.com/facts/pdfs/ESA_Essential_Facts_2010.pdf. Microsoft, manufacturer of the Xbox game consoles, also has an ongoing public service campaign to educate parents on the use of parental controls. *Video Game Report Card, supra,* at 8; Xbox, *Family Settings, supra.*

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[12] See Microsoft, *What can I control with Parental Controls?,* at http://windows.microsoft.com/en-US/windows-vista/What-can-I-control-with-Parental-Controls; Xbox, *Family Settings,* at http://www.xbox.com/en-US/support/familysettings/default.htm; Nintendo, *Parental Controls,* at http://www.nintendo.com/consumer/systems/wii/en_na/settingsParentalControls.jsp.

D. The ESRB System is Responsive to Public Concerns

While no parental guidance mechanism is immune to criticism, the ESRB, more than any other entertainment ratings system, has evolved in response to public concerns, continually refining and improving its rating system. In 2005, for instance, the ESRB added the older "Everyone" category (E10+), and changed its rules to require that video samples include content not meant to be accessed by players. The ESRB also increased its fine for misrepresenting game content to a maximum of $1 million and, in 2007, changed from part-time to full-time game raters. Then in 2008, the ESRB added the comprehensive rating summaries in order to provide parents with more information.[13]

E. Most Potential Weaknesses In The Current ESRB System Are Not Addressed By The California Legislation

The ESRB system is not perfect, of course. Critics contend that it suffers from some of the same inherent vulnerabilities as the MPAA system or the TV and music systems. Most of the weaknesses cited by critics, however, would likely be present in any type of ratings system and, moreover, are not addressed by the California legislation.

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[13] Because of these and other recent changes, older research into the effectiveness of the ESRB rating system may be dated and inaccurate. For example, the oft-cited studies by Kimberly Thompson and Kevin Haninger criticizing the accuracy of ESRB content descriptors have been addressed by the comprehensive rating summaries. *See, e.g.*, Kevin Haninger & Kimberly M. Thompson, *Content and Ratings of Teen-Rated Video Games*, 291 J. Am. Med. Ass'n 856 (2004); Kimberly M. Thompson & Kevin Haninger, *Violence in E-Rated Video Games*, 286 J. Am. Med. Ass'n 591 (2001). Moreover, because of the ESRB's demonstrated responsiveness to criticism, many potential issues are likely to be voluntarily addressed by the ESRB in the future.

For example, since the ESRB rating system is voluntary, critics note that not every game is rated. Some programmers of online games and mobile phone games do not submit games for rating. *FTC 2007 Report, supra*, at iv; *Video Game Report Card, supra*, at 9. The California legislation would likely have very little impact on these sorts of games, however, because it only applies to those who "sell or rent a video game that has been labeled a violent video game to a minor." Cal. Civ. Code § 1746.1(a).

Other critics have voiced concerns about the accuracy of a system that relies on game producers to submit samples of content rather than having the raters play games in their entirety before rating them. *FTC 2007 Report, supra,* at 18. Some members of Congress even introduced a bill that would require ESRB raters to play games in their "entirety." Truth in Video Game Rating Act, H.R. 5912, 109th Cong. (2006). But because video games are inherently variable depending on the user's skill and choices, requiring raters to play the entire game would be impractical, if not impossible. And as non-gamers themselves, it is unlikely that raters would be able to play games at their highest skill levels.[14]

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[14] The ESRB reasonably concluded that it is important to use non-gamers who have experience with children rather than gamers because non-gamers are more likely to represent the

Moreover, because of the significant contractual penalties for misrepresenting a game's content, the potential for a costly recall if a game's rating is changed post-release, and the virtual certainty that its true content will become public, there is little incentive under the ESRB system to conceal the true nature of a video game. Because the California legislation would also require someone to review the games in order to decide whether sales to minors would violate the law, that review would be subject to all the same limitations and criticisms.

Some critics argue that the ESRB ratings are subject to the possibility of ratings creep. But if such concerns are valid, it is difficult to see how those seeking to enforce the California statute would avoid a similar phenomenon. Someone must determine what a "reasonable person" would consider deviant or of morbid interest to minors, patently offensive to prevailing community standards, and lacking in any literary, artistic, political, or scientific value. Cal. Civ. Code § 1746(d). Such a subjective determination could be susceptible to the same type of variability. It would be preferable that any such variability manifest itself through a voluntary ratings scheme which parents can backstop through personal monitoring than through a legal penalty.

Finally, some critics contend that the parental controls are too limited, too confusing, and easily circumvented by tech-savvy children. See, *e.g.*, Mike Musgrove, *A Computer Game's Quiet Little Extra:*

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average parent's view of what game content is appropriate for children. *FTC 2007 Report*, *supra*, at 19.

Parental Control Software, Wash. Post, Dec. 23, 2006, at D1. But it is unclear that circumvention is possible in a significant number of cases, and it seems likely that many such concerns will be resolved as technology advances. Parents are also becoming increasingly familiar with the controls, and, as noted, one survey found that 76% found them useful. ESA, *Essential Facts, supra,* at 6. And in any event, no automated control will ever replace the need for parental involvement and supervision over a child's gaming activities. Parental controls are meant as a second line of defense after a child already has a video game in his or her possession. Meanwhile, the California legislation would not offer any solutions to these issues, and might make it less likely that game manufacturers will feel the need to address them.

CONCLUSION

It is evident that the video game industry is serious about giving parents control over minors' exposure to depictions of violence. The ESRB system is the most comprehensive, effective, and responsive parental guidance system in the entertainment field today. In fact, the National Institute on Media and the Family has stated that given all of the improvements to the ESRB system over the past few years, the Institute has "increasingly shifted [its] attention to the role of parents" in protecting children from age-inappropriate content. *Video Game Report Card, supra*, at 2.

Concerns over violence in popular entertainment and its effect on minors have been present for centuries. The appropriate response has always been industry self-regulation and parental involvement — and that is true here as well. The current ratings system effectively affords parents the ability to control their children's exposure to violence while avoiding unwarranted limitations on free expression. California's legislation would at best be a poor substitute for the voluntary system, and likely would do far more harm than good.

Respectfully submitted.

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SEPTEMBER 2010

AMICUS
CURIAE
BRIEF

No. 08-1448

In the
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as the Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber files briefs as amicus curiae in cases that raise issues of vital concern to the Nation's business community.[1]

This case presents a question of significant importance to the Chamber's members concerning the standard of review for a content-based restriction on speech. The First Amendment's protection of speech is integral to the work of American businesses. The First Amendment protects the right of businesses to engage in commercial speech to promote their goods and services and to engage in political speech to advocate for their interests. Further, a large segment of the American economy is directly involved in the creation, promotion, and distribution of expressive content. Businesses face a serious threat if, as California argues here, the government may restrict protected speech by proffering only a rational basis for the restriction, rather than by satisfying the traditional test of strict scrutiny. The Chamber has an interest in ensuring that the boundaries of the First Amendment remain stable and clear to guard against the risks of disrupting businesses with the prospect of legal uncertainty.

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[1] Pursuant to S. Ct. R. 37.6, counsel for amicus curiae affirm that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Chamber fully supports the State of California's goal to shield children from age-inappropriate material and to empower parents with the tools to foster their child's healthy development. When the government attempts to achieve its goals by imposing content-based restrictions on speech, however, this Court's long-settled First Amendment jurisprudence has required the government to satisfy the traditional standard of strict scrutiny. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

Under strict scrutiny, the government may regulate the content of constitutionally protected speech to promote a compelling interest "if it chooses the least restrictive means to further the articulated interest." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). California's video game law fails this test.

California's law fails strict scrutiny because a ban on the sale or rental of violent video games to minors is not the least restrictive alternative to protecting them from age-inappropriate media content. Industry self-regulation is a highly effective and less restrictive alternative. The video game industry voluntarily has established a private, independent review board that reviews and rates nearly every video game sold in the United States for its subject matter, including violent content. Major national retailers have voluntarily agreed to prohibit the sale or rental to minors of any video game that is unsuitable for children under 17.

Parental control software likewise is an effective and less restrictive alternative to prohibiting protected speech. Computers and major game consoles contain control settings that empower parents to restrict which classifications of games their children may play. In short, private industry and normal market forces have been enormously successful in facilitating parental control over the types of video games to which their children could be exposed.

In the face of overwhelming evidence of less restrictive alternatives, California seeks to avoid the traditional standard of strict scrutiny altogether. It argues instead for a minimalist standard of review that would uphold a State's content-based speech restriction if the State has a rational basis for restricting the content from minors. This the Chamber does not support. California's approach is without precedent, and nothing in this Court's obscenity decision of *Ginsberg v. New York*, 390 U.S.

629 (1968), justifies a watered-down review of government regulation of protected speech.

Upholding California's law under a rational basis review would invite a host of unwanted consequences. Other regulators could similarly seek rational basis review for other types of speech restrictions that long have been understood to be subject to rigorous strict scrutiny. Businesses need predictable, limited, and well-defined standards of liability in order to invest in the development of new content and new media. Malleable constitutional standards foster uncertainty; uncertainty adds risk; and risk discourages innovation and production. Because even minor sanctions can chill constitutionally protected speech, the boundaries of the First Amendment must remain stable and clear.

California's video game law unconstitutionally would chill businesses from engaging in protected speech. Attempting to apply inherently vague and subjective statutory criteria, businesses would face civil penalties up to $1,000 for failing to accurately assess a video game's appeal to the "deviant or morbid interest of minors," Cal. Civ. Code § 1746(d)(1)(A)(i), for example, or for failing to determine the prevailing community standards for "offensive[ness]," *id.* § 1746(d)(1)(A)(ii). Rather than risk being second-guessed by the government as to the application of those uncertain and vague criteria, businesses might well choose to change video game content or leave the market altogether. To protect manufacturers and retailers from exposure to liability simply because they engage in a business that distributes speech, the Court must continue to apply strict scrutiny to content-based speech restrictions.

ARGUMENT

California's video game law has two basic components. First, it prohibits the sale or rental of violent video games to anyone 17 years old or younger, and makes those acts punishable by a civil penalty up to $1,000. Cal. Civ. Code §§ 1746(a), 1746.1(a), 1746.3. The law bans sales or rentals to minors even when the minor is accompanied by or has the consent of a parent, legal guardian, other relative, or adult. Second, the law requires that all violent video games imported or distributed in California include a label to signify that they are for adults only. *Id.* § 1746.2. The law does not specify whether the producer, importer, or distributor is responsible, jointly or severally, for adding the label. See *id.*

Although the Chamber fully supports the State's laudable intent to ensure that minors view age-appropriate material, California has chosen unconstitutional means to further its goals.

I. LESS RESTRICTIVE ALTERNATIVES RENDER CALIFORNIA'S LAW UNCONSTITUTIONAL.

Where the government regulates protected speech based on its subject matter, this Court applies a well-settled standard: the government "may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126. This vigorous standard of review serves as an important check against governmental abuse. *Citizens United*, 130 S. Ct. at 898 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

California's outright ban of the sale or rental of violent video games to anyone aged 17 or under fails to satisfy strict scrutiny. There are at least two alternatives that are highly effective and less restrictive: (1) the video game industry's rating system, and (2) content-control software that already exists in computers and major game consoles.

Responding to the concerns of parents and other consumers, the video game industry years ago voluntarily instituted a widespread form of self-regulation. Due to those efforts, parents are advised of the content of video games, and they accordingly may exercise control over what video games their children may bring into the home.

The industry's independent review board—the Entertainment Software Rating Board (ESRB)—evaluates nearly every commercial video game sold in the United States for its subject matter, including violent content. The ESRB assigns a designated rating to each game and labels the game with the appropriate content warning. Industry-approved age ratings include "EC" (Early Childhood), "E" (Everyone), "E10+" (Everyone 10 and Older), "T" (Teen [13+]), "M" (Mature [17+]), and "AO" (Adults Only [18+]). Pet. App. 10a n.9. At the behest of the video game industry, major retailers such as Amazon.com, Best Buy, Target, and Walmart have voluntarily agreed to prohibit the rental or sale of "Mature" and "Adults Only" video games to unaccompanied minors, much like cinemas prohibit ticket sales to "R-rated" movies to children. Other cooperating businesses include Blockbuster, GameStop, Hastings Entertainment, Sears/Kmart, Shopko, Trans World Entertainment, and Toys "R" Us. ESRB, *Retail Partners*, available at http://www.esrb.org/retailers/partners.jsp (last accessed Sept. 16, 2010).

California obscures the effectiveness of industry self-regulation by citing outdated government statistics. See Pet. Br. 57 (citing 2000 and 2004 studies). A December 2009 report by the Federal Trade Commission ("FTC") *lauded* the video game industry for its effective efforts to shield children from inappropriate game content: "To assist parents in their gate-keeping role, video game retailers have implemented a robust system of checking for age identification when unaccompanied children attempt to buy M-rated games." Federal Trade Commission, *Marketing Violent Entertainment to Children: A Report to Congress* 27 (Dec. 2009) ("2009 FTC Report"). The FTC found that "[m]ajor game retailers continue to prevent most children from being able to purchase M-rated games without parental permission." *Id.* at 30.

The FTC concluded that "the video game industry continues to do an excellent job of clearly and prominently disclosing rating information in television, print, and Internet advertising and on product packaging." *Id.* at 29. The FTC further praised private industry for "(1) restricting target-marketing of mature-related products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children's access to mature-related products at retail." *Id.* at 30.

Currently, 89% of parents are involved in the purchase or rental of video games for their children. Federal Trade Commission, *Marketing Violent Entertainment to Children: A Report to Congress* 28 (Apr. 2007) (most recent government survey results). As these statistics show, the industry's ongoing campaign has been tremendously successful in increasing retailers' and parents' awareness of video game content and in facilitating parental control over the content that enters their home.

The ESRB ratings system empowers parents to decide for themselves what is suitable content for their children. It is a far more effective tool for exercising control over video game content than the blunt instrument employed by the State of California. In contrast to the detailed ESRB ratings, the California law recognizes no gradations of violent content and admits no gradations of maturity level among children. The law thus prohibits the commercial sale or rental of any "violent video game" to any minor 17 years old or under. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975) ("In assessing whether a minor has the requisite capacity for individual choice the age of the minor is a significant factor."). Lacking even an exemption for parental consent, the law forces very mature minors to purchase or rent games that are suitable only for younger children. The law does not enhance parental choice.

Likewise, parental control software is a preferable and less restrictive alternative to prohibiting protected speech. Currently, major game consoles—including PlayStation 3, PlayStation Portable (PSP), Xbox, Xbox360, Wii, and Nintendo DSi—contain parental controls. The Windows operating system also offers parental controls for computer-based games. Using the ESRB ratings, parents have the ability to restrict which classifications of games their children may play. The Court has repeatedly endorsed the same type of filtering technology as a less restrictive alternative to sanctions in *Ashcroft v. ACLU*, 542 U.S. 656, 666-670 (2004) (Internet filtering software), *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824-826 (2000) (television v-chip), and *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (Internet filters).

California argues that parental controls are ineffective alternatives for two reasons. First, California warns that children can learn how to bypass parental controls by searching for circumvention instructions online. That hypothetical concern has no more merit with video games than it did with parental filters to the Internet in *Ashcroft v. ALCU* and television in *Playboy*. As the Court acknowledged, alternatives need not be perfect to be effective. See *Ashcroft v. ACLU*, 542 U.S. at 669 ("The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective."); *Playboy*, 529 U.S. at 824

("It is no response that voluntary blocking . . . may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective.").

Second, California posits that parental controls "would apparently be useless" for video games not rated by the ESRB. Pet. Br. 58. But the market has already addressed this concern. Although the ESRB ratings are voluntary, the ESRB rates almost all games sold at retail in the United States. For example, the game *Postal 2*—which the State of California discusses frequently in its brief—is rated "M" (for mature). Pet. Br. 46. Moreover, several video game systems permit parents to block "unrated" games entirely. Thus, parents are already well equipped with both the information and the technology to decide for themselves what video game content to permit in their homes. *Playboy*, 529 U.S. at 824 ("[A] court should not presume parents, given full information, will fail to act.").

Because California cannot "prove that the[se] alternative[s] will be ineffective to achieve its goals," *id.* at 816, the government has not satisfied its constitutional burden of strict scrutiny. California's law thus violates the First Amendment.

II. THE CREATION OF A NEW CATEGORY OF UNPROTECTED SPEECH WOULD CHILL BUSINESSES FROM INNOVATING, DEVELOPING, AND INVESTING IN MASS MEDIA

In the face of overwhelming evidence that private industry self-regulation and market forces are less restrictive alternatives to government regulation, California seeks an exemption from strict scrutiny. Instead, it seeks a minimalist rational basis review that ordinarily applies to government economic regulation. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). California's proposal would affect a sea change in this Court's settled First Amendment jurisprudence.

Only a few "well-defined and narrowly limited classes of speech" are beyond the protection of the First Amendment: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942)). By seeking rational basis review, California in effect proposes that the Court create a new category of unprotected speech for violent video games when viewed by minors. That approach threatens to upend the First Amendment's dependable legal framework and cast doubt on the scope of free expression—a disconcerting prospect for numerous American businesses involved in the creation, promotion, or distribution of expressive content.

A. California's "Harmful to Children" Rationale Would Upend the First Amendment

In advocating for a new exception to the First Amendment, California contends that violent video games "are likely to harm the development of a child." Pet. Br. 30. California argues that the State may "help shape [the] marketplace" of ideas to which children are exposed "given [minors'] underdeveloped sense of responsibility and vulnerability to negative influences." Pet. Br. 9. And California reasons that the First Amendment permits a State to restrict the sale or rental of violent video games because they are "harmful to minors and ha[ve] little or no redeeming social value." Pet. Br. 12.

California's reading of the First Amendment would inject tremendous uncertainty into an area of heretofore settled constitutional law. Businesses have long understood that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik*, 422 U.S. at 213-214. California would have the Court abandon this rule and adopt an open-ended "harmful to minors" standard for content-based restrictions on expression. Although California here argues for a First Amendment exemption for only "offensively *violent* material," Pet. Br. 9 (emphasis added), nothing in the "harmful to minors" standard would prevent federal, state, and local governments from moving to prohibit other content they deem harmful, whether in video games or other forms of media.

For the numerous American businesses that are directly or indirectly involved in the media and entertainment industry, California's request is a chilling prospect. Speech that may be "harmful" to minors is hardly limited to violent speech. Depictions of drug use, expression of racial hatred, diatribes by anti-American groups, verbal abuse, and non-violent criminal behavior might also be considered damaging to the development of young children. As California itself notes, state governments early in our Nation's history criminalized blasphemy and profanity based on the same desire to control speech that they viewed as harmful. Pet. Br. 32.

California also offers no rationale that would limit its position to the medium of video games. Children are exposed to violence in television programming, movies, literature, newspapers, magazines, comic books, and music. According to the Kaiser Family Foundation, "TV remains the dominant type of media content consumed [by children], at 4:29 [hours] a day, followed by music/audio at 2:31, [and] computers at 1:29." Kaiser Family Foundation, News Release: *Daily Media Use Among Children and Teens Up Dramatically From Five Years Ago* (Jan. 20, 2010), available at http://www.kff.org/entmedia/entmedia012010nr.cfm (last accessed Sept. 16, 2010). Video games are fourth on that list. *See id.*

Anyone with an Internet connection can quickly access vast amounts of "offensive" and "harmful" content if they are so inclined. If the First Amendment does not protect violent video games sold or rented to minors, then governments could seek similar First Amendment exemptions from other types of "harmful" content that is available to children in other forms of media. See, e.g., Pet. Br. 22 (arguing that society has an "interest in protecting children from harm from a variety of sources").

California undoubtedly is acting with noble intentions to countermand aspects of popular culture that may negatively influence children during their formative years. But as well-intentioned as California's motives might be, this Court has never accepted social conditioning as a legitimate rationale for the suppression of speech.

The Court forcefully affirmed this notion last term in *Stevens*:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

* * *

> *Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation.

130 S. Ct. at 1585, 1591.

B. California's Proposed Exception to the First Amendment Would Stifle the Media Industry

For businesses that generate, market, or distribute mass media content, California's reading of the First Amendment would create an environment of substantial uncertainty that would chill free expression. First, California's video game law requires businesses to make a series of highly subjective and difficult judgments that are subject to second-guessing: whether game content meets the legal threshold of violence; whether it appeals to deviant or morbid interests; whether it is patently offensive to prevailing standards in the community; and whether it lacks serious literary, artistic, political, or scientific value. See Cal. Civ. Code § 1746(d)(1). And, for the reasons noted above, businesses involved directly or indirectly in other media industries would be vulnerable to the recognition of additional areas of "harmful" expression that fall outside of the First Amendment. Under these circumstances, businesses would face powerful incentives to minimize their legal exposure and steer away from content that others might find offensive.

California's reading of the First Amendment would adversely affect a significant sector of the economy. In 2008, American consumers spent over $52 billion on retail music, movies, and video games. 2009 FTC Report, *supra*, at 2, 19, 23. In 2009 alone, the publishing, motion picture, recorded music, broadcasting, telecommunications, and web search portal industries collectively added $633.8 billion of value to the U.S. economy. U.S. Bureau of Economic Analysis, *Gross Domestic Product by Industry Accounts 1998-2009: Value Added by Industry* (May 25, 2010), available at http://www.bea.gov/industry/gpotables/default.cfm (last accessed Sept. 16, 2010). American industry dominates the worldwide market for generating mass media content, in no small measure due to the Nation's historic commitment to freedom of expression.

Consumer spending by minors also represents a substantial segment of the American market. In 2005, teenagers contributed approximately $160 billion in spending to the economy. Teenage Research Unlimited, Press Release: *TRU Projects Teens Will Spend $159 Billion In 2005* (Dec. 15, 2005), available at http://www.tru-insight.com/pressrelease.cfm?page_id=378 (last accessed Sept. 16, 2010). Thirty five percent of video game players are teenagers. Piper Jaffray, News Release: *19th Semi-Annual Taking Stock With Teens Survey* (Apr. 13, 2010).

Upholding California's video game law would threaten to stunt the continuing success of American mass media industries by blurring the boundary between constitutional and unprotected expression. Businesses need predictable, limited, and well-defined standards of liability. When businesses create and develop expressive content, they do so with prospective expectations about the meaning of free speech. If businesses anticipate or worry that the parameters of the First Amendment might change—based on isolated social science data, for example—then the likelihood increases that they will refuse to invest in certain markets at all. Uncertainty adds risk, and risk discourages innovation and production.

This Court has long recognized that uncertainty and variation in the boundaries of the First Amendment "inhibit the exercise of (those) freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal formatting and citations omitted). To avoid penalties and fines, businesses will often remain silent rather than communicate words, ideas, or images that might arguably be found unlawful. *Reno v. ACLU*, 521 U.S. at 872. Even minor sanctions can chill constitutionally protected speech. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)). To guard against the risk of silencing protected speech, the boundaries of the First Amendment must be clear and firm.

The contours of the First Amendment have been historically quite stable. In recent decades, the Court has rebuked multiple attempts to restrict speech where the government asserted its interest in protecting the sensibilities of children. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (Child Online Protection Act); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (virtual child pornography); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (regulations requiring "scrambling" or restricting sexually-oriented programming on cable television); *Reno v. ACLU*, 521 U.S. 844 (1997) (Communications Decency Act); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989) (indecent commercial telephone messages).

California's video game law well illustrates how legal uncertainty can chill businesses from engaging in protected speech. Under the law, businesses in the chain of production and distribution face fines for failing to accurately assess a video game's classification as violent, a game's appeal to deviant or morbid interests of minors, and what is patently offensive to prevailing standards in the community regarding minors (among other statutory criteria). Cal. Civ. Code § 1746(d)(1). It would be impossible for businesses to apply those criteria with any reasonable degree of certainty or precision.

For example, businesses could face the question whether the video game *Lego Star Wars* meets the statutory definition of a "violent video game" because Lego characters bearing the likeness of actors in the Star Wars franchise "dismember[]" each other into piles of Lego bricks. *Id.* Business could also be faced with the question whether the violence depicted in the game *The Godfather*, which permits players to reenact gruesome episodes from the acclaimed movie and book of the same name, causes the game as a whole to lack serious literary or artistic value for minors. *Id.* § 1746(d)(1)(A)(iii).

Forced to make highly subjective judgments about the deviant or morbid interest of minors or the prevailing standards in the community as to what is suitable for minors, *id.* § 1746(d)(1)(A), and faced with the prospect of being second-guessed in court, many businesses might understandably choose to scale back their video game content or leave the market altogether. If upheld, the California law is likely to have a ripple effect in other media industries, for example as movie and television producers grapple with the prospect that their content might also be deemed harmful to minors and lacking in any social value. In the interests of shielding children, California will have succeeded in stifling the marketplace of ideas.

"It is essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689 (1968) (citation omitted). California's inherently vague regulation of speech unconstitutionally burdens businesses. Those burdens are particularly unjustified when the industry's self-regulation and parental control software are highly effective and do not limit speech.

III. NO PRECEDENT SUPPORTS CALIFORNIA'S PROPOSED RATIONAL BASIS STANDARD

With a dearth of support for its position, California relies principally on this Court's decision in *Ginsberg v. New York*, which upheld restrictions on the distribution of sexual content when viewed by minors. 390 U.S. at 637. But *Ginsberg* is narrowly confined to the context of obscenity, *i.e.*, speech that the First Amendment has never protected. In contrast, the First Amendment protects other kinds of speech that many consider harmful, including violent speech. See, e.g., *Winters v. New York*, 333 U.S. 507, 510 (1948); *Stevens*, 130 S. Ct. at 1584. The other cases cited by California, addressing broadcasting, public schools, and the criminal law, are inapposite.

A. *Ginsberg* Applies Only to Obscene Speech

Ginsberg upheld a New York criminal obscenity statute that prohibited the sale to minors of magazines depicting nudity, even though the magazines were admittedly not obscene when viewed by adults. 390 U.S. at 631-633. In holding that the definition of obscene material could vary depending on the audience—such that material that is not obscene for adults may still be obscene for minors—the Court recognized that New York's law "simply adjusts the definition of obscenity." *Id.* at 638.

Violent video games cannot be restricted on the theory that they qualify as obscene. Obscenity is limited to speech depicting sexual conduct. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) ("[W]e now confine the permissible scope of such [obscenity] regulation to works which depict or describe sexual conduct."); *Cohen v. California*, 403 U.S. 15, 20 (1971) ("Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic."); see also *Reno v. ACLU*, 521 U.S. at 873; *Erznoznik*, 422 U.S. at 213 n.10.

Ginsberg also does not permit restriction of protected speech on the rationale that it might be harmful to minors. *Ginsberg* holds that the scope of obscenity may be defined differently if the audience is a minor. California, of course, does not seek to change the definition of violence depending on the audience, but rather seeks to have a category of *protected* speech rendered unprotected when distributed to minors. As discussed, California's position, if logically extended, would apply to other types of expression and to other types of media, as long as the State could rationally claim that the speech is harmful to minors.

This Court's precedents foreclose California's creative interpretation of *Ginsberg*. In *Interstate Circuit, Inc. v. Dallas*, issued the same day as *Ginsberg*, the Court pointedly noted that "the phrase 'harmful to minors' [in *Ginsberg*] is 'specifically and narrowly defined in accordance with tests this Court has set forth for judging *obscenity*.'" 390 U.S. at 683 n.10 (emphasis added).

Similarly, in *Erznoznik*, the Court invalidated a city ordinance that prohibited drive-in movie theaters from exhibiting films containing nudity when the screen was visible from a public place. 422 U.S. at 211-212. Recognizing that the city sought to "protect[] minors from this type of visual influence," the Court held that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* at 212-213. The Court applied heightened scrutiny and invalidated the ordinance because it was not narrowly tailored to shield minors from obscenity. *Id.* at 212-214.

B. The First Amendment Applies to Depictions of Violence

The depiction of violence, unlike obscenity, is constitutionally protected speech. In *Winters v. New York*, the Court invalidated a New York law that prohibited the distribution of printed media depicting "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes." 333 U.S. at 518. In language particularly apt to this case, the Court stated: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.* at 510. The Court contrasted violent depictions with unprotected categories of speech by noting that the violent magazines "are equally subject to control if they are lewd, indecent, obscene or profane," *id.*—that is to say, if violent magazines contain otherwise *un*protected speech.

Last term the Court reaffirmed that speech depicting violence enjoys constitutional protection. In *United States v. Stevens*, the Court held that the First Amendment extends to graphic depictions of animal cruelty, despite the "gruesome" nature of such speech. 130 S. Ct. at 1583, 1586. Acknowledging the possibility that existing categories of unprotected speech are not exhaustive, the Court concluded that violent "depictions of animal cruelty" was not a "historically unprotected" class of speech. *Id.* at 1586.

Winters and *Stevens* thus foreclose a rational basis review of California's law. Video games depict virtual—not real—violence involving fictitious characters. The same First Amendment protections that extend to depictions of real violence to live animals in *Stevens* equally extend to simulated violence against only digital victims. Cf. *Free Speech Coal.*, 535 U.S. at 250 (holding that virtual child pornography is protected "speech that records no crime and creates no victims by its production").

C. The Other Decisions Cited by California Are Inapposite

California also contends that the Court may broadly curtail the First Amendment rights of minors because the law generally accords special treatment to children. See, e.g., Pet. Br. 8 ("Application of strict scrutiny would effectively ignore many undeniable distinctions between adults and minors."). In effect, California is arguing for a First Amendment's kids menu—a position that the Court has firmly rejected. See, e.g., *Erznoznik*, 422

U.S. at 212-213 ("[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." (citation omitted)). Moreover, California's law restricts the speech rights of minors *and* the rights of retailers, video game designers, producers, and marketers.

California cites cases that involve broadcast radio, public schools, and even non-speech rights in an effort to demonstrate that children have lesser First Amendment rights. However, none of these unique contexts suggests that the government has the authority to impose a content-based prohibition on speech for children without satisfying the traditional test of strict scrutiny.

California relies heavily on *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)—a precedent that the Court itself has described as "emphatically narrow." *Sable*, 492 U.S. at 127; see also *Pacifica*, 438 U.S. at 750 ("emphasiz[ing] the narrowness of [the] holding").[2] *Pacifica* upheld the government's authority to restrict indecent speech on the public airwaves. The Court reasoned that in the "unique" setting of broadcast radio, 438 U.S. at 748, the government may shield an audience from exposure to such unwanted "verbal shock treatment," *id.* at 757 (Powell, J., concurring).

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[2] The *Pacifica* decision has been subjected to "voluminous" scholarly criticism. Christopher S. Yoo, *The Rise and Demise of the Technology Specific Approach to the First Amendment*, 91 GEO. L. J. 245, 293 (2003); see also STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 80 (1990) ("Most people with any first amendment bones in their bodies are troubled by the *Pacifica* case.").

Pacifica does not justify California's ban on violent video game sales and rentals to minors. The Court's "special justifications" for regulating broadcast media—scarcity of available frequencies, history of extensive government regulation, and broadcasting's "invasive" nature, *Reno* v. *ACLU*, 521 U.S. at 868—have no application to video games. There is no risk that video games might confront captive audiences with unwanted ideas; people consciously choose to purchase or rent video games *because* of their content, not in spite of it. Compare *Pacifica*, 438 U.S. at 748 (broadcast radio "confronts" people with unwanted content "in the privacy of the home"). Playing a video game, like "[p]lacing a phone call," "is not the same as turning on a radio and being taken by surprise by an indecent message." *Sable*, 492 U.S. at 128 (distinguishing *Pacifica* and invalidating federal law that restricted indecent commercial telephone messages).

The other cases cited by California similarly provide no support for creating a new category of unprotected speech. One set of cases addresses "the constitutional rights of students in public school." Pet. Br. 20. In schools, students' rights generally yield to pedagogical concerns because public schools are limited forums in which the government may regulate speech based on content. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 272-273 (1988). The public education context thus might be relevant if California sought to restrict a student's access to video games in a school setting. California's law, of course, is far broader than that.

As California itself acknowledges, "school cases present their own unique circumstances." Pet. Br. 21. For example, a school may prohibit an indecent lecture delivered at a high school assembly, but "[h]ad [the student] delivered the same speech in a public forum outside the school context, it would have been protected." *Morse v. Frederick*, 551 U.S. 393, 404-405 (2007) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-683 (1986)). Restrictions in limited forums have no application to private commercial transactions such as video game sales. Simply put, minors' rights, including freedom of expression, "are different in public schools than elsewhere." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).

California also relies on a litany of state restrictions on minors' rights to vote, marry, serve on a grand jury, drive a school bus, purchase tobacco, play bingo for money, and execute a will. Pet. Br. 22-23. California argues that this Court has noted the special characteristics of minors in the context of abortion, *Bellotti v. Baird*, 443 U.S. 622 (1979), compulsory education, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), life imprisonment, *Graham v. Florida*, 130 S. Ct. 2011 (2010), and the death penalty, *Roper v. Simmons*, 543 U.S. 551 (2005). These cases offer no support for the proposition that depictions of virtual violence is a "categor[y] of speech that ha[s] been historically unprotected" when distributed to minors. *Stevens*, 130 S. Ct. at 1586. Ironically, in most of the cases cited by California the Court considered the special characteristics of children in order to *expand* the rights of minors, not restrict them.

* * * * *

California clearly has a legitimate interest in protecting children from harm. But the First Amendment requires that a content-based restriction on speech must satisfy strict scrutiny. Because the speech restriction here is not the least restrictive alternative, California's law violates the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, *ET AL.*,
Petitioners.

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* COMIC BOOK LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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INTRODUCTION[1]

In defense of California's law prohibiting the sale of "violent" video games to persons under 18, Petitioners and their supporting *amici* advocate "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

They ask this Court to find that the First Amendment does not fully protect those under 18, so that the State may restrict speech in order to shape minors' "moral and intellectual growth." Petitioner's Brief 7, 30 ("Pet. Br."). Petitioners want "offensively violent material" to be designated as a "categor[y] of speech that [has] been historically unprotected" based on the assertion that such speech "can be harmful" and has "little or no redeeming social value." *Id.* at 13, 29-30, 40, 47. Such expanded authority is needed, they claim, to protect minors "in the face of new and developing media." *Id.* at 29, 55. And, although the speech restriction at issue is expressly content-based, Petitioners shun strict First Amendment scrutiny and advocate (at most) intermediate review of censorship decisions, *id.* at

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[1] All parties have consented to this *amicus curiae* brief and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* represents that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

48, and actually assert that such measures may be upheld if they are "not irrational." *Id.* at 8.

Such a proposed wholesale reversal of several fundamantal First Amendment principles is both "startling and dangerous." *Stevens*, 130 S. Ct. at 1585. Unfortunately, however, proposals like this are not unprecedented. The Comic Book Legal Defense Fund ("CBLDF") has had experience with similar attempts to undermine America's free speech traditions, and for that reason files this amicus brief.

INTEREST OF *AMICUS CURIAE*

CBLDF is a non-profit organization dedicated to the protection of the First Amendment rights of the comics art form and its community of retailers, creators, publishers, librarians and readers. With a membership that includes comic book creators, publishers, retailers, and aficionados, the CBLDF has defended dozens of First Amendment cases in courts across the United States, and led important education initiatives promoting comics literacy and free expression.

Given its mission and history, the CBLDF is well acquainted with the moral panics that engender efforts to protect children from "harmful" media influences. Widespread censorship was imposed by states and localities in the 1940s and 50s after supposedly scientific claims were made that comic books were responsible for increasing juvenile delinquency in the United States. Such long-discredited arguments seem quaint and amusing in the judgment of history, but they reveal the serious damage that can be done when advocacy masquerades as science.

The experience of the comic book industry is particularly germane to the issues now confronting video games because history is repeating itself. Video games are now blamed for causing aggression and other harmful effects based on supposedly scientific studies, and the State has chosen censorship as its preferred solution. Petitioners are asking this Court both to lower the government's burden of proof generally and to adopt a more lax First Amendment standard "that will affect future cases on abroad variety of subjects." *Cf.* Pet. Br. 48.

Rather than accept this invitation to gut the First Amendment, the Court should use this opportunity to reaffirm that we must keep the "'starch' in our constitutional standards" because content-based prohibitions "have the constant potential to be a repressive force in the lives and thoughts of a free people," *Ashcroft v. ACLU*, 542 U.S. 656, 660, 670 (2004); that even where the government is certain the expression at issue lacks any possible value to society, such material is "as much entitled to the protection of free speech as the best of literature," *Winters v. New York*, 333 U.S. 507, 510 (1948); and that "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Stevens*, 130 S. Ct. at 1585.

SUMMARY OF ARGUMENT

California's bid to censor video games is the latest of a long history of moral panics that date back to the early nineteenth century. These recurring campaigns are typified by exaggerated claims of adverse effects of popular culture on youth based on pseudo-scientific assertions of harm that are little more than thinly-veiled moral or editorial preferences. Such censorship crusades have been mounted against dime novels, ragtime music, cinema, comic books, television, and now, video games.

Past crusades leave behind a cultural sense of curious bemusement, as if it is difficult to imagine what all the fuss was about. But that does not prevent social reformers and state legislatures from latching on to the next *cause célèbre* that unquestionably will lead to the ruination of America's children unless decisive action is taken. Unfortunately, such cycles of outrage leave behind a legacy of censorship.

Much First Amendment jurisprudence developed in response to the phenomenon of the moral panic. This Court has struck down various restrictions on "violent" reading material, sacrilegious movies, and dangerous new communications technologies, and in the process erected high hurdles for government to clear when it seeks to restrict free expression.

Petitioners' defense of the California video game censorship is predicated on rolling back this First Amendment tradition. Failing to come up with convincing proof of psychological harms through social science to justify the law, the State seeks to eliminate strict scrutiny as the controlling First Amendment standard, and asks this Court to defer to legislative judgments about what best promotes children's ethical and moral development. But this ignores that a central purpose of the First Amendment is to prevent the government from influencing individual attitudes and preferences.

Additionally, Petitioners seek to dismantle basic elements of First Amendment jurisprudence developed over the past six decades, including principles this Court reaffirmed as recently as last Term. The State asks this Court to find a new First Amendment exception for fictionalized violence, to reduce constitutional protections for minors, and to deem new communications media to be constitutionally suspect. All told, California's argument would undermine more First Amendment principles in a single case that any decision in living memory. This Court should reject the State's bid as being fundamentally antithetical to America's historic commitment to free expression.

ARGUMENT

I. A HISTORY OF CENSORSHIP ARISING FROM SUCCESSIVE MORAL PANICS EXPLAINS THE DEVELOPMENT AND IMPORTANCE OF STRICT FIRST AMENDMENT SCRUTINY

A. Censorship and Cycles of Outrage

Petitioners' claims that certain offensive speech is uniquely harmful to children, that minors lack the capacity to cope with ideas, and that neither they, nor the expression at issue, deserves First Amendment protection sound very familiar. Well they should, for we have heard it all before. *See generally* Margaret A. Blanchard, *The American*

Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew, 33 Wm. & Mary L. Rev. 741 (1992).

This phenomenon even has a name among social scientists – it is called a "moral panic," in which

> [a] condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; [and] socially-accredited experts pronounce their diagnoses and solutions.

Stanley Cohen, *Folk Devils and Moral Panics* 1 (3d ed. 2002). *See* Erich Goode & Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (1994). Some cultural historians have more specifically described the phenomenon as a "media panic." Kirsten Drotner, *Modernity and Media Panics, in Media Cultures: Reappraising Transnational Media* 42-62 (Michael Skovmand & Kim Christian Schroder, eds., 1992).

Concerns about the harmful effects of popular culture on children "have a very long history, dating back well before electronic technology."[2] Campaigns to protect children often are the product of "general anxieties about the future direction of society," but, "as several studies have shown, they can also be inflamed and manipulated by those with much broader political, moral or religious motivations." *Independent Assessment of Children's Wellbeing* at 25. *See* Drotner, *supra*, at 47 ("All later media panics are based on such political, social, and cultural discourses of power."). In such campaigns, "the exaggerated views of the medium's influence [are] not tempered by reality." Blanchard, *supra*, at 763.

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[2] U.K. Department for Children, Schools and Families and the Department for Culture, Media and Sport, *The Impact of the Commercial World on Children's Wellbeing – Report of an*

Modern day fears about the supposed moral threat posed to the young by video games "have their roots in nineteenth-century anxieties about the 'ill-effects' of popular forms of amusement on the 'children of the lower classes.'" John Springhall, *Youth, Popular Culture and Moral Panics* 2 (1998). Accordingly, fears of "dime novels, movies and jazz music give way to fears of Elvis Presley, comic books, *Teenage Mutant Ninja Turtles* cartoons, and now to video games and the Internet." Christopher J. Ferguson & Cheryl K. Olson, *The Supreme Court and Video Game Violence: Will Regulation be Worth the Costs to the First Amendment?*, The Criminologist, July/August 2010, at 19.

Independent Assessment (Dec. 2009) at 25 (literature review by multidisciplinary panel of experts in psychology, sociology, history, education, media studies, and marketing) ("*Independent Assessment of Children's Wellbeing*") (*available at* http://www.childrensfoodcampaign.net/ImpactofCommercialWorldonChildrensWellbeingDec09.pdf).

Long before Anthony Comstock coined the phrase "devil-traps for the young" in his campaign against dime novels and other vices,[3] the phenomenon of the moral panic was well established. Such "cycles of outrage" can be traced to early claims that "a very large majority" of those who turn bad "may trace the commencement of their career in crime to their attendance in Penny Theatres." James Grant, *Sketches in London* (n.p. 1838) (quoted in Springhall, *supra*, at 9). *See also id.* at 11-37.

Likewise, "Penny Dreadfuls" began to appear in England and continental Europe in the mid-nineteenth century. Forerunner to the American dime novels, these mass-produced serialized stories about the exploits of Gothic villains, pirates, highwaymen, thieves, and murderers were designed to appeal to a youthful and mass audience. Springhall, *supra*, at 38-58. Penny Dreadfuls were scapegoated for provoking the commission of juvenile crimes ranging from theft to murder, and by the 1890s "among street boys, reading had become an almost criminal pursuit." *Id.* at 75, 93. In the United States, such claims were reprised in Anthony Comstock's assertions that dime novels were "the inspiration for all the antisocial behavior exhibited by the youth of the day." Blanchard, *supra*, at 757.

Another early American target of moralistic fervor was ragtime music, which was castigated in

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[3] Anthony Comstock, *Traps for the Young* 20 (Robert Bremner, ed., Harvard Univ. Press 1967) (1883).

1899 as "vulgar, filthy and suggestive music" that should be "suppressed by press and pulpit." John E. Semonche, *Censoring Sex: A Historical Journey Through American Media* 144 (2007). In a 1914 call to arms against jazz, the *Musical Observer* urged its readers to "take a united stand against the Ragtime Evil as we would against bad literature." *See, e.g.*, Peter Blecha, *Taboo Tunes: A History of Banned Bands & Censored Songs* 17 (2004).

Opponents compared the music to alcohol and other intoxicating substances, and in December 1933, a Washington State congressman introduced House Bill 194 in the legislature to empower the governor to impose a ban if it was determined that "our people are becoming dangerously demented, confused, distracted or bewildered by jazz music." It also provided that those convicted of being "jazzily intoxicated shall go before the Superior Court and be sent to an insane asylum." Blecha, *supra*, at 23.

That moral panic was captured perfectly in lyrics from *The Music Man*

> One fine night, they leave the pool hall,
> Headin' for the dance at the Arm'ry!
> Libertine men and Scarlet women!
> And Rag-time, shameless music
> That'll grab your son and your daughter
> With the arms of a jungle animal instink!
> Mass-staria!

Meredith Wilson, Ya Got Trouble, *The Music Man* (1957).

Such concerns foreshadowed later campaigns against music, but by then, the critics had forgotten how foolish those efforts looked from a historical perspective. Blanchard, *supra,* at 824. Responding to demands like this, NBC in 1940 banned from the radio more than 140 songs because they allegedly encouraged "a disrespect for virginity, mocked marriage, and encouraged sexual promiscuity." Duke Ellington's *The Mooche* was blamed for inciting rape, and only the instrumental version of Cole Porter's *Love for Sale* could be aired. *Id.*

This drama played out again a couple of decades later in a two-year investigation by the Federal Communications Commission and six FBI field offices into the supposedly corrupting lyrics of the song "Louie Louie" by The Kingsmen. *See* Eric Predoehl, *The FBI Investigation of the Song "Louie Louie"* (1984) (collection of FBI reports obtained through FOIA request). The FBI finally concluded in 1966 that the song's lyrics were unintelligible (and therefore not obscene).[4]

The advent of cinema likewise "provided all the necessary ingredients for a 'moral panic'" with its attendant "full-blown conflict over moral values." Laura Wittern-Keller, *Freedom of the Screen* 18

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[4] *See* Blecha, *supra,* at 97-100. These findings did not prevent a middle school principal in 2005 from banning a marching band's *instrumental* performance out of concern for the song's supposedly "sexually explicit lyrics." Semonche, *supra,* at 138-42.

(2008). Movies with crime stories and depictions of cinematic violence would lead politicians, religious leaders, and social reformers to condemn the influence of motion pictures on children's morals and behavior. Lawrence Kutner & Cheryl K. Olson, *Grand Theft Childhood* 38 (2008). A 1907 *Chicago Tribune* editorial called movies "schools of crime where murders, robberies, and holdups are illustrated," and it called on city authorities to "suppress them at once." Blanchard, *supra*, at 761.

Given such strong editorial endorsement, it is not surprising that Chicago adopted the nation's first film censorship ordinance in 1907, requiring a police permit before any movie could be shown. *Id.* Other cities soon followed suit. In 1910, a committee in Cleveland reviewed some 250 films and declared that forty percent of them were unfit for children "because they focused on crime, drunkenness, and loose morals." *Id.* at 763. By 1926, seven states and at least 100 municipalities imposed pre-exhibition censorship on movies. Wittern-Keller, *supra*, at 22, 30.

This scenario was repeated in the episode in which CBLDF has the most direct connection – the panic over comic books. In the post-war years between 1948 and 1953, various crusaders stepped forward to blame an asserted increase in juvenile delinquency on "the preoccupation with violence and horror fostered by the wide distribution of sex, crime, and horror comic books." Note, *Regulation of Comic Books*, 68 Harv. L. Rev. 489 , 489-90 (Jan. 1955). Civic groups such as the PTA and the National Institute of Municipal Law Officers denounced comics and ordinances were proposed in cities across the United States. In addition, public burnings of comic books were organized. David Hajdu, *The Ten-Cent Plague* 143-53 (2008); Springhall, *supra*, at 130. As a tragic irony, some of the public burnings were staged not long after the publication of Ray Bradbury's dystopian novel *Fahrenheit 451*, in which firemen had the job of burning books. Hajdu, *supra*, at 303-04.

By 1949, laws to regulate comic books – mostly designed to ban the sale of crime comics to minors – were pending in fourteen states, *id.* at 150, and eventually at least fifty U.S. cities would attempt to regulate the sale of comics. Kutner & Olson, *supra*, at 50. Various measures were adopted, including the circulation of blacklists by police or local prosecutors as part of organized programs "to drive certain publications from [the] community." *Regulation of Comic Books*, *supra*, at 495-96. In some jurisdictions, lists were derived based on recommendations from interested organizations, while other communities would establish advisory committees or "literature commissions" to identify suspect works. *Id.* Such methods proved to be highly effective "establishing a virtual censorship over reading matter by keeping it from reaching newsstands or by withdrawing it afterwards." *Id.* at 496.

In 1954, the Senate Judiciary Committee convened a special Subcommittee to Investigate Juvenile Delinquency in the United States and held hearings on the topic of comic books and juvenile delinquency.[5] The star witness was psychiatrist Dr. Fredric Wertham, a vociferous anti-comic book crusader. His 1954 book, *Seduction of the Innocent*, became Exhibit A for the case against comic books. *See* Fredric Wertham, *Seduction of the Innocent* (1954); Amy Kiste Nyberg, *Seal of Approval: The History of the Comics Code* 50 (1998) (Wertham's book was the "primer of the American campaign" against comics).

Wertham was no stranger to the florid rhetoric of the moral crusader. Not to be outdone by his predecessor, Anthony Comstock, he proclaimed "Hitler was a beginner compared to the comic-book industry." *Senate Hearings* at 95. He posited that "as long as the crime comic books industry exists in its present forms there are no secure homes," *id.* at 84, and he took an exceedingly broad view of which comics fell into that category. For example, he described *Superman* comics as "particularly injurious to the ethical development of children" for engendering fantasies of "sadistic joy in seeing people punished over and over again" and for teaching "complete contempt of the police." *Id.* at 86.

Wertham previously had lobbied the State of New York to adopt a "public health" law prohibiting the sale and display of crime comics to children under the age of 15, describing such materials as "the cause of a psychological mutilation of children." Springhall, *supra*, at 132. The legislature passed the proposed bill in March 1952, but Governor Thomas E. Dewey vetoed it. Dewey's veto memorandum cited this Court's then-recent decision in *Winters v. New York* and said that the bill violated the First Amendment. *See People v. Bookcase, Inc.*, 201 N.E.2d 14, 15-16 (N.Y. 1964).

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[5] U.S. Congress, *Juvenile Delinquency (Comic Books): Hearings before the Subcommittee on Juvenile Delinquency*, 83d Cong., 2d Sess. (April 21-22 and June 24, 1954) ("*Senate Hearings*").

At the federal level, the senate subcommittee's interim report adopted Wertham's rhetorical style and warned that crime and horror comic books "offer short courses in murder, mayhem, robbery, rape, cannibalism, carnage, necrophilia, sex, sadism, masochism, and virtually every other form of crime, degeneracy, bestiality, and horror." S. Rep. No. 84-62, at 7 (1955) ("*Senate Report*"). Ultimately, however, the committee, to its credit, rejected the notion of federal censorship as "totally out of keeping with our basic American concepts of a free press operating in a free land for a free people." *Senate Report* at 23. Instead, it endorsed a strict system of self-regulation that had a devastating impact on the comics industry.

Wertham failed to obtain the federal legislation he advocated and was unable to secure passage of the New York censorship bill. But he nonetheless was credited with persuading a number of states and cities to adopt such laws. Blanchard, *supra*, at 789; Kutner & Olson, *supra*, at 50; Springhall, *supra*, at 140. His actions and writings fueled a national movement to get comic books off the shelves, and triggered police action against comic books in more than fifty cities. Nyberg, *supra*, at 34. And, although Wertham was deeply disappointed in the industry code that was adopted to forestall legislation, as a practical matter, the national system of informal censorship that resulted had a profound chilling effect.[6]

So goes the cycle of outrage in the typical moral panic. "Whenever the introduction of a new mass medium is defined as a threat to the young, we can expect a campaign by adults to regulate, ban or censor, followed by a lessening of interest until the appearance of a new medium reopens public debate." Springhall, *supra*, at 7. Despite this well-trodden path, the reaction carries with it "an intrinsic *historical amnesia*." Drotner, *supra*, at 52. "Every new panic develops as if it were the first time such issues were debated in public and yet the debates are strikingly similar." *Id.*; Springhall, *supra*, 7. At the same time, "preoccupation with the latest media fad immediately relegates older media to the shadows of acceptance." Drotner, *supra*, at 52.

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[6] The comics code had a devastating effect on the industry. Entire categories, such as horror comics, were terminated. Although not entirely due to the new content code, the number of comic book titles that were published dropped by forty percent, from around 500 in 1952 to approximately 300 in 1955. Springhall, *supra*, at 140-41. In 1955, for first time since the business began, no new publishers entered the comic book market. Nyberg, *supra*, at 124-25.

Repeating this pattern, the language describing media and video game violence is little changed from the moral panics of yesteryear. Taking a cue from Comstock and Wertham, Petitioners and their supporting *amici* give examples of games they consider the most lurid, and assert broad claims about the adverse effects of such materials on youth. On this basis, they assert that the speech – if it rises to that level at all – is undeserving of constitutional protection, and they ask this Court to uphold broad restrictions on freedom of expression.

Same as it ever was.

B. From Sin to "Science" and Back Again

While all moral crusaders over the decades have sought to protect children from bad influences that they claimed would cause them to commit crimes (or at least behave disrespectfully), Anthony Comstock, at least, was honest about his animating concerns. He wrote that "*Satan lays the snare, and children are his victims.*" His overriding goal was to "awaken thought upon the subject of *Evil Reading*." Comstock, *supra*, at 5, 9. Put simply, Comstock's mission was to save children from the wages of sin. *Id* at 239.

The purposes of social reformers did not change in the moral panics of the 20th Century, but the crusaders began to dress up their moralistic arguments with the trappings of science. Well, social science anyway.

In the well-rehearsed script of the typical moral panic, however, science has been used less as a tool for understanding than as currency to be exchanged for political leverage. As a result, the policy debates in this area are a mélange of social science mixed with politics and advocacy, and rarely is there a clear dividing line between the researchers and the advocates. *See, e.g.*, David Trend, *The Myth of Media Violence* 45-49 (2007). The debate over media violence has followed the standard script, dominated by "reactionary rhetoric, flawed research, and distorted accounts of legitimate scientific studies." *Id.* at 48.

Some scholars have warned that such misuse of social science can do great damage when it is "weak in methodology, but strong in ideology" and that in such cases "social science runs the risk of becoming little more than 'opinion with numbers.'" Ferguson & Olson, *supra*, at 19-20. Criminologist David Gauntlett described this "opportunistic mixing of concerns about the roots of violence with political reservations about the content of screen media" as "a lazy form of propaganda." David Gauntlett, *Moving Experiences: Media Effects and Beyond* 147 (2d ed. 2005). *See also id.* at 130-35. Those who exploit such moral panics are dubbed "moral entrepreneurs." *Id.* at 127.

The panic over film censorship provides a clear example of the distortion of scientific claims in service of a political objective. In 1933, the Motion Picture Research Council published an exhaustive nine-volume scholarly study on the effects of movies on American children, commonly known as the Payne Fund studies. The project was undertaken with a goal of discrediting movies, but the researchers actually reached more nuanced conclusions that were "about one-third unfavorable to the movies, about one-third favorable, and about one-third neutral." *Children and the Movies: Media Influence and the Payne Fund Controversy* 104 (Garth S. Jowett et al., eds., 1996). *See* Wittern-Keller, *supra*, at 58. Unfortunately, the researchers' reservations were forgotten as their work became part of the policy debates.

Not content to rely on the more dryly academic analysis, the Council also commissioned a book to summarize the research for popular consumption. *See* Henry James Forman, *Our Movie Made Children* (1935). The resulting work was more a polemic than an accurate digest of the study. "It twisted conclusions, omitted facts, and used inflammatory language to conclude that children's mental attitudes were changed by their viewing choices" and that films were "responsible for juvenile delinquency, promiscuity, and disrespect to parents." Wittern-Keller, *supra*, at 58. As such things go, "it was the popularized version that stuck in the minds of policymakers." *Id.* at 59.

The comic book panic followed the same pattern. Fredric Wertham's *Seduction of the Innocent* has been classed as "the archetypal reaction to a new mass medium," with its denunciation of comics as "morally contagious and sexually dangerous." Drotner, *supra*, at 45. Yet, despite its Comstockian prose and its unabashed purpose as part of the author's anti-comic book crusade, the book was presented as a work of "science." *See Seduction of the Innocent*, *supra*, (publisher's note to the original edition) ("This book . . . is the result of seven years of scientific investigation"); *Senate Hearings* at 82 (Testimony of Dr. Fredric Wertham) ("This research was a sober, painstaking, laborious clinical study."). Due to its purportedly authoritative nature, Wertham's book was tremendously influential, not just in the United States, but in Canada and Europe as well. *Senate Hearings* at 251; Drotner, *supra*, at 45-46.

But *Seduction of the Innocent* was anything but scientific, and its findings have been thoroughly discredited. It consisted of random, undocumented, and unverifiable case studies of children who supposedly had been harmed by reading comic books. Springhall, *supra*, at 125. The examples were "carefully selected to support Wertham's conclusions about comic books," which were presented through the dramatic reconstruction of contrived dialogue. Nyberg, *supra*, at 96. Scholarly critiques noted that the book lacked any scientifically gathered research data or systematic inventory of comic book content, and concluded that, "[w]ithout such an inventory, the conjectures are biased, unreliable, and useless."[7]

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[7] *See, e.g.*, *Seduction of the Innocent: The Great Comic Book Scare*, *in Milestones in Mass Communication Research* 262, 264 (Shearon Lowery & Melvin DeFleur, eds., 1983); Patrick Parsons, *Batman and His Audience: The Dialectic of Culture*, *in The Many Lives of The Batman: Critical Approaches to a Superhero and His Media* 82 (Roberta E. Pearson & William Uricchio eds., 1991) (Wertham's claims were based on a "crude social learning theory model which either implicitly or explicitly assumed unmediated modeling effects").

Such evident weaknesses did not prevent Wertham from presenting his conclusions as if they represented a scientific consensus, despite the fact that "most professional social workers, psychologists, sociologists, and criminologists denied any direct link between mass media and delinquency." Nyberg, *supra*, at 20; *Senate Report* at 16-17. He confidently testified before Congress that his book provided "incontrovertible evidence of the pernicious influences on youth of crime comic books" and that "on this subject there is practically no controversy." *Senate Hearings* at 81, 90. He made such claims despite data that had been presented to the Senate that juvenile delinquency *actually declined* during the years that "crime comics" increased in popularity.[8]

This experience is virtually identical to current claims about media and video game violence. Channeling Wertham, advocates of increased regulation frequently make the claim that "the scientific debate is . . . over" about the impact of fictionalized violence. *E.g.*, *Violent Video Game Effects on Children and Adolescents* 4 (Craig A. Anderson et al., eds., 2007). Such present-day crusaders are prone to extravagant rhetoric, comparing their theories to such things as the link between smoking and health, Br. of Amicus Common Sense Media at 5, and asserting that to dispute their conclusions is to "argue against gravity." *See* Lawrie Mifflin, *Many Researchers Say Link is Already Clear on Media and Youth Violence*, N.Y. Times, May 9, 1999 (quoting Jeffrey McIntyre of the American Psychological Association). However, researchers in the field who have not signed on to this faux consensus caution that such "[g]randiose claims demand intense skeptical scrutiny." Ferguson & Olson, *supra*, at 19.

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[8] U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce, *A Compilation of Information and Suggestions Submitted to the Special Senate Committee to Investigate Organized Crime in Interstate Commerce Relative to the Incidence of Possible Influence There-on of So-Called Crime Comic Books During the Five-Year Period 1945 to 1950*, 81st Cong., 2d Sess. 137-48 (1950); Springhall, *supra*, at 131.

Contrary to the assertions of regulatory crusaders, there is nothing approaching a scientific consensus on the asserted link between electronic media or video games and violent behavior. Trend, *supra*, at 47-48; Kutner & Olson, *supra*, at 63; Joint State Government Commission of the Commonwealth of Pennsylvania, *The Report of the Task Force on Violent Interactive Video Games* (Dec. 2008) at 9, 12. Additionally, legislative endorsements by various professional associations have not been based on careful or in-depth reviews of the literature.[9]

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[9] *See, e.g.*, Ferguson & Olson, *supra*, at 19 (noting AAP statement based on minimal fact checking); Trend, *supra*, at 48 ("scores of respected humanities professors and intellectuals" sent "letters and petitions to groups like the AMA and the ACAP, imploring them to back down on blanket condemnations of violent movies and games").

Interdisciplinary reviews have found "long-running and often heated debates among researchers on the issue of media effects" about such fundamental issues as "how the key questions are to be framed, what might count as an answer, and what the implications of these answers might be in terms of what should be done." *Independent Assessment of Children's Wellbeing*, at 72. In particular, there is a "'stand-off' between researchers in the tradition of psychological effects research – which is particularly prominent in the United States – and researchers within disciplines such as sociology, anthropology and cultural studies." *Id.* at 72, 124-25. Looking at the issue more broadly, the UK government's recent review of the media effects literature found significant disagreement among scholars, and concluded that the evidence of a causal link between violent media content and violent behavior to be "weak and inadequate." *Id.* at 123.

Most importantly, real-world reductions in crime and violence contradict claims of widespread effects of video games on minors. During the past twenty years, "as video games became increasingly popular, and as technology allowed ever more detailed depictions of violence, youth violence rates have plunged – not only in the United States, but in most industrialized nations." Ferguson & Olson, *supra*, at 19. According to FBI statistics, since 1995, the juvenile crime rate has dropped by 36 percent, and the juvenile murder rate has plummeted by 62 percent.[10]

Anti-violence crusaders in the past frequently would cite rising crime rates in the 1970s and 1980s as proof of their media effects theories. Now, however, the current decline in crime "has passed without comment by many of the same scholars." Ferguson & Olson, *supra*, at 19. As this case comes before the Court, crime rates continue to drop. Pete Yost, *No Answers as Crime Rates Are Falling*, Wash. Post, Sept. 14, 2010, at A-4 (noting FBI crime statistics showing a 5.3 percent decline in violent crime reports from 2009).

Given the persistent refusal of real world experience to corroborate their theories, Petitioners in this case and their supporting *amici* are trying to have it both ways. They argue that social science research is sufficient to support restrictions on speech, Pet. Br. 41-45, but their principal argument is that the government should not be required to present such data at all. *Id.* at 30, 48-52. Rather, they claim that courts should defer to legislative judgments about which games should be censored to protect the "ethical and moral development" of children, which they acknowledge are "nebulous concepts." *Id.* at 30.

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[10] Adam Thierer, *Violent Video Games & Youth Violence: What Does Real World Evidence Suggest?* Technology Liberation Front (Feb. 9, 2010) (http://techliberation.com/2010/02/09/violent-video-games-youth-violence-what-does-real-world-evidence-suggest/).

When their arguments are reduced to their essence, Petitioners are asking this Court to return to the age of Anthony Comstock, in which the government could ban literature in order to save America's youth from sin.

C. Restricting Speech Under the First Amendment Requires More Than the Government's Moral Certainty

Under the First Amendment, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000). Any such regulations are presumptively invalid, and the government bears a heavy burden to prove that the harms it recites are real, and the restrictions adopted are the least restrictive means of serving a compelling interest. *Id.* at 816-18; *Reno v. ACLU*, 521 U.S. 844, 879 (1997).

These fundamental requirements are not affected by the State's claim that it is acting solely to promote the well-being of youth. Quite to the contrary, this Court developed each of these First Amendment principles in cases arising from earlier moral panics in which the government restricted speech for the very same purpose. *See, e.g.*, *Butler v. Michigan*, 352 U.S. 380, 381 (1957) (rejecting ban of material "'tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth'").

This Court rejected film censorship in *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 502 (1952), despite the argument that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." It held that constitutional protection is not diminished by the fact that movies are commercial entertainment, and it found that the state must meet a "heavy burden" show otherwise. *Id.* at 501, 504. In the intervening years the Court has reaffirmed that "the burden of proving that [a] film is unprotected expression must rest with the censor." *Freedman v. Maryland,* 380 U.S. 51, 58 (1965).

The same goes for reading material the state believes could predispose minors toward crime and aggression. This Court struck down a section of New York's penal law that was "aimed at the protection of minors from the distribution of publications devoted principally to criminal news and stories of bloodshed, lust or crime" in *Winters v. New York*, 333 U.S. at 511. Like California in this case, New York had sought to expand the concepts of indecency and obscenity to include descriptions or depictions of violence. *Id.* at 513-14. The Court rejected claims that such expression is unworthy of constitutional immunity, finding it "as much entitled to the protection of free speech as the best of literature." *Id.* at 510. The lower court had attempted to narrow the New York law, but this Court held it was unconstitutional because of "the utter impossibility of the actor or the trier to know where the new standard of guilt would draw the line between the allowable and the forbidden publications." *Id.* at 519.

The Court has reaffirmed these basic First Amendment requirements each time the government's interest in protecting children assertedly is threatened by some new communications medium. Although the government may act to protect minors from dangers arising from media such as cable television or the Internet, it must do so "in a way consistent with First Amendment principles." *Playboy*, 529 U.S. at 826-27; *Reno*, 521 U.S. at 864-78.

The Ninth Circuit decision under review did nothing more than apply these well-established principles. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 961-62 (9th Cir. 2009). The same is true of the other circuit court decisions that struck down similar video game regulations.[11]

Petitioners' argument that the Court should depart from strict scrutiny requirements because it is too difficult to meet the burden of proof simply misses the point of these holdings. It is *supposed* to be difficult because First Amendment exceptions are meant to be limited and rare.[12] Deferring to legislative judgments so long as they are "not irrational," Pet. Br. 8, and relying on the expert advice of "responsible social scientists" to address the admittedly "nebulous concepts" of ethics and morality, *id.* at 30, 49, are the very problems that fostered the development of strict scrutiny in the first place.

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[11] *Entertainment Software Ass'n v. Swanson*, 519 F.3d 768, 771-72 (8th Cir. 2008); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576-77 (7th Cir. 2001).

The First Amendment restricts government interference or control of expression precisely because "[i]t is through speech that our personalities are formed and expressed." *Playboy*, 529 U.S. at 817. Fundamentally, a central purpose of the First Amendment is to prevent government from guiding the "ethical and moral development" of its citizens. For that reason, this Court has stressed that First Amendment freedoms are most in jeopardy "when the government seeks to control thought or to justify its laws for that impermissible end." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

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[12] Dictum in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009), does not absolve the government of meeting the demands of strict scrutiny in this case. While this Court has not required scientific evidence supporting the impact on minors of obscene or indecent speech, that concept has never been extended outside that limited area. *Kendrick*, 244 F.3d at 575 (regulating depictions of violence raises "a different concern from that which animates the obscenity laws").

The Ninth Circuit distinguished the State's interest in protecting minors from actual psychological or neurological harm from that "in controlling minors' thoughts" and correctly found that the latter goal is not a legitimate governmental objective. *Schwarzenegger*, 556 F.3d at 962. *See Playboy*, 529 U.S. at 817-18 ("these judgments are for the individual to make, not for the Government to decree"). If this Court were to disagree and accept Petitioners' arguments for avoiding strict scrutiny, the cautionary lessons of past moral panics would be lost.

D. Censorship of the Past is Prologue

Congress declined to adopt a law regulating crime comic books in the 1950s because it recognized such a measure would be "totally out of keeping with our basic American concepts of a free press operating in a free land for a free people." *Senate Report* at 23. New York Governor Thomas Dewey likewise found that a state law banning such comics for minors would violate the First Amendment principles set forth in *Winters v. New York*. *See* Nyberg, *supra*, at 42-43. However, if California persuades this Court to reverse such strict scrutiny, the resulting license for state censorship will be overwhelming.

It is not hard to imagine what types of censorship regimes would spring up if this Court permitted states to regulate speech to promote children's moral development based on the advice of "responsible social scientists." Pet. Br. 49. Dr. Wertham had very definite ideas about the types of comic books would be harmful to minors. He wrote that stories of Batman and Robin help "fixate homoerotic tendencies" with their living arrangement representing "a wish dream of two homosexuals living together." *Seduction of the Innocent*, *supra*, at 190-91. He added that the "Lesbian counterpart of Batman may be found in the stories of Wonder Woman and Black Cat." *Id.* at 192. He also criticized these comics for their depictions of violence. Superman was singled out for special criticism for "poisoning" the minds of children by undermining "the authority and the dignity of the ordinary man and woman." *Id.* at 97-98; *Senate Hearings* at 297. A continuing theme was that comic books contributed to disrespect for authority by subconsciously breeding "a special indifference to it."[13]

Unfortunately, it is not necessary to imagine how such theories might translate into practice. Across the country, laws inspired by Wertham's writings led to vast amounts of formal and informal censorship. In Massachusetts, the public prosecutor circulated lists of objectionable titles to news dealers based on the recommendation of an informal advisory committee. Georgia established a literature commission appointed by the governor to investigate sales of any publications "detrimental to the public morals." And Detroit implemented "a particularly active police censorship" in which "distributors never failed to withhold anything blacklisted." *Regulation of Comic Books, supra,* at 495-96.

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[13] *Seduction of the Innocent*, *supra*, at 158. Even Wertham's admirers acknowledge that his work on comic books "was rife with negative comparisons to the type of culture that he personally preferred as a reader and art collector." Bart Beaty, *Fredric Wertham and the Critique of Mass Culture* 202 (2005).

The same pattern of arbitrary and excessive censorship recurred in America's failed experiment with film censorship. For example, Atlanta banned *Lost Boundaries,* a film about a black physician and his family who "passed" for white, on grounds that exhibition of the film would "adversely affect the peace, morals and good order" of the community; Ohio's censors deleted scenes of orphans resorting to violence in the film *It Happened in Europe*; the Chicago licensing board banned newsreel films of Chicago policemen shooting at labor pickets and refused a license to exhibit the film *Anatomy of a Murder*; and the New York film licensing board censored over five percent of the movies it reviewed. *Times Film Corp. v. City of Chicago,* 365 U.S. 43, 69-72 (1961) (Warren, C.J., dissenting). Such examples are just the tip of the iceberg. *See generally* Edward DeGrazia & Roger Newman, *Banned Films,* at xviii, 177-381 (1982) (describing 122 representative examples of film censorship between 1908 and 1981).

Allowing states to regulate video games based on "reasonable" legislative judgments about what constitutes "offensive violence" would be no different. Judge Harry Edwards of the United States Court of Appeals for the D.C. Circuit has accurately described any attempt to fashion a constitutionally sound standard for regulating fictional violence as a "jurisprudential quagmire." *See* Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on*

Television, 89 Northwestern U. L. Rev. 1487, 1502-03 (1995). In addition to the "insurmountable problem in finding a generic definition of violence that is coherent and not overbroad," Judge Edwards explained social science data would be insufficient to match the supposedly harmful material with the legislative definition. *Id.* at 1492.

Inevitably, the gap between the assumed adverse impact and the statutory classification of the material would be filled in by legislators and social scientists' subjective and viewpoint-based judgments. That, at least, was the experience of the comic book and film industries, and it underscores the vital need to reaffirm strict First Amendment scrutiny in this case.

II. THIS COURT SHOULD NOT CREATE NEW EXCEPTIONS TO FIRST AMENDMENT PROTECTION

Strict scrutiny is not the only First Amendment doctrine Petitioners seek to topple. They also ask this Court to recognize a new category of unprotected speech, to find diminished constitutional protection for minors, and to reduce First Amendment protection from new and emerging media. Such a radical reconstruction of the law governing freedom of expression must be rejected.

A. Petitioners Provide No Basis for Creating a New Category of Unprotected Speech

Petitioners' demand that this Court recognize a new category of "historically unprotected" speech confirms their desire to return First Amendment law to the era of Anthony Comstock. Pet. Br. 13-14. The State even asks the Court to reinstate the Victorian precedent *Regina v. Hicklin* (1868) L.R. 3 Q.B. at 371, and to recognize a new exception for depictions of violence because states initially had laws prohibiting profanity and blasphemy. Pet. Br. 32 & n.1.

If adopted, such vast changes would sweep away the basic foundations of First Amendment law. For nearly six decades, it has been settled that the Constitution cannot tolerate a ban on blasphemy. *Joseph Burstyn, Inc.*, 343 U.S. at 504-05. Nearly as long ago, the Court rejected the rule of *Hicklin*, which judged obscenity by the effect of isolated passages upon the most susceptible persons, as being "unconstitutionally restrictive of the freedoms of speech and press." *Roth v. United States*, 354 U.S. 476, 488-89 (1957).

Undaunted by the fact that historical "exceptions" on which they rely have not been recognized for several generations, Petitioners ask this Court to reverse course and find a new unprotected category based on the argument that depictions of violence lack sufficient value to be covered by the First Amendment. Pet. Br. 29-30, 40, 47. They make these claims notwithstanding this Court's refusal to extend the obscenity doctrine to descriptions of violence 62 years ago in *Winters v. New York*.

But the Court just last Term overwhelmingly rejected such "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Stevens*, 130 S. Ct. at 1586. Petitioners hope to find lurking in the past some evidence that depictions of violence were "historically unprotected" yet not "specifically identified," Pet. Br. 14, but their argument is nothing more than wishful thinking. Most importantly, *Stevens* made crystal clear that an asserted lack of value does not disqualify recreational expression from First Amendment protection. The Court stressed that "*[m]ost* of what we say to one another" lacks value "but it is still sheltered from government regulation." *Stevens*, 130 S. Ct. at 1591.

Thus, the State provides no justification for this Court to chip away at the First Amendment.

B. Petitioners Provide No Basis for Denigrating Childrens' First Amendment Rights

Petitioners' other major contention is that its regulation should be permitted because children lack significant First Amendment protection. Pet. Br. 15, 20-28, 41. This central theme of the State's case fails to account for the fact that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (citation omitted).

Petitioners make no serious attempt to show that their regulation of video games falls within the "narrow and well-defined circumstances" in which minors' First Amendment rights are not coextensive with those of adults. But their argument suffers from an even deeper flaw. They assume that social science can operate as a universal solvent to dissolve the constitutional rights of a large segment of the population.

The State points to *Graham v. Florida*, 130 S. Ct. 2011 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005), in which this Court relied on psychological studies to limit the government's power to punish minors as adults. Pet. Br. 25-27. Amicus Common Sense Media picks up on this theme and asserts that "[t]he differences between juvenile and adult minds that *compel* differential treatment in *Graham* and *Roper* surely *tolerate* differential treatment here." Br. of *Amicus Curiae* Common Sense Media at 3-4. The obvious fallacy in this reasoning, however, is that different burdens of proof apply to individuals seeking to retain their rights, versus the government when it tries to take them away. *Cf.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

There is absolutely no basis in our constitutional traditions to support the State's dangerous claim that the constitutional rights of millions of individuals can be hobbled based on "professional opinions [of] responsible social scientists." Pet. Br. 49. This argument is downright Orwellian, particularly when coupled with the government's freedom-canceling assumption that it has greater authority to act when it believes the speech is "worthless."

As Judge Richard Posner wrote in an earlier case striking down video game restrictions, children have First Amendment rights, and "[t]o shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it." *Kendrick*, 244 F.3d at 577. Such rights cannot be minimized on the pretext of "assisting" parents, as "the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary." *Id.*

The decision below followed Judge Posner's lead and held that the State's asserted interests cannot override minors' First Amendment rights, as did other circuits that addressed the issue. *Schwarzenegger*, 556 F.3d at 962. *See Interactive Digital Software Ass'n*, 329 F.3d at 960. This Court should do the same.

C. Petitioners Provide No Basis for Limiting First Amendment Protections for New Communications Technology

In addition to everything else, Petitioners seek to reverse the trend of First Amendment jurisprudence by arguing the state should have greater authority to restrict speech because of the assumed dangers of new media. Pet. Br. 29, 55. Once again, it seeks to justify censorship by embracing long-discarded constitutional doctrine that was formulated in response to an earlier media panic. *Compare, e.g.*, *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915), *with Joseph Burstyn, Inc.*, 343 U.S. at 503 (each medium may "present its own particular problems," but "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary").

This Court's modern jurisprudence makes quite clear that new technologies do not receive less constitutional protection, even when the government's asserted interest is to protect children. *Reno*, 521 U.S. at 870 ("our cases provide no basis for qualifying the level of scrutiny that should be applied to this medium"). More generally, this Court reaffirmed just last Term that "[t]he Framers may have been unaware of certain . . . forms of communication, but that does not mean that those . . . media are entitled to less First Amendment protection." *Citizens United v. FEC*, 130 S. Ct. 876, 906 (2010).

Accordingly, this Court should soundly reject Petitioners' bid to rewrite First Amendment jurisprudence by stripping away the protections forged in earlier media panics.

CONCLUSION

H.L. Mencken described Anthony Comstock as "the Copernicus of a quite new art and science," the professional vice crusader, "who first capitalized moral endeavour like baseball or the soap business, and made himself the first of its kept professors." H.L. Mencken, *Puritanism as a Literary Force, in A Book of Prefaces* 197, 255 (5th ed. 1924). Such moral entrepreneurs "come before a legislature with a bill ostensibly designed to cure some great and admitted evil, they procure its enactment by scarcely veiled insinuations that all who stand against it must be apologists for the evil itself, and then they proceed to extend its aims by bold interferences, and to dragoon the courts into ratifying these interferences, and to employ it as a means of persecution, terrorism and blackmail." *Id.* at 251.

Now, after successive moral panics of the 20th Century, the land is awash with Lilliputian Comstocks, each vying to save America's children from the threat *du jour*. Today's crusaders come less from the pulpit than from university social science departments, but their goals and tactics remain the same. Yet, for all of the supposed science marshaled in support of censorship, the call to suppress video games at last comes down to an appeal by the State for government to control the moral development of its youth.

California should not be permitted to sell out America's First Amendment heritage simply because it succumbed to the latest moralistic campaign. This Court should heed journalist Heywood Broun's warning that "censorship of any sort should never be entrusted to professional crusaders." Heywood Broun & Margaret Leech, *Anthony Comstock: Roundsman of the Lord* 272-73 (1927).

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ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN, Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* COMMON SENSE MEDIA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Common Sense Media is the nation's leading non-partisan, not-for-profit organization dedicated to improving the media lives of kids and families. We provide the trustworthy information, education, and independent voice families need to thrive in a world of media and technology. Common Sense exists because our nation's children spend more time with media than they do with their families or in school, which profoundly impacts their social, emotional, and physical development. Put simply, Common Sense helps families and kids have a choice and a voice about the media they consume.

Common Sense recognizes that in a vast media world, there are many great resources, but also some that are potentially negative or even dangerous for children. In 2008, we outlined some of the negatives in a meta-analysis prepared by Yale University School of Medicine, the National Institutes of Health, and the California Pacific Medical Center, entitled "The Impact of Media on Child and Adolescent Health."

For more than seven years, Common Sense has worked to inform tens of millions of families and educators across the United States, and to help them choose media content that is appropriate for children. The widely recognized value of our media reviews and parent tips is reflected in the rapid growth of our organization. Common Sense now has more than 12,000 reviews, and more than 1.4 million unique visitors come to our website each month to obtain reviews and non-partisan, educational information that will help them decide whether a movie, videogame, website, mobile phone application, or other media content is appropriate for their children.

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[1] Pursuant to Supreme Court Rule 37.2, amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

Common Sense Media provides parents with information about the media their children are consuming. Common Sense also works to inform policymakers and industry leaders about other ways we can empower parents – including the statute in this case.

SUMMARY OF ARGUMENT

The First Amendment rights of children as an audience are clearly limited with regard to entertainment materials such as violent video games or should apply with lesser strength.

Children are more likely to be harmed by the effects of exposure to violent video games than adults, and the potential damage to their psychological development differs from any damage caused to adults. Denying the existence of a right of children to obtain violent video games would strengthen parents' ability to determine what content is appropriate for their children, and would be consistent with this Court's precedents. There is no historical evidence or any other support for the proposition that the Framers or the founding generation would have recognized a constitutionally protected right for children to purchase violent video games. Indeed, the proposition, once articulated, seems absurd. Everything the Framers understood with regard to the nature of children and the development of their character supports shielding children from negative influences.

ARGUMENT

A. JUVENILE MINDS ARE DIFFERENT FROM ADULT MINDS IN CONSTITUTIONALLY SIGNIFICANT WAYS THAT SPEAK DIRECTLY TO THE ISSUES AT STAKE HERE.

Recognizing the many critical ways in which juvenile minds differ from adult minds, this Court has held in recent years that states are constitutionally compelled, in some circumstances, to ensure that their laws reflect the scientific evidence and widely-held understanding that the minds of juveniles and adults are simply not the same. *See, e.g.*, *Graham v. Florida*, 130 S.Ct. 2011 (2010) (barring sentence of life imprisonment without the possibility of parole for juveniles convicted of non-homicidal offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring juvenile death penalty). This case involves much of that same basic science about cognitive development and many of those same wide-held understandings about the fragility of youth. Unlike those cases, however, the matter now before the Court involves a State that has affirmatively embraced these differences and enacted a carefully-tailored law in response. The differences between juvenile and adult minds that *compel* differential treatment in *Graham* and *Roper* surely *tolerate* differential treatment here.

In striking down the juvenile death penalty in *Roper*, the Court relied on some realities about differences between juveniles and adults that "any parent knows and [that] the scientific and sociological studies…tend to confirm." *Roper*, 543 U.S. at 569. One of these differences, the Court explained, is that "[y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Ibid* (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). And another key difference the Court cited is that "the character of a juvenile is not as well formed as that of an adult." *Ibid.*[2]

The Court relied on these principles again last Term in *Graham*, where it held that a sentence of life imprisonment without possibility of parole for a juvenile offender who did not commit homicide is constitutionally excessive. Once again, the Court relied on a body of scientific knowledge, writing that "[n]o recent data provide reason to reconsider the Court's observation in *Roper* about the nature of juveniles…[and] developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 130 S.Ct. at 2026 (citing Brief for American Medical Association et al. as *Amici Curiae* 16-24; Brief for American Psychological Association et al. as *Amici Curiae* 22-27).

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[2] The Court recognized that "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have attained a level of maturity some adults will never reach." *Roper*, 543 U.S. at 1197. Nonetheless, the Court recognized that "a line must be drawn" and that the "age of 18 is point where society draws the line for many purposes between childhood and adulthood. *Id. at 1998*.

The differences between juvenile and adult minds do not only impact the back-end question of how a state can punish a juvenile who commits a heinous act. These differences also affect the policies states may adopt to promote the health developments of juvenile minds and help prevent violence among those who are, as the Court has recognized, uniquely incapable of resisting outside influences, including those that promote violence.

A great number of scientific studies have established the effects that exposure to media violence has on juveniles. A study published this year in *Pediatrics* outlined how the "relationship between media violence and real-life aggression is nearly as strong as the impact of cigarette smoking on lung cancer: not everyone who smokes will get lung cancer, and not everyone who views media violence will become aggressive themselves. However, the connection is significant." Strasburger, V., Jordan, A., and Donnerstein, E., "Health Effects of Media on Children and Adolescents," *Pediatrics* (2010).

The scientific data on the effect of violent video games is particularly compelling. A recent meta-analysis published in *Psychological Bulletin* examined 136 such studies, involving over 130,000 subjects. *See* Craig A. Anderson, et al., *Violent Video Game Effects on Aggression, Empathy, and Pro-Social Behavior in Eastern and Western Countries: A Meta-Analytic Review*, 136 (no. 2)

Psychological Bulletin 151 (2010). The study concluded that "regardless of research design... VGV [video game violence] exposure was significantly related to higher levels of aggressive behavior." *Id.* at 161. Thus, something more is at work here than aggressive children enjoying violent video games. According to the authors of the study, "the finding of a significant longitudinal affect...shows that playing violent video games can increase aggression over time." *Id.* at 162.[3]

Violent video game play was also found, in the meta-analysis, to be significantly related to increases in aggressive thoughts. This is important, because "the repeated activation of aggressive thoughts...is the most likely route to relatively permanent changes in the person, because the activation of aggression-related knowledge structures becomes more automatic and chronic with repetition and eventually becomes part of the person's personality." *Id.* at 155.

The meta-analysis reinforces the positions taken by health organizations such as the American Academy of Pediatrics, the American Psychological Association, The Australian College of Paediatrics, and the Canadian Paediatric Society, and governmental agencies such as the U.S. Office of the Surgeon General and the U.S. Department of Health and Human Services. *See* Craig A. Anderson, *supra*, at 151.

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[3] Video games have now been in existence long enough to allow for longitudinal studies to be included with laboratory experiments and demographic studies. While there were differences in the quality of the studies included in the meta-analysis, the authors conclude that "[C]ontrary to claims by videogame industry representatives, some gamers, and a few researchers, in general it is not the methodologically poor studies that tend to yield big effects. Rather, methodologically superior studies tend to yield larger effects." *Id.* at 170.

Other recent studies support the conclusions of the meta-analysis.[4] A study published in the *Journal of Adolescence* found that "adolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school." D. Gentile, P. Lynch, J. Ruh Linder, and D. Walsh, "The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance," *Journal of Adolescence*, volume 27, pp. 5-22, (2004).[5]

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[4] Experimental studies in which children who are given the opportunity to play violent video games consistently demonstrate more post-game physical aggressiveness than children in a control group have been criticized for measuring aggressiveness rather than violence. For example, Judge Posner, writing for the court in *American Amusement Machines Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), said "[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive…" But, as the district court in that same case noted, "it is completely unremarkable that an academic study would use proxy variables to stand in for measures of actual, harmful aggression. The prospect of controlled experiments with human subjects that could result in aggression inflicting actual harm raises a few ethical issues, to put it mildly. Surely the constitutionality of a law does not depend on whether such experiments have been conducted." *American Amusement Machines Ass'n v. Kendrick* 115 F.Supp.2d 943, 964 (S.D. Ind. 2000), rev'd, 244 F.3d 572, 578-79 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001).

[5] Although not every study has found a relationship between violent video game play and violence, the lack of significant effect is easily explained in some instances. For example, in *Wilson v. Midway Games,*

In addition to these specific studies, more general developments in neuroscience have shed light on the harm exposure to violent video games can have on juveniles. It has become clear that the physical development of the human brain does not end in early childhood; at the time of puberty, it undergoes a process of overdevelopment of synapses in the region of the brain governing inhibition and judgment, with a paring of synapses in adolescence. For a non-technical explanation of this development, *see* Barbara Strauch, *The Primal Teen: What the New Discoveries About the Teenage Brain Tell Us about Our Kids* (2008); Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences and Juvenile Justice*, 2005 Utah L. Rev. 695. Moreover, environment appears to affect that development. A study at the University of Indiana School of Medicine shows that exposure to media violence leads to deficiencies in development in this region of the brain. *See* W.G. Kronenberger et al., *Media Violence and Executive*

Inc., 198 F.Supp.2d 167 (D. Conn. 2002), the court noted an Australian study purporting not to find any correlation between aggression and playing a violent video game. The authors of that very study acknowledged, though, that they chose, for ethical reasons, to use a game that was not very violent and that this choice diminishes the import the study has on the impact of truly violent games. Michelle J. Fleming & Debra J. Rickwood, *Effects of Violent Versus Nonviolent Videogames on Children's Arousal, Aggressive Mood, and Positive Mood*, 31 J. Applied Soc. Psych. 2047 (2001)

Functioning in Aggressive and Control Adolescents, 61 J. Clinical Psych. 725 (2005).

This impressive body of scientific literature confirms the validity of the State's interests in protecting juveniles from exposure to images that can have profound impact on their behavior and development. The same reasons that compel treating children differently in certain criminal contexts apply here. Not only is the ability to exercise judgment and inhibition not fully developed, the direction of that development may be unclear. The irresponsible child may become a responsible adult, and the death penalty or a sentence of life without the possibility of parole should not implicitly deny that possibility. Concerns over the influences children face are the obverse side of the same coin. If children are more likely than adults to change in rather fundamental ways with regard to responsibility, care must be taken with regard to the influences that will determine the direction and outcome of that change.

The science has become clear, and this Court has used it to override legislative determinations with regard to juvenile justice. The science is just as clear for considerations of limitations the legislature may choose to impose on the access of children to violent video games. The evidence is so clear that, even if the Court were to conclude that the First Amendment applies with equal strength to children as to adults, it should be sufficient to meet strict scrutiny in demonstrating the necessity of shielding children from these influences to avoid damaging their psychological well-being and brain development.[6]

B. THE FREE EXPRESSION CLAUSES DO NOT PROHIBIT THE STATE FROM BANNING THE SALE OF VIOLENT VIDEO GAMES TO MINORS.

As long as violent video game limitations do not prohibit parents from purchasing or renting games for their children, they actually strengthen parental rights. Without such limitations, the person most directly deciding which games a child may purchase is the retailer. The parent is put to the task of constant surveillance to be sure that the child is not purchasing a game that is unacceptably violent. With restrictions, it is the parent who decides whether or not the child may purchase a game, since the direct sale would be prohibited, and it is a decision that is implemented at a particular instance, as opposed to the constant surveillance required if the retailer makes the decision.

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) is consistent with limiting the access of children to violent video games. While *Tinker* recognized First Amendment rights on the part of children, it did so in the context of political speech, and in the context of children as the creators of expression, not as the audience. In addition, later cases, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Morse v. Frederick*, 551 U.S. 393 (2007), recognized that other forms of speech might merit less protection. It has been argued elsewhere, *see* Kevin W. Saunders, *Saving Our Children from the First Amendment*, at 250-53, that the real flaw in the school system's behavior in *Tinker* was in skewing a political debate in the community by allowing only one side to be presented in school. Even expanding that analysis to include the sort of speech that concerned Justices Alito and Kennedy in *Morse* would only require a prohibition against skewing the debate on social, as well as political, issues. *See* 551 U.S. at 422-23 (Alito, J., concurring). Justice Alito did also rely on concerns over safety posed by speech advocating illegal drug use, *id.* at 423, but there are concerns of at least equal strength with regard to violent video games. In terms of political and social issues, both the majority opinion and the concurrence by Justice Alito note that this advocacy of drug use did not constitute political speech advocating a position on the war on drugs or the legalization of marijuana. This distinction, as applied to violent video games, would point to full protection for speech, even by or to children, regarding the political issue of limits on the access of children to such games, while allowing limits on actual access.

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[6] In the event the Court should decide the current state of the science is not adequate to justify the regulations at issue, that should be recognized as a contingent conclusion, *i.e.*, a conclusion that at present the science is inadequate. The further development of psychological or neuroscience studies may, in the future, remedy any such perceived inadequacies.

Recognizing that in some cases children should enjoy lesser free expression rights is consistent with all the lines of cases decided by this Court, and is also in accord with the Court's decisions in other areas. For example, parents may have their children committed to mental hospitals under procedures that would be clearly inadequate for a spousal relationship. *See Parham v. J.R.*, 442 U.S. 584 (1979).

Furthermore, whatever the eventual outcome of Second Amendment cases, any right to purchase or possess firearms will presumably not extend to children. While a parent might want to buy a hunting rifle for a mature minor, the idea that a gun dealer could sell a firearm directly to a young child is beyond the pale.

There are also areas within the confines of the First Amendment in which age makes a difference. Under the Free Exercise Clause, even prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), the free exercise rights of minors were less fully protected than those of adults. For example, a minor, who also claimed to be a minister of her faith, could be prohibited under state law from distributing periodicals, including religious tracts, *see Prince v. Massachusetts*, 321 U.S. 158 (1944), a result that clearly would not stand for an adult.

C. FREEDOM OF EXPRESSION IN THE ERA OF THE FRAMING OF THE CONSTITUTION AND BILL OF RIGHTS WOULD NOT HAVE ENCOMPASSED THE DISTRIBUTION OF ENTERTAINMENT MATERIALS TO CHILDREN.

The Framers clearly understood that children's rights as an audience for entertainment could be limited, including in terms of violence.

At the time of the framing of the Constitution and the Bill of Rights, the ideas of widely read philosophers and of the Framers themselves with regard to children would have included that children should be sheltered from harmful content. Writings of that time show a concern over the development of character in children and an understanding of the need to shield them from negative influences. These views on the difference between children and adults should continue to guide our understanding of the First Amendment.

Moreover, the writings of philosophers in the general milieu and widely read by the Framers make it clear that those in the founding generation would not have seen children as enjoying a right to obtain whatever entertainment materials might appeal to them and that vendors would not have had a right to provide whatever wares they might wish directly to children.

Plato asks in *The Republic*, and answers in the negative, "[A]nd shall we just carelessly allow children to hear any casual tales which may be devised by casual persons, and to receive into their minds ideas for the most part of the very opposite of those which we would wish them to have when they are grown up?" Plato, *The Republic* 49 (Benjamin Jowett, trans. 2000). Aristotle was in accord. Addressing entertainment, he said that "it should not be granted to younger people to witness iambus or comedy..." Aristotle, VI *Politics* II33 (Richard Kraut, trans. 1997). Clearly, neither of the greatest classical philosophers saw children as possessing a right as an audience to entertainment that would cause them harm.

Philosophers more contemporaneous with the framing were perhaps even clearer with regard to the need to protect children from negative influences, including violence. In *Some Thoughts Concerning Education*, John Locke expressed particular concern over children learning violence.

> *Give me a blow that I may beat him*, is a Lesson, which most Children every Day hear; and in it is thought nothing, because their

> Hands have not Strength to do any Mischief. But I ask, Does not this corrupt their Minds? Is this not the way of Force And Violence, that they are set in? And if they have been taught, when little, to strike and hurt others by Proxy and incouraged to rejoyce in the harm that they have brought upon them, and see them suffer, are they not prepar'd to do it, when they are strong enough to be felt themselves, and can strike to some purpose?

John Locke, *Some Thoughts Concerning Education* 105 (John W. & Jean S. Yolton, eds. 1989). This passage could not be more on point. It expresses the concerns of legislators, now backed up by psychological science, that experiencing virtual violence, or as Locke would put it, violence by proxy, increases the chance that children will become violent.

Jean-Jacques Rousseau makes similar points. He agrees that children learn through experience and says "As soon as the child begins to take notice, what is shown him must be carefully chosen." Jean-Jacques Rousseau, *Émile* 30 (Barbara Foxley, trans. 1911). He, too, expressed particular concern over violence, arguing that it would have a potentially strong impact. "The explosive passions produce a great effect upon the child when he sees them; their outward expression is very marked; he is struck by this and his attention is arrested." *Id.* at 60.

The Framers themselves expressed similar ideas about the need to protect children from negative and harmful influences. Thomas Jefferson, in a letter to Tom Jefferson Randolph, advised him to "be very select in the society you attach yourself to, avoid taverns, drinkers, smokers, idlers and dissipated persons generally..." Thomas Jefferson, *Letter to Tom Jefferson Randolph, Washington, November 24, 1808, reprinted in* Edward Boykin, *To the Girls and Boys: Being the Delightful, Little-Known Letters of Thomas Jefferson to and from His Children and Grandchildren* 186 (1964).

In a letter to his college friend William Bradford, James Madison advised Bradford to "shun those impertinent fops that abound in every City to divert you from your business and philosophic amusements." Ralph Ketcham, *James Madison: A Biography* 4 (1971).

It is clear that any view of the scope of the protections of the First Amendment based on what the Framers thought would not have included a right of children as an audience to whatever entertainment materials they might desire. Thinkers raised in the philosophical and religious environment of the 18th century simply would not have given children free rein in choosing their entertainment.

In addition, the broadly construed legal and historical concept of obscenity in the constitutionally relevant periods prior to the adoption of the First and Fourteenth Amendments illustrates that obscenity was not considered limited to sexual matters, particularly as it applied to minors. Rooted in prohibitions on religious blasphemy, colonial obscenity laws remained amorphous and expansive, and several state statutes banned a wide range of "vice and immorality" in the period between the Bill of Rights and the adoption of the Fourteenth Amendment. Kevin W. Saunders, *Violence As Obscenity: Limiting the Media's First Amendment Protection* 99 (1996).

Beyond the broad construction of obscenity in the constitutionally important period, several early 19th century

New England laws prohibited materials "manifestly tending to the corruption of the morals of youth." *Id.* at 100. The *Ginsberg* Court drew on this history and precedent in formulating its "variable obscenity" doctrine to distinguish between adults and minors. The pertinent legal history therefore supports obscenity restrictions on a range of objectionable materials, including violence, and demonstrates that the protection of minors has been considered of particular importance.

While it has lately become recognized that the protection afforded free expression must extend to entertainment, the distinction between children and adults remains clear, as does the distinction between children as creators and children as an audience. The extension of the First Amendment to entertainment was established in *Winters v. New York*, 333 U. S. 507 (1948). There, the Court concluded that the line between entertaining and informing was too elusive to delimit the protections of the First Amendment. Interestingly, the statute at issue in *Winters* was one that addressed and limited generally violent publications, those containing pictures and stories involving bloodshed, lust or crime. While the statute was declared unconstitutional on vagueness grounds, the Court warned against the conclusion that depictions of violence could not be regulated under a properly drawn statute, stating that "[n]either the states nor Congress are prevented by the requirement of specificity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise." *Id.* at 520. This possibility can only become stronger when a state seeks to limit only access by children.

For anyone guided by history, the conclusion that children as an audience do not have constitutionally protected right to violent video games is inevitable.

CONCLUSION

The arguments offered should be sufficient to justify the conclusion that the First Amendment does not protect a right of children as an audience to obtain violent video games.

Children can be harmed by their media experiences in ways that go far beyond any impact on adults. Parents have a special role in raising their children, and the California statute recognizes that role, and further empowers parents. If the right of children as an audience to harmful media is not protected by the First Amendment, then clearly the concerns that motivate the legislatures will justify the restrictions.

Finally, it is inconceivable that the Framers would have accepted the existence of children's rights as an audience for harmful materials. Everything they knew about children led to the conclusion that children needed to be shielded from negative influences, including violence. Even if this Court should conclude that children do enjoy First Amendment rights with regard to entertainment, the arguments offered would support the conclusion that those rights should have less strength than similar rights for adults. If the conclusion is that legislative restrictions must meet a heightened, but not strict, scrutiny, the science should certainly stand up to that level of scrutiny.

Respectfully submitted,

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July 19, 2010

AMICUS
CURIAE
BRIEF

No. 08-1448

In the

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CONSUMER ELECTRONICS ASSOCIATION, INFORMATION TECHNOLOGY INDUSTRY COUNCIL, TECHAMERICA, CENTER FOR DEMOCRACY & TECHNOLOGY, and the DIGITAL LIBERTY PROJECT OF AMERICANS FOR TAX REFORM IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Computer & Communications Industry Association, through the undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Amicus curiae Consumer Electronics Association, through the undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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technological innovation and public policy advocacy, urging adoption of policies which maximize private sector growth and responsibility. ITI members' combined global sales exceed 1 trillion dollars.

Representing approximately 1,200 member companies of all sizes from the public and commercial sectors of the economy, *amicus curiae* TechAmerica is the technology industry's largest advocacy organization. Its members include manufacturers and suppliers of broadband networks and equipment, consumer electronics companies, software and application providers, Internet and e-commerce companies, and Internet service providers, among others, many of which are directly involved in the video game industry.

Amicus curiae Center for Democracy & Technology (CDT) is a non-profit public interest Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT's has conducted extensive policy research, published academic papers, and testified before Congress on the impact of content regulations on freedom of expression and the availability of alternative methods, including user empowerment technology tools, for protecting individuals who use the Internet.

Amicus curiae the Digital Liberty Project (DLP) is a special project of Americans for Tax Reform that promotes free-market technology and telecommunications policy. In support of this goal DLP advocates for limited regulation of the Internet including issues impacting freedom of speech. Americans for Tax Reform is a 501(c)(4) non-profit organization dedicated to reducing the size and scope of government and its influence on the economy and Americans' day-to-day lives.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge the Court to affirm the Ninth Circuit's decision holding that the California statute at bar violates the First Amendment. Collectively, *amici* represent some of the leading participants in the Internet and online industry, including service providers and equipment manufacturers, and leading public interest organizations concerned with the First Amendment and online civil liberties. While the California statute does not, on its face, seek directly to regulate online video gaming activity, the Court's decision in this case will have a direct impact on online gaming and other constitutionally protected content accessed via the Internet. In light of this impact, *amici* present the Court with two considerations:

1. Promotion of user empowerment tools continues to represent a less restrictive means to controlling minors' access to content that is inappropriate for them. This Court has already addressed the question of regulating minors' access to online content in the *Reno v. ACLU* and COPA cases, which extended full First Amendment protection to Internet speech. In those cases, this Court concluded that the promotion of the use of voluntary user empowerment tools was a less restrictive means than government regulation for allowing parents to control their children's access to indecent content. In the gaming context, industry has voluntarily integrated user empowerment tools into gaming consoles and offline gaming systems; these tools, as well, point to a less restrictive means

than government regulations prohibiting minors' access to constitutionally protected speech.

2. *Amici* agree with Respondents that the statute in this case is unconstitutional in the offline context. But if the statute were to be upheld and then applied in the online context, compliance would be even more challenging. Age-based restrictions on access to content are prohibitively difficult to implement online. Information about a user's age is not transmitted during a typical Internet transaction, and age verification technologies are generally not effective online. Further, requiring websites to implement age verification technologies would burden the First Amendment rights of adults to access online content anonymously, and would have an unconstitutional chilling effect on the speech of video game providers and website operators.

The Internet has been a significant engine for innovation and expression, and much of this activity has greatly benefited from the fact that speakers can reach a global audience with a minimum of barriers. *Amici* – many of which have been directly involved in creating this medium – urge the Court to exercise caution in considering how the issues raised in this case might impact the continued expansion of speech online.

ARGUMENT

I. THIS CASE COULD HAVE A SIGNIFICANT IMPACT IN THE ONLINE ENVIRONMENT, AND THE COURT'S ONLINE "USER EMPOWERMENT" JURISPRUDENCE SHOULD GUIDE ITS DECISION HERE.

Although on its face this case does not involve online gaming, the Court should carefully consider how the issues raised here would play out in the online environment, for at least two reasons. First, although the California statute here does not cover online games, similar statutes in other states have sought to do so, and through its influence on future legislation the Court's decision here will have an impact in the online world. Second, the online context can also provide helpful guidance to the Court in reaching its determination on the constitutionality of the California statute. The Court should look at the robust development and voluntary adoption of parental and user empowerment tools in the offline video gaming context, which can serve as the foundation for less restrictive means to protect children, enabling parents to control minors' access to content, just as such technology has played a pivotal role in online First Amendment jurisprudence.

A. The Court's Decision in This Case Could Have a Direct Impact on Online Gaming.

While Cal. Civ. Code § 1746 (the "Act") is focused on video game *devices*, the future of video gaming is moving toward both online gameplay and online distribution of game software.[2] Other states have included "computer software" in their attempts regulate violent video game content, and the Court's decision in this case will influence how California and other states approach regulation of online gaming in the future.

The Act defines "video game" to be "any electronic amusement *device* that utilizes . . . its own monitor, or is designed to be used with a television set or a computer monitor . . . ." Cal. Civ. Code § 1746 (emphasis added). This definition appears to cover only physical game systems, cartridges, and discs, and would not reasonably cover video or other games that are available only over the Internet to be played on a general-purpose computer. Other comparable state and local regulations – all of which have been overturned on similar First Amendment grounds as are presented here – have sought to regulate video games broadly enough to include the online environment. *See, e.g.*, Okla. Stat. title 21, § 1040.75 (effective Nov. 1, 2006) (found to be unconstitutional in *Entertainment Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17 2007)); Wash. Code, Title 9, Chapter 91, § 180 (effective July 27, 2003) (found to be unconstitutional in *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004)).[3]

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[2] *See, e.g.*, Ken Sweet, *The Video-Game Industry's Big Digital Shift*, FOXBUSINESS, June 11, 2010, http://www.foxbusiness.com/markets/2010/06/11/video-game-industrys-big-digital-shift/; Alexander Sliwinski, *NPD: PC retail and digital distribution sales reaching parity*, JOYSTIQBETA, Jul. 21, 2010, http://www.joystiq.com/2010/07/21/npd-pc-retail-and-digital-distribution-sales-reaching-parity/. Increasing numbers of games are also available for download from the Internet as applications for mobile phones. *See, e.g.*, Apple - Web apps – Games, http://www.apple.com/webapps/games/ (last visited Sept. 16, 2010) (offering over 1,000 game applications); Android Market, http://www.android.com/market/ (last visited Sept. 16, 2010).

Moreover, the broad movement of the gaming industry has been toward online games – sometimes in connection with physical gaming systems, but often games that are *only* available online. In light of the migration of gaming online, and the repeated efforts of states and localities to regulate gaming, it is highly likely that, were the Court to uphold the Act in this case, future regulations would directly target the online environment. It is thus appropriate for the Court to consider the potential impact of this case on online gaming (as well as the influence that the Court's online jurisprudence can have on the issues raised here).

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[3] In fact, *every* statute attempting to regulate video game content, whether that content is accessed online or offline, has been struck down as a violation of the First Amendment. Beyond the Act in this case and the cases cited above, at least five other courts have struck down as unconstitutional efforts to regulate gaming. *See, e.g., Video Software Dealers Ass'n v. Webster*, 773 F. Supp. 1275, 1276 (W.D. Mo. 1992), *aff'd*, 968 F.2d 684, 687 (8th Cir. 1992); *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (2006).

As discussed below, concerns about minors' exposure to inappropriate content online are most appropriately addressed through the use of "user-empowerment" tools that allow parents to make and enforce their own decisions about what is and is not suitable for their children to access. That approach has worked well in the online environment, being both less restrictive and more effective than direct government regulation, and it is an appropriate approach to apply to offline gaming. And, as discussed in Part II below, while this type of content-based regulation of violent content fails strict scrutiny no matter what the medium, applying this type of regulation in the online context would present some significant additional difficulties, because, unlike in a bricks-and-mortar storefront, there is no effective way for content providers on the Internet to know whether a user visiting their sites is an adult or a minor.

B. In the Online World, Promotion of User Empowerment Tools Represents the Least Restrictive Means of Protecting Minors from Unwanted Content.

This case raises the question of whether government regulation can be imposed to shield minors from content depicting violence. We agree with Respondents that the Court should not create a new category of content that is placed outside of the First Amendment's protection. But even if the Court were to find that the government has a permissible interest in regulating minors' access to violent content, that interest would be best addressed by promoting the use of user empowerment tools that allow parents to control what content is available to their children.

In the online and cable contexts, the Court has considered the goal of shielding minors from unwanted sexual content and has found that user empowerment tools provide a "less restrictive means" of achieving the governmental interests. *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (*COPA II*). Applying strict scrutiny, *see id.*, the Court has found that government-mandated restrictions on access to content are not the "least restrictive means" of achieving the government's interest to protect children. A plethora of user empowerment tools - developed through voluntary industry efforts to respond to consumer demand – give parents effective means to protect their own children while not unconstitutionally infringing First Amendment rights of adults to publish and access material online.

In the Communications Decency Act decision, *Reno v. ACLU*, 521 U.S. 544 (1997), the Court noted that parental control tools can provide a "reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children," *id.* (emphasis in original) (citing *ACLU v. Reno*, 929 F. Supp. 824, 842 (1996)). Subsequently in the context of cable TV, the Court held that "the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814 (2000). In that case, the Court concluded that parents' ability to protect their children on a targeted basis meant that a broader governmental regulation could not withstand strict scrutiny. *Id.* at 815.

The Court continued to develop its jurisprudence concerning user empowerment tools in determining the constitutionality of the Child Online Protection Act (COPA), which prohibited making any communication for commercial purposes available online to a minor that included any material that is harmful to minors. In *Ashcroft v. ACLU* (*COPA II*), the Court upheld a preliminary injunction of COPA based on the Act's likely violations of the First Amendment. *COPA II*, 542 U.S. at 670-71. In that case, the Court noted that "[b]locking and filtering software is an alternative that is less restrictive than COPA and, in addition, likely more effective as a means of restricting children's access to materials harmful to them." *Id.* at 666-67. These user empowerment tools "impose selective restrictions on speech at the receiving end, not universal restrictions at the source." *Id.* at 667. The Court noted that the District Court, in its fact-finding capacity, found that "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." *Id.* at 663 (internal citation omitted).

C. User Empowerment Tools Can Be Very Effective in Protecting Minors, Even from Violent Content.

After upholding the preliminary injunction against the COPA statute, this Court remanded the case so the District Court could make a final determination of whether filters are more effective than the challenged law. *COPA II*, 542 U.S. at 672-73. The District Court found that filters are "at least as effective, and in fact, are more effective than COPA in furthering Congress' stated goal for a variety of reasons." *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 815 (2007). The Third Circuit concurred that the evidence produced at trial confirmed the initial determination that user empowerment tools were a constitutionally less restrictive alternative to the direct governmental regulation of speech in that case, *see ACLU v. Mukasey*, 534 F.3d 181, 188, 203-04 (3d Cir. 2009), and this Court denied certiorari review, *see Mukasey v. ACLU*, 129 S. Ct. 1032 (2009).

User empowerment tools remain the most successful – and constitutionally appropriate – approach to allowing parents to choose whether and how to control minors' online access to inappropriate content. The District Court on remand in the COPA case did extensive fact-finding on online filtering technology. Although that case of course focused on sexual content, the court noted in its findings of fact that some filters:

> are highly customizable, allowing a parent to make detailed decisions about what to allow and what to block. Filtering products do this by, among other things, enabling parents to choose which categories of speech they want to be blocked (such as sexually explicit material, illicit drug information, information on violence and weapons, and hate speech) and which age setting they want the product to apply."

Gonzales, 478 F. Supp. 2d at 791. *See also id.* at 797 (noting that some filters block violent content); GETNETWISE, *Tools filtering violent content*, http://kids.getnetwise.org/tools/blockviolence. After extensive expert testimony and a review of the relevant research, the COPA trial court concluded that online filtering is highly effective in allowing parents to block children's access to unwanted sexual content. *See Gonzales*, 478 F. Supp. 2d at 794-97.

Just as the courts have concluded that filtering tools are the most effective and constitutionally appropriate approach to protecting children from sexual content, such user empowerment tools also provide the most appropriate answer for violent content. To the extent that parents are concerned about violent content online, industry has developed a broad range of filtering tools that enable parents to shield their children from such content. In light of these alternatives, direct government regulation of violent online content would not likely survive constitutional scrutiny (if the Court were to conclude that such content could in any situation be regulated under the First Amendment).

D. User Empowerment Tools Are Also the Solution to Regulating Children's Access to Violent Content in *Offline* Video Games.

Similar to filtering and blocking software for web browsers, user empowerment tools are already integrated into the console- and computer-based gaming systems contemplated in the California statute. The video game industry has made a concerted, and successful, effort to provide parents with options for controlling their children's access to certain types of content. The three major consoles – Nintendo Wii, Sony PlayStation 3, and Microsoft Xbox 360 – all include software tools designed to give parents control over what their children play.[4] The Microsoft and Nintendo consoles allow parents to use the Entertainment Software Rating Board rating level to control children's access to inappropriate games. ADAM THIERER, PARENTAL CONTROLS & ONLINE CHILD PROTECTION: A SURVEY OF TOOLS &

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[4] *See* Mike Musgrove, A *Computer Game's Quiet Little Extra: Parental Control Software*, WASH. POST, Dec. 23, 2006, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/22/AR2006122201278.html; *see also* MICROSOFT, *Introduction to Family Settings*, http://www.xbox.com/en-US/support/familysettings/xbox360/familysettings-intro.htm; NINTENDO, *Parental Controls*, http://www.nintendo.com/consumer/systems/wii/en_na/settings ParentalControls.jsp; SONY, *Using the Parental Control Settings*, http://manuals.playstation.net/document/en/ps3/3_15/basicoperations/parentallock.html.

METHODS, 94 (2009), www.pff.org/parentalcontrols. These parental controls work with embedded flags in software, which allow consoles to automatically recognize a game's rating and restrict access. *Id.* at 95. Sony's PlayStation 3 console and PlayStation Portable handheld gaming system let parents use a numeric scale to determine the level of a game or DVD content they will allow their children to play. *Id.* at 96. Parental controls also allow parents "to manage who [their] kids play with, how and when they play, and for how much time." ENTERTAINMENT SOFTWARE RATING BOARD, *Setting Parental Controls*, 5 (2008), http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf.

These tools go further than the California statute, which attempts to restrict the sale of games, by allowing parents to control what games are played on the system, no matter how they were obtained. These user empowerment tools, just like filters in the online space, are in many ways more effective than restrictions on sale, and they represent the least restrictive means of controlling minors' access to material in the offline space. As it considers the issues in this offline case, the Court should look to its online jurisprudence for guidance, and should conclude that efforts to promote parental empowerment tools are a less restrictive alternative to governmental regulation.

II. AN AGE-BASED VIOLENT CONTENT RESTRICTION WOULD BE HIGHLY PROBLEMATIC IN THE ONLINE WORLD BECAUSE OF THE INABILITY TO RELIABLY DETERMINE OR VERIFY THE AGES OF ONLINE USERS.

Depictions of violence have traditionally received the highest degree of protection afforded to speech under our Constitution. But if this Court were to declare, in a significant deviation from established precedent, that violent content receives lesser First Amendment protection and were to uphold the Act in this case, restrictions aimed at the online world would quickly follow. As noted above, some violent video game statutes have already sought to target online gaming, and game play and distribution is increasingly incorporating online platforms. It is thus appropriate for the Court to consider how its decision here could impact the online world. To that end, it is vital that the Court understand a critical characteristic of the online environment: the extreme difficulty (or even, in some contexts, impossibility) of reliably determining or verifying a minor's age online.

As discussed below, "age verification" technology does not function with the necessary level of accuracy in most online contexts and cannot effectively be used to separate minors from adults online. While age restrictions may be more feasible to apply in a bricks-and-mortar store – where the age of the customer can be gauged by sight and verified by reference to a driver's license or identification card (as occurs during the sale of alcohol or tobacco) – age-based restrictions on access to content cannot be applied in the online environment with anything close to the same degree of certainty. The data transmitted to complete communications via the Internet does not include detailed identity information and the various purported "age verification" systems simply cannot establish the age of particular Internet users with the level of accuracy the Constitution would require of a content-based restriction on speech.

Further, a government mandate on website operators to implement these age verification systems would chill speech among adults and website operators and would constitute an impermissible burden on speech. It is critical to acknowledge that any effort to "age verify" users to exclude minors would require that *all* users be verified, raising significant additional issues. Because of these and other concerns, the Court in this case should be very cautious about going down a path that would lead to later practical and constitutional problems in the online world.

A. "Age Verification" Technologies Do Not Establish the Ages of Internet Users with the Level of Accuracy Needed to Avoid an Unconstitutional Chill on Speech.

Online age verification processes have been assessed by a range of courts and task forces, all of which have reached the same conclusion: Age verification technology does not work at all in some contexts, and in others does not work accurately enough to satisfy the First Amendment concerns raised by age-based restrictions on access to constitutionally protected material. *See, e.g., ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007); INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY AND ONLINE TECHNOLOGIES (Dec. 31, 2008) ("ISTTF Report"). Indeed, this Court first acknowledged limitations of online "age verification" in its 1997 decision on the Communications Decency Act. *See Reno v. ACLU*, 521 U.S. 844, 855 (1997) (citing *ACLU v. Reno*, 929 F. Supp 824, 845 (E.D. Pa. 1996)).

Ten years later, the District Court in the COPA case looked more broadly and in greater detail at the issue of online "age verification." There, the court found that "there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users." *Gonzales*, 478 F. Supp. 2d at 800, *aff'd sub nom.; Mukasey*, 534 F.3d 181, *cert. den.* 129 S. Ct. 1032 (2009). The court reviewed several commonly cited methods of verifying a user's age and concluded, "[c]redit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age." *Gonzales*, 478 F. Supp. 2d at 811.

The shortcomings of various approaches to age or identity verification online have been well documented. Requiring Internet users to pay for access to content with a credit card is often proposed as a solution,[5] but credit card transactions do not verify that the user providing the information is an adult. Credit card–based "verification systems may be subject to evasion and circumvention, for example, by minors who have their own credit cards." *COPA II*, 542 U.S. at 668. "[M]inors under 17 have access to credit cards, debit cards, and reloadable prepaid cards. . . . [P]ayment card issuers are increasingly marketing credit cards, debit cards, and prepaid cards to minors as young as 13." *Gonzales*, 478 F. Supp. 2d at 801. In addition to minors who have legitimate access to their own credit cards or are authorized to use their parent's card, some minors may use a credit card belonging to a parent or other adult without that adult's knowledge or consent. *Id.* at 801.[6] And the only information that is actually verified when a credit card is charged during an online transaction is that the user has access to a valid credit card number.

Services that match user-provided data to databases of public information also "do not verify the age or identity of an individual; instead, they merely verify the data entered by an Internet user." *Gonzales*, 478 F. Supp. 2d at 802. These types of data verification services cannot ensure that the person entering the data is in fact the person whose data is being verified. *Id.*[7] Moreover, these services are limited by the type, quality, and accuracy of the databases they can access and will not be able to provide information about people who are not U.S. citizens. *Id.* at 803.

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[5] *See, e.g.* Child Online Protection Act, 47 U.S.C. 231(c)(1) ("It is an affirmative defense to prosecution . . . that the defendant, in good faith, has restricted access by minors to material that is harmful to minors by requiring use of a credit card, debit account, adult access code, or adult personal identification number. . .").

[6] Recognizing these shortcomings, "payment card associations in this country prohibit Web sites from claiming that use of a payment card is an effective method of verifying age, and prohibit Web site owners from using credit or debit cards to verify age. . . . Payment card associations in this country advise consumers not to offer payment cards to merchants as a proxy for age. . . ." *Gonzales*, 478 F. Supp. 2d at 801 (E,D, Pa. 2007).

The problem of online age verification is made all the harder because most minors lack *any* recognized formal identification. The district court on remand in COPA noted that it is "especially difficult for [data verification services] to verify young adults (between the ages of 17 and 21) or minors, because there is little data available on younger adults, and very little, if any, data available on minors." *Id.*

Another weakness in age verification systems is the potential for supposedly "verified" information to be used for circumvention. Some age verification systems verify the data that a user submits, and then create a login ID or other credential that the user can use to access age-restricted content in the future. *See* ISTTF Report, Appendix D at 9. These logins and credentials can be shared among users as a way to circumvent the age verification process. *Id.* at 29.[8]

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[7] Online transactions that involve the sale of regulated items, including alcohol and tobacco, require the online merchants to verify the age of the purchaser. In these circumstances, adults have an incentive to verify their age correctly, and such purchases usually require an adult to receive delivery of the item (and thus verify his age in person). *See* Internet Safety and Technical Task Force, Enhancing Child Safety and Online Technologies 29 (Dec. 31, 2008). But "without a physical delivery of goods and an accompanying visual age verification, neither [a data verification service] nor the Web page operator can know whether an adult or a child provided the information. Attempting to verify age with this information in a consumer-not-present transaction is therefore unreliable." *Id.* at 803.

There remain significant questions about the practicality and effectiveness of "age verification" technology in the online environment. The validity of any government prohibition on minors' access to constitutionally protected content would depend in part on the ability to accurately distinguish between minors and adults. As this Court considers how the statute in this case might be applied online, it should not assume that "age verification" technology is any more of a viable option today than it was in the 1990s during the CDA appeal or in the recently concluded COPA litigation.

B. A Government Mandate on Websites to Implement Age Verification Technologies Would Infringe on Adults' First Amendment Rights.

Attempts to restrict minors' access to violent video games online would require websites to implement age verification technologies, requiring adults to disclose personal information in order to access that same material. This is an impermissible burden on free speech. The First Amendment protects the right to anonymous speech,[9] which includes the right to send and receive material online without verifying one's identity. Mandatory age verification procedures would have significant chilling effects on adults' speech, as at least some adults would be deterred from accessing constitutionally protected material because they are unwilling to provide personal information in order to gain access to the content.[10] Age verification procedures would require adults to compromise their anonymity to access protected speech, which would have a particularly deterrent effect with regard to sensitive or controversial content that users may not want linked with their identities. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996) (striking down identification requirement because it would "further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel"); *Gonzales*, 478 F. Supp. 2d at 812.[11]

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[8] "Unlike in financial contexts, users in online social settings may have reduced incentives to maintain the confidentiality of login IDs and credentials, and members of the [the ISTTF research board] report that sharing [login] credentials is common among young people." ISTTF Report at 29-30.

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[9] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995)

[10] *See ACLU v. Ashcroft*, 322 F.3d 240, 259 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004).

[11] *See also ACLU v. Mukasey*, 534 F.3d 181, 197 (3d Cir. 2009) (discussing the difference between online and offline methods of restricting minors' access to material that is constitutionally protected as to adults: "Blinder racks do not require adults to pay for speech that otherwise would be accessible for free, they do not require adults to relinquish their anonymity to access protected speech, and they do not create a potentially permanent electronic record. Blinder racks simply do not involve the privacy and security concerns that" age verification

As the District Court on remand in COPA found:

> Requiring users to go through an age verification process would lead to a distinct loss of personal privacy. Many people wish to browse and access material privately and anonymously.... Web users are especially unlikely to provide a credit card or personal information to gain access to sensitive, personal, controversial, or stigmatized content on the Web. As a result of this desire to remain anonymous, many users who are not willing to access information non-anonymously will be deterred from accessing the desired information.

Gonzales, 478 F. Supp. 2d at 805-06. Age verification requirements would also produce a chilling effect among adults who have security concerns about providing site operators with sensitive information such as credit card numbers: "Requiring Internet users to provide payment card information or other personally identifiable information to access a Web site would significantly deter many users from entering the site, because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet." *Id.* at 806.

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procedures raise.)

As the Third Circuit concluded in the COPA case, age verification technology would "burden [material] which is constitutionally protected for adults" and would "drive this protected speech from the marketplace of ideas on the Internet." *Mukasey*, 534 F.3d at 193 (citing *ACLU v. Ashcroft*, 322 F.3d 240, 260 (3d Cir. 2003)). That court concluded that "[t]his type of regulation is prohibited under the First Amendment." *Id.*

C. Any Requirement that Online Video Game Providers Implement Age Verification Would Be an Unconstitutional Burden on Their Speech.

Restricting minors' access to violent video games online through mandatory age verification processes would also place unconstitutional burdens on the First Amendment rights of the game developers and website operators who provide these games online. *See Mukasey*, 534 F.3d at 197. The costs associated with an age verification mandate would result in a twin infringement on game providers' First Amendment rights: the chilling effect on the game providers' constitutionally protected speech, and some decrease in the audience for their websites and games as a result of this self-censorship.

Age verification systems, though ineffective, are costly to implement.[12] "A statute is presumptively inconsistent with the First

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[12] *See Reno*, 521 U.S. at 856-57.

Amendment if it imposes a financial burden on speakers because of the content of their speech." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105, 115 (1991). Small game providers, start-up companies, individual designers creating games for an online-only audience, game developers and websites that want to offer their games for free, all would likely censor themselves in the face of a burdensome government mandate to implement age verification systems on their sites.

Moreover, game providers are also likely to lose some of the audience for their constitutionally protected speech if they implement age verification systems. Due to the costs associated with these systems, game providers would likely have to charge fees for their content. *See Gonzales,* 478 F. Supp. 2d at 804. Web users are often reluctant to provide personal information or to pay for content when there are other, free alternatives available; thus, one likely result of an age verification mandate would be to drive traffic to sites and games hosted outside of the United States, where any state or federal regulation would not apply. As the district court found in the COPA remand, "[b]ecause requiring age verification would lead to a significant loss of users, content providers would have to either self-censor, risk prosecution, or shoulder the large financial burden of age verification." *Id.* at 804-05. "Many users who are not willing to access information non-anonymously will be deterred from accessing the desired information. Web site owners . . . will be deprived of the ability to provide this information to those users." *Id.* at 806. Age verification procedures "place substantial economic burdens on the exercise of free speech because all of them involve significant cost and the loss of Web site visitors, especially to those . . . who provide their content for free." *Id.* at 812-13.

* * *

Any regulation of online content that imposes age-based requirements will encounter very significant practical and constitutional problems. A decision upholding such requirements in the offline world – for a new type of content previously unregulated – would be sure to lead to constitutional problems in the online context.

CONCLUSION

Amici appreciate that many parents would like to limit their children's access to certain types of content – including violent content – in both the online and offline worlds. *Amici* have strongly supported the development of user- and parental-empowerment tools that provide this type of control, to be used on a voluntary basis in the households that choose to use them. As Respondents make clear in their brief, the video game industry has been a leader in promoting parental control tools. *Amici* urge this Court to affirm the judgment below, and hold that these voluntary tools – and not governmental regulation of a new category of less-protected speech – are the best approach to achieve the social goals at issue here.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF CONSUMER ELECTRONIC RETAILERS COALITION, RETAIL INDUSTRY LEADERS ASSOCIATION, AND STATE RETAILER FEDERATIONS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

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STATEMENT OF INTEREST OF AMICI[1]

Consumer Electronics Retailers Coalition ("CERC") is a not-for-profit public policy organization that includes major specialist and general retailers of consumer electronics products, and retailer associations. Established in 1991 as an informal coalition, and incorporated in 2003, CERC members bring unique and expert perspectives to policy issues facing the consumer electronic retail industry and their customers.

Retail Industry Leaders Association, Inc. ("RILA"), established in 1969 as the Mass Retailing Institute, represents the interests of retailers, product manufacturers, and service suppliers. Its 600 member companies include the largest and fastest growing companies in the retail industry, and account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

Amici state retailer federations include the Arkansas Grocers and Retail Merchants Association, California Retailers Association, Colorado Retail Council, Illinois Retail Merchants Association, Iowa Retail Federation, Louisiana Retailers Association,

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their respective members, or their counsel made a monetary contribution to its preparation or submission.

Maine Merchants Association, Maryland Retailers Association, Minnesota Retailers Association, Nebraska Retail Federation, North Carolina Retail Merchants Association, Ohio Council of Retail Merchants, Retailers Association of Massachusetts, South Carolina Retail Association, Texas Retailers Association, Utah Retail Merchants Association, Virginia Retail Merchants Association, and Washington Retail Association. These not-for-profit trade associations were formed to represent the interests of the retail community before local, state, and federal government, and to provide retailers large and small with information and advocacy with respect to legislative and regulatory actions affecting retailer and business interests.

Members of the *amici* are among the largest and smallest sellers of entertainment products, including electronic video games. Collectively, these companies operate tens of thousands of physical locations in urban, suburban, and rural communities around the United States and in other countries of the world, and reach consumers online through many of the largest retail "stores" on the internet.

Retail sale of works subject to First Amendment protections constitutes a significant portion of the domestic economy. According to government and industry estimates, in 2009 the electronic game industry constituted a $20 billion market segment in the United States.[2] Retail commerce more generally in expressive works sold in the United States (such as books, recorded music, motion pictures, and magazines) reached $881 billion.[3] Thus, the outcome of this case potentially will have a significant impact not only on First Amendment jurisprudence, but also on interstate commerce and the operations of retailers nationwide from mass retail chains to independent stores.

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[2] Press Release, NPD Group, Inc., 2009 U.S. Video Game Industry and PC Game Software Retail Sales Reach $20.2

Not all members of the *amici* sell video games, and not all members that offer video games will sell mature-rated video games. Some retailers prefer to offer consumers access to a broad inventory of products that includes new and used video games of mature content. Such decisions reflect the retailers' assessments of the markets in which they operate, as well as the companies' judgments as to the goals and public images of their respective businesses, and as to how best to build customer loyalty.

Major member companies of the *amici* that sell video games implement stringent voluntary policies not to sell games labeled as "M" ("Mature") by the Entertainment Software Ratings Board ("ESRB") to any person under 17 years of age without parental

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Billion (Jan. 14, 2010), http://www.npd.com/press/releases/press_100114.html.

[3] U.S. Bureau of Economic Analysis, U.S. Dep't of Commerce, National Economic Accounts, Table 2.4.5U. Personal Consumption Expenditures by Type of Product, http://www.bea.gov/national/nipaweb/nipa_underlying/TableView.asp?SelectedTable=17&FirstYear=2009&LastYear=2010&Freq=Qtr&ViewSeries=Yes (last visited Sept. 14, 1010).

consent, both in physical retail stores and in online commerce. In "mystery shopper" audits by the Federal Trade Commission and the ESRB Retail Council, these efforts have proved robust and effective. Retailers' websites provide information to parents as to the meaning of the ESRB ratings and the meaning of the supplementary ESRB "content descriptors," and explain companies' policies with respect to restricting such sales to minors. In addition, companies' websites educate parents as to the availability and use of "parental block" technologies on the various brands of video game consoles that enable parents to prevent the play of games with mature ratings.

The *amici* file this brief in support of the principles of the First Amendment. Absent proof of compelling state interests, and that the legislative proscriptions are the least restrictive means to achieve those interests, governments should not be empowered to restrict public access to expressive works based on content. It perhaps is unfortunate, but ultimately irrelevant, that this case concerns "violent" video games whose content some customers and retailers may find offensive. As this Court has observed, the Constitution does not safeguard only popular or wholesome ideas and images. To protect free speech, First Amendment rights must also be preserved for content that some find distasteful. "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause." *United States v. Playboy Entm't, Inc.*, 529 U.S. 803, 826 (2000).

The California statute is but one of many unconstitutional laws that seek to hold retailers liable for sales of certain video games, without parental permission, to persons younger than 18. Each of these laws has been found a content-based restriction that impermissibly restricts the First Amendment rights of minors. Each statute would premise liability on subjective statutory terms that attempt to define proscribed imagery according to vague descriptors and "community standards" that vary by locale and over time. Such indefinite standards create serious issues for national retailers, both in physical stores and online. The threat of liability under these statutes, and inconsistencies in their terms and provisions from state-to-state, would compel many retailers simply to stop carrying these games -- thus also limiting what speech is available to adults.

The *amici* submit that existing efforts of retailers -- to restrict sales of mature video games to minors, to educate and inform parents about the content of video games, and to empower parents to block access to games they consider inappropriate for their children -- provide an effective less restrictive alternative that makes state regulation, and the specific impositions on free speech rights at issue in this case, unnecessary and constitutionally impermissible.

ARGUMENT

I. Retailers Provide Effective Less Restrictive Alternatives By Voluntarily Restricting Sales to Minors and Helping Parents Supervise Minors' Access to Mature Video Games.

Retailers play a vital role in promoting the purposes of the First Amendment. Retailers provide creators and the public with efficient access to a vast market for works that implicate First Amendment rights – books, DVDs, music, and video games. Second perhaps only to public libraries, retailers open the gateway for consumers to discover, acquire, and experience content that educates, informs, challenges, and entertains.

First Amendment rights apply to minors as well as adults. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975). *See also, Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001). Courts uniformly have held that video games constitute expression protected by the First Amendment, and are analytically indistinguishable from other protected media. *See Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008); *Interactive Digital Software Assoc. v. St. Louis Cty., Mo.*, 329 F.3d 954, 957 (8th Cir. 2003), *citing Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002); *Am. Amusement Mach.*, 244 F.3d at 577. *Accord Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 830 (M.D. La. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004). Numerous books and articles have analyzed the expressive qualities of videogames, and their power to convey complex systems and ideas.[4] Whereas movies and books present an author's prescribed narrative, video game users' actions have consequences that can influence the course of the narrative as well as the outcome.

Video games implicate First Amendment rights in other ways as well. Increasingly, digital video games marketed by retailers have a social networking component that enables multiple players to communicate directly with each other from physically remote locations. Game consoles such as the Microsoft X-Box or the Sony PlayStation connect to the internet so that games can be played with friends across the city, the country, or the world. And, players can "chat" with these other players via these internet-connected game consoles. Video game technology has been at the vanguard of developing social network communications environments where players interact in and outside the games in ways protected by the First Amendment freedoms of speech and electronic assembly.

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[4] *See, e.g.*, Dr. Ian Bogost, *Persuasive Games: The Expressive Power of Videogames*, MIT Press (2007); McKenzie Wark, *Gamer Theory*, Harvard University Press (2007). A recent article noting the popularity of war video games in which gamers engage in simulated first-person combat in Afghanistan and Iraq (sometimes from the perspective of American or enemy forces) asks whether video games today "are successfully conveying an experience of war to audiences in a way that is at least as effective and affecting as the war stories told in literature or film?" Chris Suellentrop, *War Games*, The N.Y. Times Sunday Magazine, Sept. 12, 2010, at 62, 64. And a magazine article and accompanying videogame enabled the user to assume the role of Somali pirates to make rational business choices in seizing ships and negotiating ransom in a game called "Cutthroat Capitalism." Scott Carney, *An Economic Analysis of the Somali Pirate Business Model*, Wired Magazine (July 13, 2010) http://www.wired.com/politics/security/magazine/17-07/ff_somali_pirates.

Members of the *amici* recognize that parents may deem the content of certain video games to be inappropriate for younger audiences. For that reason, retailers have stepped up to their responsibility to inform and protect their customers. Retailers empower parents to make intelligent decisions, with and for their children, about their families' entertainment choices, in a number of ways:

- Retailers support the voluntary ESRB ratings system. These ratings ensure that parents have easily understandable information available to them on the face of the game boxes as to the nature of the content in video games. Weekly newspaper advertising inserts of various retailers inform parents of ratings for particular games as well as how to learn more about the ratings system in general, and encourage consumers to learn and to use the ESRB rating system to make intelligent purchasing decisions.

- Retailers inform parents of the meaning and implications of both the ESRB ratings and the additional "content descriptors" that provide more granular information concerning the content of games. Retailers provide brochures in their stores and pages on their websites that explain the ESRB ratings and descriptors. Some retailer websites feature search functions allowing the user to type in the name of the game so as to retrieve ratings and content descriptor information.[5]

- On various retailer websites, pages offering particular games for sale give parents additional information about the content of particular games, such as more detailed plot descriptions and customer comments about the games.

- Retailer websites can instruct parents how to use "parental block" technology in various game consoles.[6]

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[5] *See* Target Corporation, *ESRB Game Ratings & Content Descriptors*, http://www.target.com/ESRB-Game-Ratings-Product-Warranty/b/13309611/ref=sc_fe_1_5_1042122_27?node=13309611; (last visited Sept. 14, 2010), Best Buy Co. Inc., *What do ESRB ratings mean?* http://www.bestbuy.com/site/null/null/pcmcat150500050005.c?id=pcmcat150500050005&h=387 (last visited Sept. 14, 2010); Walmart Stores, Inc., *ESRB Ratings*, http://www.walmart.com/cservice/esrb_ratings.jsp (last visited Sept. 14, 2010); Amazon.com, Inc., *ESRB: Understanding Video Game Ratings*, http://www.amazon.com/gp/feature.html/ref=amb_link_85825731_2?ie=UTF8&docId=71576&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=left-10&pf_rd_r=0BDXXY3F8E36B6Z1QREB&pf_rd_t=101&pf_rd_p=496315851&pf_rd_i=468642 (last visited Sept. 14, 2010).

[6] *See e.g.*, Best Buy Co. Inc., *Family Gaming Resources*, http://www.bestbuy.com/site/Misc/Video+Games+for+Kids+and+Families/pcmcat106200050008.c?id=pcmcat106200050008 (last visited Sept. 14, 2010).

- Retailers explain their sales policies online, including their policies that prevent unauthorized sales to minors, and that explain their choice whether to sell certain types of games.[7]

- Most importantly, retailers have successfully implemented policies and protections to prevent the sale to minors of video games rated for persons over the age of 17. Store clerks are trained to check the age identifications of persons seeking to purchase games rated "M" for mature, and are required to refuse, without parental consent, to sell such games to any persons under 18. And several of the above-cited retailer websites describe how retailers prompt clerks to check customer identification, via a reminder on the video screen of the cash registers triggered by a bar code scan of "M" and "AO" rated video games.

- Retailers also restrict minors' ability to purchase mature games from their internet websites. Online commerce requires use of a credit card which, in addition to mandatory age verification requirements, puts the purchasing decision in the hands of persons who are 18 or older or have parental consent.

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[7] *See, e.g.*, Target Corporation, *Target Stores Mature-Rated Games Policy*, http://www.target.com/Mature-Rated-Games-Policy-Product/b/14306571/ref=sc_fe_l_5_1042122_28?node=14306571 (last visited Sept. 14, 2010); Walmart Stores, Inc., *ESRB Ratings*, http://www.walmart.com/cservice/esrb_ratings.jsp (last visited Sept. 14, 2010); Best Buy, Co. Inc., *ESRP PSA*, http://images.bestbuy.com/BestBuy_US/en_US/images/musicmoviegame/videogames/features/esrb_dunn.wmv (last visited Sept. 14, 2010).

- Members of the *amici* participate in the ESRB Retail Council, and subscribe to a voluntary code of conduct that incorporates these and other commitments concerning disclosure, information, sales restrictions, and compliance.[8]

Video game retailers, including members of the *amici*, began implementing these policies as early as 2000, and have made impressive progress over the last decade. Members of the ESRB Retail Council submit to biannual "mystery shopper" audits which show, as of May 2010, greater than 80 percent aggregate industry compliance with both in-store signage and sales policy enforcement.[9] The most recent Federal Trade Commission report similarly confirms that retailers (including members of the *amici*) have implemented "robust" systems to restrict sales to minors, and that

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[8] ESRB, *ESRB Retail Council: Ratings Education and Enforcement Code* (June 21, 2006), http://www.esrb.org/retailers/downloads/erc_code.pdf.

[9] ESRB, *ESRB Retail Council*, http://www.esrb.org/retailers/retail_council.jsp (last visited Sept. 14, 2010).

"retailers are strongly enforcing age restrictions on the sale of M-rated games."[10]

Where, as here, industries voluntarily collaborate to educate and empower parents through ratings information, retail restrictions, and technological controls within the home, there exist clear, recognized, and effective less restrictive alternatives to legislation. Thus, even if the state could demonstrate a compelling state interest in the legislation (which, as the district court and the Ninth Circuit found, it could not), or that the legislation was not impermissibly vague (which both courts held it to be), these efforts demonstrate that highly effective less restrictive alternatives to legislation exist. On this basis alone, the California statute should be held invalid and in violation of the First Amendment.

Courts recognize that such voluntary retailer actions constitute effective less restrictive alternatives to the broad content-based regulations proposed by California and other states. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651-52 (7th Cir. 2006) (restrictions on video game sales are not narrowly tailored where state could have passed laws increasing awareness of ESRB rating system; citing evidence that under ESRB parents are involved in video game purchase decisions 83 % of time). *Entm't Software Ass'n v. Granholm*. 426 F. Supp. 2d 646, 654-55 (E.D. Mich. 2006) (promoting ESRB ratings is a reasonable alternative to regulation); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d at 833 (encouraging awareness of rating system and availability of parental controls). *See also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656 (2004) (website filtering a less restrictive alternative); *United States v. Playboy Entm't, Inc.*, 529 U.S. 803 (availability of parental blocking a less restrictive alternative).

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[10] FTC, "Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries," at iv, 27 (December 2009). Notably, the FTC recognizes the Constitutional flaws in statutory requirements, and recommends voluntary methods of enforcement with respect to video game sales: "Given important First Amendment considerations, the Commission supports private sector initiatives by industry and individual companies to implement these suggestions." *Id.* at v.

As the Court observed a decade ago, measures to inform parents and enable parents to block unauthorized access by minors can constitute less restrictive alternatives to regulation:

> It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

Playboy Entm't, 529 U.S. at 824.

These efforts and others have protected minors from exposure to inappropriate video content, and put parents in control of decisions over their families' entertainment choices. The *amici* submit that such voluntary education and enforcement efforts already have proven more effective to achieve the statutory goals of empowering parents and protecting children. The existence of such less restrictive alternatives demonstrates that California cannot meet its burden under strict scrutiny to justify regulating retail sales based on the content of video games.

II. Laws Such as the California Statute, Based on Vague, Subjective, Localized Standards, Do Not Comport With the Realities of National Retail Businesses.

Members of the *amici* operate nationwide and international businesses. Many of these stores are able to offer lower prices to consumers because of efficiencies achieved through coordination on a national level of purchasing, inventory control, advertising, training, sales, promotion, and service. Moreover, each store projects a uniform image that reflects the national store brand and defines differences from its competitors. Members of the *amici* also offer product information and sales through their presence on the internet, which by definition has a national footprint and portrays a uniform image and inventory to citizens of every state.

Nationwide retail commerce thrives in a legislative and regulatory environment that is uniform and certain. Laws such as the California statute disrupt this flow, making it impossible for retailers to implement these laws in ways that promote First Amendment values for adults as well as children; and, ironically, resulting in less predictable or effective enforcement for parents and retailers alike.

A. Vague and inconsistent state video game laws would threaten commerce on a national level.

State video game laws passed (and overturned) to date have threatened retailers' national operations in two ways. First, the laws failed to provide clear guidance to retailers as to what content would be subjected to the restrictions. Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." *Grayned v. City of Rockford*, 408 U.S 104, at 108 (1972). Video game laws have applied vague standards to the classification or labeling of "violent" games, and have correctly been held to be unconstitutionally vague. *See Entm't Merchants Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009); *Entm't Software Ass'n v. Granholm*. 426 F. Supp. 2d at 654; *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d at 835-836.

Second, even if the various statutes were not unconstitutionally vague, the inconsistencies among the various state requirements and prohibitions further compound a retailer's dilemma. The disparate requirements imposed by these state laws (had they been upheld) illustrate the challenges facing retailers to know what type of conduct invokes the law; what game titles are or are not covered by the law; how such games are supposed to labeled; and, what such labels are supposed to mean. For example:

Definition of Covered Content

California	Defines "violent video game" as: —incorporating requirements of appeal to "deviant or morbid" interests of minors, being patently offensive to prevailing community standards, and, lacking as a whole serious literary, artistic, political, or scientific value for minors; —embedding separate definitions of subjective terms such as "cruel," "depraved," "heinous," "serious physical abuse," and "torture"; and, —listing "pertinent factors" as to whether actions are especially " heinous, cruel, or depraved," which include infliction of "gratuitous" violence.[11]
Indianapolis, Indiana	"Graphic violence," defined as "visual depiction or representation of realistic serious injury to a human or human-like being where such serious injury includes amputation, decapitation, dismemberment, bloodshed,

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[11] Cal. Civil Code §§ 1746-1746.5. On appeal, the State apparently conceded that several of these definitional conditions could not pass muster.

	mutilation, maiming or disfiguration."[12]
Louisiana	The average person, applying community standards, would find that the game as a whole appeals to the minor's "morbid interest in violence," and depicts violence in a manner patently offensive to prevailing standards in the adult community with respect to what is suitable for minors.[13]
Michigan	"Ultra-violent" game described as "continually and repetitively depicts extreme and loathsome violence."[14]

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[12] City-County General Ordinance No. 72, 2000, amending §§ 831-1, 831-5, 831-6 and 831-8, and adding new § 831-7 to Chapter 831 of the Revised Code Of The Consolidated City And County for the City of Indianapolis and Marion County, Indiana, *held unconstitutional in Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572.

[13] La. Rev. Stat. Ann. § 14:91.14, *held unconstitutional in Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823.

[14] Mich. Comp. Laws Ann. §§ 722.685-693, *held unconstitutional in Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646.

St. Louis County, Missouri	"Graphically violent"[15]
Nassau County, New York	"Indecent crime material" that depicts a heinous crime or criminal, and which appeals to the depraved interest of minors in crime.[16]
Oklahoma	Prohibits sales of video games with "inappropriate violence," defined within one of nine disjunctive categories, including: --"glamorized or gratuitous"; --"graphic" and used to "shock or stimulate" or is "not contextually relevant to the material"; --"trivializes the serious nature of realistic violence"; --"does not demonstrate the consequences or effects of realistic violence"; --uses "brutal weapons" to inflict

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[15] St. Louis County Ordinance No. 20,193 (Oct. 26, 2000), *held unconstitutional in Interactive Digital Software Assoc. v. St. Louis Cty., Mo.*, 329 F.3d 954. An earlier Missouri law addressing sales and rental of videocassettes imposed liability based on whether the average person would find that the content has a tendency to cater or appeal to "morbid interests" in violence for persons under the age of 17. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

[16] Nassau County Local Law 11-1992, *held unconstitutional in Eclipse Enter. Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997). The referenced law applied to trading cards describing crimes or criminals, not violent video games.

	the "maximum amount of pain and damage"; --"endorses or glorifies torture or excessive weaponry"; *or* --"depicts lead characters who resort to violence freely."[17]
Washington	Realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer.[18]

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[17] Okla. Stat. Ann. § 1040.75, *held unconstitutional in Entm't Merchants Ass'n v. Henry*, No. Civ 06-675-C, 2006 WL 2927884 (W.D. Ok. Oct. 11, 2006). These standards, if applied to traditional media, could have sanctioned characters as diverse as Johnny Rambo, Wile E. Coyote, and The Three Stooges.

[18] Wash. Rev. Code Ann. § 9.91.180, *held unconstitutional in Video Software Dealers Ass'n. v. Maleng*, 325 F. Supp. 2d 1180. The law also did not define "public law enforcement officer," thus potentially applying to depictions of the gunfight at the OK Corral, the classic TV series "Gunsmoke," or rebel attacks on the Imperial Army in the "Star Wars" series.

Labeling

Several of the invalidated statutes, including the California law, would have imposed mandatory labeling requirements that are inconsistent with the uniform, nationally-implemented, voluntary ESRB approach. These inconsistencies as to the content, meaning, and placement of the labels would hinder retailers' ability to comply with the resulting patchwork of laws.

Type of Labeling Required/Not Required

Louisiana,[19] Michigan,[20] Missouri,[21] Washington[22]	Each retailer must judge the content for itself. Statutes do not refer to ESRB or other labels.
Minnesota[23]	Reliance on existing ESRB labels
California,[24] Illinois[25]	Requires application of a separate label

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[19] *See supra* note 13.

[20] Mich. Pub. Acts No. 108, § 1 *et. seq.*, held unconstitutional in *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646.

[21] *See supra* note 15.

[22] *See supra* note 18.

[23] Minn. Stat. Ann. § 325I.06, subd 3, *held unconstitutional in Entm't Software Ass'n v. Swanson, 519 F.3d 768.*

[24] *See supra* note 11.

[25] 720 Ill. Comp. Stat. 12B 25a (Jan. 1, 2006) *held unconstitutional in Entm't Software Ass'n v. Blagojevich*, 469 F.3d at 643.

Size of Label[26]

California[27]	2" by 2" square on the front of the box.
Illinois[28]	4" by 4" square on the front of the box.

Meaning of the Label

California[29]	"18" label refers to "violent" content.
Illinois[30]	"18" label refers to either "violent" or "sexually explicit" content, or both.

It would be far-fetched to contend that these statutes, each using different, but equally vague and subjective, terms, could somehow be susceptible to a single, reliable interpretation by retailers, state authorities, the courts, or the "communities" whose standards ostensibly were to be applied. Such inconsistent labeling requirements similarly defy implementation in a consistent policy and program by a national retailer. Yet the penalties under these statutes for failure to comply are substantial. Civil fines against retailers range as high as $1,000 per sale (about 15 times the retail price of many popular video games); and the Louisiana statute adds criminal penalties including imprisonment for up to one year, with or without hard labor.

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[26] Ironically, these labels could comply with the law yet obscure the title of the game, or the ESRB rating and content descriptor label, which gives parents and adults better information than a mere suggested age rating.

[27] *See supra* note 11.

[28] *See supra* note 25.

[29] *See supra* note 11.

[30] *See supra* note 25.

B. Mandatory labeling requirements create additional snares for retailers.

The existing voluntary ESRB labeling program was designed so that an independent board reviews, describes, and rates the video game content according to objective criteria. The ESRB ratings system gives retailers assurance that the games they sell will be categorized in a manner that is uniform, predictable, and informative to parents.

As noted above, several laws would have imposed a labeling requirement directly on the retailers to pass judgment over the content (independent of the ESRB guidance), and to restrict minors' access to that content in accordance with unknown and indefinable community standards. Retailers carry hundreds of thousands of products (known as "SKU's" or "stock-keeping units"). They cannot know with sufficient certainty the content of each segment of each of the thousands of media products they sell. Retailers must rely on information provided by the manufacturer.

Mandatory labeling requirements raise their own First Amendment problems. Freedom of speech prohibits the government also from telling people what they must say. *Rumsfeld v. Forum for Academic and*

Institutional Rights, Inc., 547 U.S. 47 (2006). Thus, courts have invalidated requirements for video game labeling, signs, and brochures, because they are intended to convey non-factual information reflecting subjective and controversial judgments. *See Entm't Software Ass'n v. Blagojevich*, 469 F.3d at 651-2 (violation of First Amendment to require retailer application of an adhesive label on video game box, and to require in-store signage and brochure requirements).

If a court were to uphold generally legislation that restricts sales to minors, while striking labeling requirements under the First Amendment, retailers would confront a chaotic environment with no rational solutions. Retailers could have no way other than through litigation to know whether they correctly applied the key statutory terms to the hundreds of video games they sell. Undoubtedly, some retailers would cautiously label some as "violent," while other retailers might believe incorrectly that the content of certain games did not merit the label. Over-inclusive labeling would offend the First Amendment, while under-inclusive labeling fails to achieve the purposes of the statute. This also would place an equally-impossible burden on state authorities entrusted with attempting to enforce retailer compliance. And, ironically, the resulting confusion and uncertainty would undermine retailers' current successful voluntary efforts using the ESRB ratings to inform parents and prevent sales to minors.

C. Inconsistencies among state regulations will create a retail environment that is highly chaotic, unduly restrictive, and ultimately less effective at protecting family interests.

If the California statute is upheld, or if the Court permits individual state regulation based on gaming content, experience shows that different states would enact different and potentially conflicting rules governing, *inter alia*, the appearance, content, and application of labels, or age requirements, or identification requirements. Such state or community-based variations would be impossible for a national retailer to accommodate and implement effectively. Presented with a patchwork of disparate, potentially conflicting, requirements, national retailers likely would respond by seeking the most cautious, overly restrictive, approach. Either they would create their own composite code combining the most restrictive provisions under each of the laws or, more likely, would simply remove the games from their inventory even for adults. Neither of these self-censoring outcomes serves the purposes of the First Amendment.

Moreover, even if retailers could abide a Balkanized regulatory environment on a state-by-state or county-by-county basis, the end result likely would be far less effective than the voluntary efforts retailers already implement nationwide. The same games could be sold to minors in one state but not in another; and different retailers could reach different conclusions as to what could be sold even within the same state or community. Such a result would only confuse parents and consumers, and undermine implementation of the current consistent use of the ESRB ratings. Thus, allowing state-by-state regulation of content could lead to greater uncertainty, inconsistent protections, and greater burdens on those tasked with enforcing the law, and hence on the state and federal courts.

III. Strict Scrutiny Should Continue to Apply to Content-Based Restrictions that Implicate First Amendment Rights.

Although the statute at issue in this case arises in a particular context involving depictions of violence, the principle at stake applies across the board to any content that might be found objectionable by some segment of the populace. During the last century, courts were asked to rule upon legislative and private efforts to ban public access to a panoply of creative works. This Court responded instead by zealously preserving the right to publish and sell a spectrum of protected speech. These protections are crucial to retailers that provide consumers with access to expressive works. Many of the works initially proscribed by legislation or challenged in litigation – such as *Ulysses* by James Joyce, *Lady Chatterley's Lover* by D.H. Lawrence, or *Howl* by Allen Ginsburg – are recognized as literary or genre classics, despite initial legislative or judicial findings that these works lacked any artistic merit or social value. Hence, legislatures and courts plummet headlong down a slippery slope when attempting to define intangible, inherently subjective, factors such as community standards and aesthetic significance.

A content-based restriction of protected speech is presumptively invalid under the First Amendment. *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010);

R.A.V. v. St. Paul, Minn., 505 U.S. 377, 382. (1992). "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft* v. *Am. Civil Liberties Union*, 535 U. S. 564, 573 (2002) citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (internal quotation marks omitted). "It is rare that a regulation restricting speech because of its content will ever be permissible." *Playboy Entm't.*, 529 U.S. at 818. Restrictions on selling obscene materials to minors have been permissible under the First Amendment because obscenity falls into the category of unprotected speech. *United States v. Stevens*, 130 S. Ct. at 1584; *R.A.V.*, 505 U.S. at 382-83 (recognizing confined categories of unprotected speech to obscenity, fighting words, defamation, and direct incitement of lawlessness).

By contrast, this Court has held that material depicting violent content generally is protected by the First Amendment. *See Winters v. New York*, 333 U.S. 507, 508-510 (1948). In the last term, this Court held that while legislatures clearly have the power to prohibit acts of cruelty toward animals, it does not follow that they can proscribe *depictions* of such acts. *United States v. Stevens*, 130 S. Ct. at 1585-1586. Consequently, courts consistently have rejected suggestions to apply rational scrutiny standards, applicable to obscenity, to other types of content, including descriptions or depictions of violence. *See, e.g., Interactive Digital Software Ass'n.*, 329 F.3d at 958; *Entm't Software Ass'n v. Granholm*. 426 F. Supp. 2d at 652. Instead, courts have applied and upheld strict scrutiny for works based on non-obscene content, including violent content, even as to minors.

> [S]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.

Erznoznik v. Jacksonville, 422 U.S. at 213-14. No compelling reason has been shown in this case to justify departing from the existing rule.

Singling out video games over all other media sets a dangerous precedent. As the Seventh Circuit observed, all media is in some sense "interactive" and entitled to protection. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d at 577. *Accord Interactive Digital Software Ass'n.*, 329 F.3d at 957. *Accord Entm't Software Ass'n v. Foti*, 451 F. Supp. at 830. Courts invalidating content-based restrictions of video games have cited depictions of "extreme" violence in the works of Homer and Shakespeare, and even in the Bible. *Entm't Software Ass'n v. Swanson*, 519 F.3d at 772; *Interactive Digital Software Assoc.*, 329 F.3d at 957; *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d at 577. *See Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1185. Indeed, the descriptions of video games in briefs of the state and their *amici* are uncomfortably close to, if not indistinguishable from, aberrant behavior depicted in now-classic books and motion pictures such as Anthony Burgess' *A Clockwork*

Orange or the Stanley Kubrick film based on it, or Quentin Tarantino's "Pulp Fiction."

Legislation such as the California law cannot be justified by subjective judgments as to what depictions may be "devoid" of moral or aesthetic merit. While one court described a popular video game, "Grand Theft Auto III," as "filth,"[31] the updated version of the game was given a serious and more nuanced review in the Wall Street Journal by a Pulitzer Prize-winning novelist, who observed: "GTA IV doesn't have to be 'Moby-Dick' or 'Beloved' to be the Greatest Game of a Lifetime or even to be worthy of discussion."[32] Academics compare the structure and narrative of video games to classics of ancient literature.[33]

Nor is the debate over how violence in a new medium may influence children a new phenomenon. The California statute, in its purpose and effect, evokes unsuccessful legislative attempts in the 1930's (the early years of the new interactive medium of that day –

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[31] *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d at 1190.

[32] Junot Diaz, *'Grand' but no 'Godfather,'* The Wall Street Journal (June 28, 2008), http://online.wsj.com/article/SB121460385251911957.html.

[33] *See, e.g.*, *Living Epic: Video Games in the Ancient World*, the blog by Roger Travis, Associate Professor of Classics at the University of Connecticut (last visited Sept. 14, 2010), http://livingepic.blogspot.com/. *See also*, Benjamin Popper, *Dante Alighieri: Epic Poet, Ass Kicker*, The Atlantic, Feb. 2010, http://www.theatlantic.com/magazine/archive/2010/02/dante-alighieri-epic-poet-ass-kicker/7936/.

the "talkies") to ban the showing of gangster films. Furor over unrepentant violent characters in films such as "Little Caesar" impelled voluntary censorship of Howard Hawks's 1932 classic "Scarface."[34] Such film industry agitation and public indignation seems as quaint today as it was unfounded then. Film historians today recognize such genre films as classics of the American cinema, and urge restoration of initially-censored films to their original intended directors' cuts. This Court considered, and invalidated, analogous legislative attempts to prevent theaters from showing "sacrilegious" films. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Such events from the not-too-distant past illustrate precisely why legislatures remain ill-suited to make objective assessments -- or to require retailers to make *subjective* assessments -- as to long-term social value based on short-term political pressures.

Retailers must remain free to exercise their own judgment as to what CDs, movies, books and games to carry for their respective customer bases, and let customers vote with their wallets. Some retailers choose not to carry mature content, including mature and adult video games, or CDs with parental advisory warnings. But others prefer to offer consumers access to all such products, and to provide their customers with facts and descriptions to inform their purchasing decisions.

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[34] *See* American Film Institute Catalog of Feature Films, http://www.afi.com/members/catalog/10top10View.aspx?bhcp=1&Movie=1134 (last visited Sept. 14, 2010). Fears that gangster films glorified gang violence led to release of the film under the homiletic title, "Scarface: The Shame of a Nation," with an altered ending in which the antagonist faces a judge's gavel rather than a riddle of police bullets.

Blunt legislative instruments and threats of liability such as those in the California law may influence retailers' decisions to not carry these works at all, and as a result reduce adult choice to that which is fit for children. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957). This concern was recognized by other federal courts in the context of video game legislation analogous to the California law now before the Court:

> The lack of precision among these definitions will subject Michigan retailers to steep civil and criminal liability if they guess wrongly about what games the Act covers. Retailers will respond by either self-censoring or otherwise restricting access to any potentially offending video game title. ... Such behavior will deprive access to such expression by adults as well as minors.

Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d at 656.

> The real problem is that the [retailer] might know everything there is to know about the game and yet not be able to determine whether it can legally be sold to a minor. ... Not only is a conscientious [retailer] likely to withhold from minors all games that could possibly fall within the broad scope of the Act, but authors and game designers will likely 'steer far

> wider of the unlawful zone ... than if the boundaries of the forbidden area were clearly marked."

Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d at 1191, *citing Grayned v. City of Rockford*, 408 U.S. at 109.

The California law cannot survive strict scrutiny. Moreover, no reason has been shown in this case to depart from the strict scrutiny test. The breadth and imprecision of the California law requirements further offend the First Amendment, as its threats of civil liability will likely compel self-censorship by game developers and retailers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
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BRIEF

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IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, AND EDMUND G. BROWN JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION AND ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition.

The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

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No. 08-1448

IN THE
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ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY
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ENTERTAINMENT MERCHANTS ASSOCIATION
AND ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

*On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

INTEREST OF *AMICUS CURIAE*[1]

Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit organization founded in 1981, is a pro-family group that has long advocated fidelity to the text of the U.S. Constitution. Its mission includes affirming the rights of parents to control the upbringing of their children, and the role of government in helping parents protect minors from harmful influences, such as the extremely violent video games at issue in this case. EFELDF has a longstanding interest in defending First Amendment rights of free speech, but maintains that the First Amendment does not require the exacting standard of strict scrutiny with respect to judicial review of laws that help protect minors from violent video games.

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[1] This brief is filed with the filed written consent of all parties. Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

EFELDF successfully filed an *amicus* brief in support of the *Petition for Certiorari* in this action.

SUMMARY OF ARGUMENT

Video games are *role-playing* activities that do not constitute free speech. Accordingly, the California statute at issue here need only satisfy the "rational basis" standard, which it easily does. This statute is also constitutional because it facilitates parental control over the upbringing of their children. Finally, children playing video games are the equivalent of a "captive audience," and the statute is constitutional by protecting this audience against image abuse.

The video game industry has quickly surpassed Hollywood in sales and influence. According to data from the Respondent Entertainment Software Association,[2] the computer/video game industry attained $11.7 billion in sales in 2008.[3] Children spend more time playing video games than watching television, and the time spent (wasted) is staggering: the average eighth-grade boy spends 23 hours a week playing video games – more than many part-time jobs – while the average girl spends 12 hours.[4] But unlike Hollywood movies and the television-watching of prior generations, video games entail active role-playing with simulations of an increasingly violent and disturbing nature, featuring decapitations, mutilations and other horrific violence. *See, e.g., Pet. Br.* at 46-47.

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[2] Tellingly, Respondent Entertainment Software Association declares that it "is the U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish computer and video games for video game consoles, personal computers, and the Internet." http://www.theesa.com/index.asp (viewed 7/13/10). This video game industry is not watching out for the interests of children.

[3] http://www.theesa.com/facts/index.asp (viewed 7/13/10) (Entertainment Software Association's own website).

Does playing violent video games lead to aggressive or violent behavior? Yes, and nearly as much as the other major indicator of youth violence: gang membership. Playing violent video games ranks almost as high as gang membership as the number one tell-tale sign among youth for a propensity to commit violence. *See Violent Video Game Effects, infra,* at 143 (utilizing for comparison purposes data from a 2003 report by the U.S. Department of Health and Human Services). Playing violent video games is a far bigger risk factor than other familiar indicators of youth violence. For example, playing violent video games is *three times* greater as a risk factor for aggressive/violent behavior than engaging in substance abuse, being from a broken home, having a low IQ or even having abusive parents. *Id.* Playing violent video games is nearly *two times* greater as a risk factor for aggressive/violent behavior than having a record of prior violence or being a large consumer of media violence. *Id.* The risk of harmful effects from being exposed to violent video games is far greater than many other risks that receive more attention and regulation, such as exposure to lead, second-hand smoke, and asbestos. *See id.* at 144.

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[4] http://mentalhealth.about.com/cs/familyresources/a/videotv404.htm (viewed 7/13/10).

The State of California, like other states before it, has taken reasonable and modest steps to protect its children against the harm of increasingly violent video games, by passing the statute at issue here. This statute bans selling or renting video games labeled as violent to minors. A modest fine of up to $1000 may be imposed on the store itself, but not on a non-managerial employee lacking in an ownership interest, for violation of this limitation. Cal. Civil Code § 1746.3.

The decision below, like others before it, struck down this legal safeguard by declaring violent video games for children to be constitutionally protected free speech. But conduct is not free speech, and selling or playing video games no more constitutes free speech than selling or playing bingo and other forms of gambling. Playing a video game is conduct rather than constitutionally protected free speech.

Many studies confirm that violent video games can harm young people addicted to them and even others around them when the addict violently lashes out. Just as states properly regulate access by minors to pornography and gambling, states may constitutionally facilitate parental control over their children's access to violent video games. No heightened burden of justification for such laws is required; the State of California does not need to submit ironclad proof of potential harm from the games in order to help parents supervise their children with respect to a potentially harmful activity.

Children playing video games are akin to a captive audience, vulnerable to whatever image abuse the game may hurtle at them next as the player's game skill improves. Disturbing images are thrown at children, at the very youngest ages, by video game manufacturers trying to increase the shock value. Parents cannot easily view and screen the content because the images are based on the skill level of the player, which improves based on many hours of experience in playing the game. These games flash images at young players depending on the game-playing skills that they develop over time. The State of California may constitutionally prohibit those who profit from these games from selling and renting them directly to children.

ARGUMENT

Competing in a game is not free speech for First Amendment purposes, and selling or renting that game is not protected free speech either. Lower courts have given the billion-dollar video game industry a blank check in the name of free speech, and this has led to increasingly violent and harmful games in the hands of children. Shocking gore and disturbing images sell better than responsible entertainment, and the industry has raced to its lowest common denominator to the detriment of society. Nintendo, the early market leader in video games, once had family-friendly designs and adhered to a policy against "excessive blood and violence," but that caused it to lose out in the market to competitors producing more violent games. *Violent Video Game Effects, infra*, at 5 (inner quotes omitted). Now no game is too violent for the manufacturers and dealers. Decapitation, mutilation, and mind-numbing image abuse dominate many popular games. *See, e.g.*, Pet. App. 78a. Internet gambling is not free speech, and neither are video games. The California statute is a constitutional regulation of conduct.

There are two additional and independent grounds for reversing the decision below, and upholding the constitutionality of the California statute. This statute enhances parental rights in protecting their children against harmful activities, and such protection is a valid exercise of state authority. In addition, children are a captive audience in these video games, and the state can protect captive audiences against shockingly offensive images.

I. VIDEO GAMES ARE NOT FREE SPEECH.

Video games are not constitutionally protected free speech. First, like gambling, video game sales and rentals are commercial conduct, not free speech. Second, violent video games incite violent behavior under a well-recognized exception to free speech.

This Court has never held that video games are free speech, and it should not do so here. "The Supreme Court has not specifically commented on whether video games contain expressive content protected under the First Amendment." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 958 n.11 (9th Cir. 2009). This Court should resolve this uncertainty by definitively holding that video games are not free speech, and thus the California statute restricting the distribution of violent video games to minors may be upheld under the rational basis standard.

There is no need to carve a new exception for free speech. Rather, the decision below should be reversed by declining to extend free speech protections to the gambling-like, violence inducing conduct of playing video games.

A. LIKE GAMBLING, VIDEO GAME SALES AND RENTALS ARE CONDUCT, NOT PROTECTED FREE SPEECH.

Federal courts have repeatedly and justifiably rejected arguments that gambling and other role-playing conduct constitute protected free speech. Given that playing blackjack at a casino is not protected free speech, why should playing video blackjack or any other video game in an arcade be protected as free speech? It should not be. Likewise, purchasing or renting such video games to play elsewhere can no more constitute free speech than internet gambling can.

It is axiomatic that the First Amendment protections apply to speech rather than conduct. U.S. Const. amend. I ("Congress shall make no law ... abridging ***the freedom of speech***") (emphasis added). Playing a video game is conduct, as is collecting money for that game from the player, which is what the California statute regulates. As this Court has emphasized, it "is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – ***but such a kernel is not sufficient to bring the activity within the protection of the First Amendment***." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (emphasis added).

This Court has, of course, protected certain forms of "symbolic conduct" such as flag-burning, but this Court has repeatedly rejected the argument "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). It is clear what someone is saying when he burns an American flag or a draft card. But what is the seller or renter of a video game saying to a teenage buyer? "Please waste more of your time on my addictive products"? If that were constitutionally protected free speech, then casino owners and tobacco sellers would be the next to assert it.

Even if the taking of someone's money for video games included some expressive elements, that would still fall far short of the free speech necessary to trigger strict scrutiny. Combating teenage addiction to time-consuming video games is plainly "a sufficiently important governmental interest" to "justify [the statute's] incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. Limiting the type of "emotional gambling" exploited by video game manufacturers and retailers is just as worthy a governmental interest as regulating other types of conduct, such as adult gambling.

Moreover, the intentional inclusion of secret pornographic images to sell to children in video games, discussed in Point II.B *infra*, is potentially a criminal act and there is no First Amendment protection for conduct that facilitates a criminal act. *See Truchinski v. United States*, 393 F.2d 627, 634 (8th Cir.), *cert. denied*, 393 U.S. 831 (1968) (rejecting a First Amendment argument against a law prohibiting the use of interstate facilities to further the commission of state criminal offenses); *Martin v. United States*, 389 F.2d 895, 897 (5th Cir.), *cert. denied*, 391 U.S. 919 (1968) (upholding the constitutionality of the Wire Act as applied to criminalize the receipt of a wager, because gambling was illegal where the wager was placed in Texas even though its receipt in Nevada was legal there).

The California statute at issue here does not prohibit the *playing* of video games, but only the taking of money in selling or renting violent video games to children. *See* Cal. Civil Code §§ 1746.1(a), § 1746.3 ("A person may not sell or rent a video game that has been labeled as a violent video game to a minor."). This statute in no way prevents a video game manufacturer or anyone else from engaging in any type of free speech. Instead, this statute properly regulates the conduct of taking money in connection with the conduct of playing violent video games.

B. MANY STUDIES CONFIRM THAT VIOLENT VIDEO GAMES ARE THE EQUIVALENT OF "FIGHTING WORDS" FOR KIDS WHO PLAY THEM.

Displaying a shockingly violent image to belligerent, misbehaving teenagers is conceptually identical to the utterance of "fighting words" to an adult. This Court held to be outside of First Amendment protection provocative words:

> which by their very utterance inflict injury or tend to incite an immediate breach of the peace. ... [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

As proof of the powerful effect of these games on even adults, both law enforcement and the military use similar video games to train officers and soldiers to kill more quickly and without hesitation. *See* Lt. Col. Dave Grossman and Gloria DeGaetano, *Stop Teaching Our Kids To Kill* 75 (1999) [hereinafter, *Grossman*] (noting that one video game advertises that it is "based on the same exacting technology used for aerospace, medical and military simulators. ... Psychiatrists say it is important to feel something when you kill."). These video games are useful to the military precisely *because* they incite participants to kill. Such incitement, regardless of its merits for military training, falls outside of the protections of free speech and into the exclusion established by *Chaplinsky*. The government should be able to ban terrorist training video games.

Michael Carneal was 14 years old when he walked into a prayer group in Paducah, Kentucky in December 1997, and began shooting defenseless teenagers with a stolen gun. *See id.* at 75. There were several tell-tale signs that this massacre was incited by a violent video game. For example, he never moved his feet during his shootings, and never fired far to the left or right; instead, he fired only once at each target that appeared, just as a player of video games maximizes his game score by shooting only once at each victim, in order to hit as many targets as possible. *See id.* The killer's "tally" for his eight shots was three dead and one paralyzed, all struck in the head or upper torso by a 14-year-old "who, prior to stealing that gun, had never shot a real handgun in his life!" *Id.* In contrast, "the average experienced law enforcement office, in the average shootout, at an average range of seven yards, hits with approximately one bullet in five." *Id.* at 4.

There are many similar tragedies. One shooting that was widely publicized was the massacre at Columbine High School in April 1999. It was incited by the violent video game "Doom," with which the young killers were obsessed. Other examples, in addition to the Columbine and Paducah massacres, include Jonesboro, Arkansas (Mar. 1998), Springfield, Oregon (May 1998), Santee, California (Mar. 2001), Wellsboro, Pennsylvania (June 2003) and Red Lion, Pennsylvania (Apr. 2003). *See Violent Video Game Effects, infra,* at 3. Then there was the killing spree that paralyzed the D.C. area with sniper shootings in the Fall of 2002. That, too, was incited by violent video games. *See id.*

The manner in which the violent video game "Doom" incited the Columbine massacre is illustrative. First, the video game is so realistic and effective in training combat killing that the Marine Corps use a modified version of it (called "Marine Doom") to teach recruits how to kill." *Grossman, supra,* at 77. Moreover, the Marine Corps use it "as a tactical training device, as opposed to teaching motor skills" because "[i]ts primary value is in developing *the will to kill by repeatedly rehearsing the act until it feels natural.*" *Id.* (emphasis added). Teenagers Dylan Klebold and Eric Harris played "Doom" and similar violent video games for "hundreds and hundreds of hours" before acting out the violence in real life at Columbine High School. *Id.* Indeed, "Eric Harris reprogrammed his edition of "Doom" so that it looked like his neighborhood, complete with the houses of the people he hated." *Id.*

Military training-like video games are not constitutionally protected free speech. In the hands of an adult working under the supervision of a drill sergeant, they may be useful. But in the hands of immature or disturbed teenage minds, they are a recipe for disaster. And in the hands of terrorists training kids to perform the next suicide mission, they are an anathema to free speech.

Studies repeatedly confirm how violent video games incite harm. *See* Craig Anderson, Douglas Gentile and Katherine Buckley, *Violent Video Game Effects on Children and Adolescents* (Oxford: 2007) [hereinafter, *Violent Video Game Effects*]. Reflecting how violent video games incite violent conduct in children within the *Chaplinsky* exception to free speech, studies have found more aggressive behavior by students who play violent video games.[5] *See also Amicus Curiae Brief By Eagle Forum Education & Legal Defense Fund in Support of the Petition for Certiorari* filed in this case on June 22, 2009; Craig Anderson, "Violent Video Games: Myths, Facts, and Unanswered Questions," APA Online (October 2003) ("Violent video games are significantly associated with: increased aggressive behavior, thoughts, and affect; increased physiological arousal; and decreased prosocial (helping) behavior," all of which supports the *Chaplinksy* exception with respect to minors).[6]

The billion-dollar video game industry can, of course, find researchers to defend it, just as the tobacco industry for decades denied a connection between cigarettes and cancer. A leading book attempting to deny the harm caused by violent video games in children is Lawrence Kutner and Cheryl Olson, *Grand Theft Childhood: The Surprising Truth About Violent Video Games, and What Parents Can Do* (2008) [hereinafter, *Grand Theft Childhood*]. This book provides all sorts of advice for parents, absurdly assuming they have the time, ability and inclination to play these video games along with their children.

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[5] http://www.medicalnewstoday.com/articles/67221.php (viewed 7/13/10).

[6] http://www.apa.org/science/psa/sb-anderson.html (viewed 7/13/10).

The authors implore parents to "learn[] some of the terms gamers use," such as the difference between "first-person shooter" (used in the games "Doom" and "Halo") and "third-person shooter" (used in the games "Grand Theft Auto" and "Tomb Raider"). *Id.* at 220. But not all households today are managed by parents having the time and inclination to play a video game at its various skill levels before allowing the children in the household to do likewise. Indeed, one in 50 children has a parent who is in jail, and many more have a single parent who is busy with a fulltime job and many other responsibilities. *See Grossman, supra*, at 17. Moreover, even parents who have the time and energy will still typically be unable to advance to the skill levels in the game needed to screen all the images that will be shown to a persistent child player. *See* Point II.B, *infra*. Only the video manufacturers and retailers can protect the children against image abuse; parents simply cannot effectively screen this material without a law like the California statute.

II. LAWS THAT ENHANCE PARENTAL RIGHTS, AS THE CALIFORNIA STATUTE DOES, ARE PRESUMPTIVELY VALID UNDER THE RATIONAL BASIS STANDARD.

The California statute constitutionally protects the intrinsic parental right to control the upbringing of children, a well-recognized constitutional objective. *See, e.g., Pierce v. Soc'y of Sisters,* 268 U.S. 510, 535 (1925) ("[T]hose who nurture [a child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). The California statute facilitates the ability of parents to protect their own children from harmful video games. The decision below interferes with that parental right to decide whether a child should be playing violent video games, and for that reason it should be reversed.

As this Court explained with respect to regulating images in *Ginsberg,* "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. State of New York*, 390 U.S. 629, 639 (1968).

Justice Breyer explained in dissent in the 5-4 *Playboy* decision that "over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week." *United States v. Playboy Entm't Group,* 529 U.S. 803, 842 (2000) (Breyer, J., dissenting) (citing U.S. Dept. of Education, Office of Research and Improvement, Bringing Education into the After-School Hours 3 (summer 1999)). The California statute is consistent with Justice Breyer's concern; it "offers independent protection for a large number of families" and the government has a substantial interest, even a compelling one, in "preventing, say, an 8-year-old child from watching virulent pornography without parental consent." *Id.* (citing numerous precedents of this Court to that effect). Government likewise has a substantial interest in facilitating parental authority over an "8-year-old child" intent on playing violent video games.

The opinion below erroneously limited to pornography the authority of a state to protect children against image abuse. 556 F.3d at 960. (Interestingly, the decision below never uses the term "pornography" in drawing its distinction between violent images and sexually explicit ones, even though many decisions of this Court have used that descriptive term.) But the justification for safeguarding children against image abuse is in no way cabined to only one type of image; the rationale explained in *Ginsberg* is far broader:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children *justify reasonable regulation of the sale of material to them.*

Ginsberg, 390 U.S. at 640 (quoting *People* v. *Kahan,* 15 N. Y. 2d 311, 312, 206 N. E. 2d 333, 334 (Fuld, J., concurring), emphasis added). *See Ginsberg,* 390 U.S. at 640-41 ("[T]his Court, too, recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'")

(quoting *Prince v. Massachusetts,* 321 U.S. 158, 165 (1944)).

State facilitation of parental control over violent video games is constitutional for two primary reasons. First, age restrictions on activities by children in analogous activities is well-recognized in other areas of law. Second, the uniquely pernicious characteristics of video games further underscore the constitutionality of the California statute.

A. The Constitutionality of Requiring Parental Approval Is Well Recognized in Other Areas.

Consent by minors in many analogous areas of law typically requires parental approval, as mandated by the State. *See, e.g.,* 10 Pa. Cons. Stat. § 305(d)(1) (a minor in Pennsylvania cannot play bingo "unless accompanied by an adult"). A minor in most states cannot give consent in marriage unless his or her parent or guardian approves. Federal law properly requires parental approval before certain minors enlist (and receive military video game training, as discussed above): "[n]o minor under the age of fourteen years shall be enlisted in the naval service; and minors between the age of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians." *United States v. Williams,* 302 U.S. 46, 49 n.4 (1937) (quoting 34 U.S.C. § 161). The California statute at issue here mandates that minors cannot give consent to purchasing and viewing the disturbing, highly graphic and violent video game images.

Surely if parental approval for minors to play bingo is constitutional, then parental approval to play video games depicting violent decapitation or acts of terrorism is likewise constitutional. Given that the State can constitutionally protect its minors against harmful game-playing, then there is even greater justification for State limits when the game-playing entails "image abuse" that may disturb that child for years. Game-playing does not become protected First Amendment free speech once violent images are added.

Even with respect to the controversial abortion industry, this Court has *unanimously* upheld state requirements of parental involvement when a minor considers terminating her pregnancy. There, as here, States have an undeniable "strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 326 (2006) (unanimous opinion written by O'Connor, J.) (quoting *Hodgson* v. *Minnesota*, 497 U.S. 417, 444-445 (1990) (opinion of Stevens, J.)).

A legislature does not need to cite million-dollar studies or take exhaustive testimony in order to justify requiring parental consent for a minor to play bingo, get married or serve in the military. The *Ginsberg* Court emphasized that harm need not be shown:

> [T]he growing consensus of commentators is that "while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either." ***We do not demand of legislatures "scientifically certain criteria of legislation.***"

390 U.S. at 642-43 (footnote omitted, quoting *Noble State Bank* v. *Haskell*, 219 U.S. 104, 110 (1911), emphasis added). The court below erred in insisting on

special proof of harm to justify the California statute. 556 F.3d at 964.

As Justice Breyer emphasized in his dissent in *Playboy Entm't Group*, "It is difficult to reconcile today's decision with our foundational cases that have upheld similar laws, such as *FCC v. Pacifica Foundation*, 438 U.S. 726, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978), and *Ginsberg v. New York*, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968)." *Playboy Entm't Group*, 529 U.S. at 847 (Breyer, J., dissenting, italics added). The federal government protects children against vulgarities aired over radio, and yet states cannot protect children against far more disturbing images of pornography on television (the *Playboy* decision) or decapitation in violent video games? This inconsistency is not constitutional law.

As commentators have observed, there are ample justifications for upholding parental rights with respect to protecting children. In criticizing a Seventh Circuit decision by Judge Posner that struck down an Indiana ordinance regulating children's access to violent video games, Law Professor Rosalie Berger Levinson noted:

> [Judge Posner's] analogy to violent movies and television is inapt. Unlike television, it is feasible for a city to restrict access to violent video games without affecting adult access, and movies already have a rating system that denies minors access to unsuitable films. The fact that parental rights are protected by allowing access when children are accompanied by their parents, similar to the motion picture industry, further supports the validity of the ordinance.

Rosalie Berger Levinson, "State and Federal Constitutional Law Developments," 35 Ind. L. Rev. 1263, 1270 (2002) (referring to *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001), citation omitted).

B. Because Game Content Is Based on Skill Level, and Secret Adult Content Sometimes Awaits Highly Skilled Users, Parents Need the Assistance of California in Protecting Their Children.

Video game manufacturers argue that parents alone should bear the burden of protecting their children, without the assistance of state laws like the one passed by California. "Let the parents do their job" is the canard often heard by promoters of completely unregulated video games. *See, e.g., Grand Theft Childhood, supra*, at 223 (in defending violent video games, preaching that parents "should be paying closer attention to a host of potential behavioral issues").

This argument fails because parents have no way of screening video game content for offensive material, even if they had the time to do so. Unlike a book or magazine, which a parent can flip through a book quickly, or a movie, which a parent can play in fast-forward mode for easy scanning, a video game requires skill to play it. Video games reveal content based on the skill levels of the players, thereby flashing *different* images at players as they advance in their playing ability. It requires a great deal of time and effort to progress to higher skill levels in order to view the images there. Some may never be able to progress to high skill levels to screen the content there no matter how hard they try, in contrast with reading a book or viewing a movie.

Content known only to the manufacturers include the use of undisclosed "Easter eggs" in video games that secretly take players to sexually explicit images. Not even game reviewers are aware of these secret passageways to pornographic images, or what the content of those images is for children who discover them in the games based on their skill, not their maturity in being able to deal with the images.

For example, the video game "Grand Theft Auto: San Andreas" by Rockstar Games included an ostensibly innocuous Easter egg called "Hot Coffee," which leads to "sexual intercourse between the main character and his girlfriend."[7] Once discovered – long after many children had played the game – some retailers then pulled the game off of store shelves until a replacement version without the pornography was supplied.[8]

The California statute provides the only effective way to guard against manufacturers' slipping inappropriate material into video games. Parents cannot detect and screen for all of the offensive images in video games unless the law puts them on notice and prohibits bypassing them by selling or renting directly to children. Manufacturers, of course, have economic incentives to boost their sales and rentals by including shocking or titillating material, and the California statute properly guards against the abuses that result from that incentive.

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[7] http://www.sync-blog.com/sync/2010/03/hunt-for-easter-eggs-in-your-favourite-video-games.html (viewed 7/13/10).

[8] *Id.*

"Children have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). This protection is not only to guard against pornography. The State of California may constitutionally protect children against other forms of image abuse, including violent video games.

III. A Minor Buying and Playing a Video Game Is the Legal Equivalent of a Non-Consenting "Captive Audience," For Which Requiring Adult Consent Is Constitutional.

Once a child becomes addicted to a video game, he then becomes the legal equivalent of a "captive audience" for which this Court has already extended protections from unwanted images or vulgarities. "[P]ublic displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid" are entitled to greater protection due to the "'captive audience' problem." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 128 (U.S. 1989).

Justice Stewart emphasized this issue in his concurrence in *Ginsberg*:

> When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others "by way of sound trucks with loud and raucous noises on city streets." And so it was that my Brothers BLACK and DOUGLAS

> thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience. I think a State may permissibly determine that, at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

390 U.S. at 649-650 (footnotes omitted) (Stewart, J., concurring).

The decision below erred in failing to recognize that free speech to a non-captive, adult audience may not constitute protected free speech to a *captive* audience of *children*:

> [M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter ***may vary according to the group to whom the questionable material is directed or from whom it is quarantined.***"

Ginsberg, 390 U.S. at 636 (emphasis added). *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 n. 11 (1975) ("A state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults.") (quotations omitted).

Violent video games contain graphic depictions of decapitation and mutilation, which can be aptly characterized as "image abuse" when flashed at children. Few would deny the truth in the observation that "a picture is worth a thousand words," and a disturbing image can be cause far more harm than a thousand words, particularly for children. As explained recently in the *New York Times*, a psychologist hired by a company that screens inappropriate internet images "reached some unsettling conclusions in her interviews with content moderators. She said they were likely to become depressed or angry, have trouble forming relationships and suffer from decreased sexual appetites. Small percentages said they had reacted to unpleasant images by vomiting or crying." Brad Stone, "Policing the Web's Lurid Precincts," *N.Y. Times* B1 (July 19, 2010). Flashing image abuse at a captive audience of children is not protected free speech.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: July 19, 2010

AMICUS CURIAE BRIEF

No. 08-1448

IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ENTERTAINMENT CONSUMERS ASSOCIATION, COMPETITIVE ENTERPRISE INSTITUTE, CONSUMER ACTION, CONSUMER FEDERATION OF AMERICA, PUBLIC KNOWLEDGE AND STUDENTS FOR FREE CULTURE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Amici Curiae submit this brief in support of Respondents, urging the Court to affirm the judgment below that California's law restricting the sale of certain video games to persons under eighteen, California Civil Code §§ 1746–1746.5 (2006) (the "California Act" or "Act"), is unconstitutional.[1] *Amici* are nonprofit, public interest organizations that advocate for consumer and citizen interests on a range of issues, including issues affecting consumers' rights in matters of technology and media. *Amici* include:

Entertainment Consumers Association ("ECA"). Founded in 2006, the ECA is a nonprofit membership organization that represents consumers of interactive electronic entertainment, including video games. The ECA acts as the collective voice of video game consumers to communicate their concerns and advocate for their rights in the courts and the political arena.

Competitive Enterprise Institute ("CEI"). Founded in 1984, CEI is a public interest organization dedicated to advancing limited government and individual liberty.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to the preparation or submission of this brief.

Consumer Action ("CA"). CA has been a champion of underrepresented consumers nationwide since 1971. A nonprofit organization, CA focuses on consumer education that empowers low to moderate income and limited-English-speaking consumers. It also advocates in the media, in the courts, and before lawmakers to advance consumer rights and promote industry-wide change.

Consumer Federation of America ("CFA"). CFA is an association of nearly 300 nonprofit consumer organizations. Established in 1968, CFA works to advance consumer interests and pro-consumer policies by researching and reporting consumer issues and behavior, and by advocating about consumer concerns before the federal and state governments. CFA also educates the public, news media and policymakers about consumer topics, and supports consumer-oriented individuals and organizations in their work.

Public Knowledge ("PK"). PK is a nonprofit public interest organization devoted to protecting citizens' rights in the emerging digital information culture, and focused on the intersection of intellectual property and technology. PK seeks to guard the rights of consumers, innovators and creators at all layers of our culture through legislative, administrative, grass-roots and legal efforts, including regular participation in intellectual property cases.

Students for Free Culture ("SFC"). SFC is an international chapter-based student organization that promotes the public interest in intellectual property policy, and in information and communications technology policy. SFC has chapters at over forty colleges and universities in the United States and other countries.

As technology evolves, consumers are becoming more and more concerned with the government's role in regulating access to innovative media. In particular, consumers of video games are becoming increasingly worried about their freedom to access and play video games. As demonstrated by a recent online petition, consumers consider experiencing a video game to be no different than reading a book, listening to music, seeing a movie or attending a play; they expect video games to be subject to First Amendment protections like any of these other forms of expression.[2] Yet California and other states have enacted legislation—and politicians and advocacy groups are pressing for legislation in other states—that would restrict consumers' access to games that state officials personally find objectionable. If upheld, the California Act will not only adversely affect *amici* and the rights of their members in California, but also the rights of their members in the eleven other states supporting California before this Court, as well as the rights of their members in other states that will undoubtedly be pressured to follow suit. *Amici* wish to be heard to help vindicate the First Amendment rights of their members and all consumers.

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[2] As of the date of filing, tens of thousands of consumers have signed on to the petition, and more are expected to sign on in the future. The petition will remain open for signature for video game users to continue to voice their concern about governmental threats to their First Amendment rights. The petition may be viewed at http://action.theeca.com/p/dia/action/public/?action_KEY=1781.

SUMMARY OF ARGUMENT

1. Video games are an expressive medium that deserves the same First Amendment protection as books, movies, plays and other forms of expression. People play video games because today's games have the ability to tell emotionally engaging stories in ways comparable to literary or cinematic experiences. Beyond storytelling, there is a wide range of video games that consumers enjoy for different kinds of experiences, like educational games, music games and simulation games, all of which contain expressive content worthy of First Amendment protection.

Like every other expressive medium that came before it, video games sometimes use depictions of violence when communicating ideas. At times the violence depicted in any medium can be intense, bloody and graphic—whether in works of unquestionable historic and literary value such as the film *Saving Private Ryan* or the novel *Crime and Punishment*, or in works of far more questionable value such as potboilers, pulp magazines and B-grade horror movies (and even then, value is often in the eyes of the beholder). Video games simply emulate these predecessors. Given its ubiquitous presence in art, literature and other forms of expression, the depiction of violence has never been exempted from First Amendment protection. There is no basis in law, logic, science or experience to create a "violence" exception for video games or any other form of protected expression. California's attempt to squeeze violence into the obscenity exception of the First Amendment does not work. Violence is not "obscene" within the meaning of First Amendment jurisprudence, and the standards that govern obscenity were never meant to be extended to other categories of expression. *See Miller v. California*, 413 U.S. 15, 24 (1973) (confining scope of state obscenity laws to "works which depict or describe sexual conduct"). Because there is no precedent regarding violence, a reviewing state official's (or perhaps a jury's) individual view about a game's content—both its use of violence and its supposedly countervailing serious literary, artistic, political or scientific value—would be the only deciding factor. This is impermissible under the First Amendment. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

There is nothing exceptional about the interactivity of video games that distinguishes them from other forms of expressive media, or that justifies content-based regulation of speech. Being able to interact with media content is not novel, as theater audiences well know. As technology progresses, so do the interactive features of all forms of media, such as, for example, e-books and movies on DVDs. Ultimately, interactivity is a matter of preference: some people prefer to read books, some prefer to watch movies, and some prefer to play video games. The choice should belong to the media consumer, not the state.

Video game consumers have First Amendment rights that must be protected from the state's interference. The First Amendment protects a person's right to choose what information or entertainment he or she wishes to receive, just as it protects a speaker's or author's right to speak or publish what he or she wishes to say. *Stanley v. Georgia,* 394 U.S. 557, 564 (1969). Without this corollary right, the marketplace of ideas would not work, as speakers and publishers would not have audiences with whom to transact.

2. The California law cannot withstand strict scrutiny. As Respondents and other *amici* have fully addressed, neither of California's two purported interests warrants the Act's restriction on the marketplace of ideas. Parents do not need the state's assistance in controlling what video games their children play, since they already benefit from

an informative video game rating system and parental controls on consoles. And as every court to consider it has held, there is no reliable support for Petitioners' assertion that violence in video games causes harm to minors' physical and psychological well-being.

The Act is not subject to any lesser degree of scrutiny because it limits its restrictions to minors. The protections of the First Amendment, including the right of access to information, extends to minors to ensure, at a minimum, that they can effectively participate in society once they become adults. The government may not restrict the dissemination of protected expression to minors, except in narrow and circumscribed instances, such as school settings, that are not applicable to the California legislation. None of the traditional limitations on minors' rights cited by Petitioners or *amici*, such as marriage or ability to enter into contracts, implicate First Amendment rights.

In any event, the Act is not narrowly tailored to achieve California's stated goals. The legislation does not recognize the importance of age in drawing its restrictions, and limits access to 17½-year-olds to the same degree as 10-year-olds. The Act is underinclusive because it does not restrict the sale or rental to minors of movies or music, no matter how graphically or aggressively violent. The legislation is overinclusive because its restrictions turn on depictions of violence perpetrated on the vague term "image of a human being," which can be read to extend to stylized humanoid forms, as well as stylized and cartoonish violence—both of which are easily distinguishable from the realistic violence that the Act seeks to restrict, and both of which are frequently used in video games.

Less restrictive and more effective alternatives are available to accomplish the state's goals. The rating system promulgated by the industry's self-regulatory Entertainment Software Rating Board ("ESRB") and game console parental controls provide better information and more nuanced control to parents than the California legislation does. And unlike the Act, they are tailored to specific ages. These user-friendly mechanisms more than adequately serve California's interests. Adding on California's different standards will only lead to consumer confusion—confusion that will be compounded when other states inevitably layer their own differing standards and interpretations.

ARGUMENT

I. VIDEO GAMES ARE AN EXPRESSIVE MEDIUM PROTECTED BY THE FIRST AMENDMENT.

Video games are a form of expression protected by the First Amendment. Their content provides value to users in the form of entertainment, education, ideas and information. Although Petitioners do not contest this premise, there are others that would have this Court hold otherwise.[3] (*See, e.g., Amicus Curiae* Eagle Forum Education & Legal Defense Fund Br. 6.) In order to protect the marketplace of ideas that is evolving from this stimulating new medium, this Court should hold that the First Amendment protects the content of video games, regardless of whether it includes depictions of violence.

Given the expressive content in video games, they are entitled to full First Amendment protection, and any content-based regulation of them is presumptively invalid. *See R.A.V.*, 505 U.S. at 382 ("The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed.") (citations omitted). The corollary right to receive information and ideas necessarily extends to video game users, who deserve the same First Amendment protection. *See Stanley*, 394 U.S. at 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). The First Amendment mandates this right to receive information because the marketplace of ideas can only operate if content consumers are available to transact with content producers. *See*

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[3] This Court has not yet specifically held that the First Amendment protects the expressive content contained in video games. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F. 3d 950, 958 n.11 (9th Cir. 2009).

Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring). This right extends not only to political speech, but to artistic expression and entertainment as well. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Winters v. New York*, 333 U.S. 507, 510 (1948).

A. Video Games, Like Books, Music, Movies And Other Forms Of Expression, Communicate Valuable Ideas.

Consumers play video games for their expressive and engaging content. New technology allows today's games to have the power to tell involving stories that integrate a combination of many other expressive media. They employ, among other features, text to convey information, dialogue to tell stories, music to set atmosphere, sound effects to create immersion, and artwork and moving images to render worlds for players to interact with.[4] Critics review these features of video games when measuring their value for audiences.[5] Indeed, video games are now regularly reviewed and analyzed alongside other forms of art and entertainment, in publications many would consider guardians of culture, like the *New York Times*, the *Wall Street Journal*, the *New Yorker* and the *London Review of Books*.[6] Lower courts have relied on these story-

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[4] *See* Smithsonian American Art Museum, *The Art of Video Games*, http://americanart.si.edu/exhibitions/archive/2012/games/#news (last visited September 14, 2010) (previewing a forthcoming American Art Museum exhibition regarding video games as an influential form of narrative art).

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[5] *See, e.g.*, Justin Calvert, *Grand Theft Auto IV Review*, Gamespot, Apr. 28, 2008, http://www.gamespot.com/ps3/action/grandtheftauto4/review.html (reviewing the video game *Grand Theft Auto IV* (Rockstar North 2008) and its various elements); David Clayman, *Assassin's Creed II Review*, IGN, Nov. 17, 2009, http://xbox360.ign.com/articles/104/1045745p1.html (reviewing the video game *Assassin's Creed II* (Ubisoft Montreal 2009) and its various elements); Seth Schiesel, *There Be Dragons, Among Other Things*, N.Y. Times, Jan. 4, 2010, at C1, *available at* http://www.nytimes.com/2010/01/04/arts/television/04dragon.html (reviewing the video game *Dragon Age: Origins* (BioWare 2009) and noting that "[e]ven more important to a great game of this sort is that it provide players with a world they actually care about saving . . . . That means setting, plot and personalities, and it is in these elements that Dragon Age is perhaps the best electronic game yet made.").

[6] *See, e.g.*, Chris Suellentrop, *War Games*, N.Y. Times Magazine, Sept. 12, 2010, at 62, *available at* http://www.nytimes.com/2010/09/12/magazine/12military-t.html (discussing forthcoming *Medal of Honor* (Danger Close 2010) video game and relationship to the war in Afghanistan, on which the game is based); Adam Najberg, *Halo: Reach Review—An Advance Look at the Video Game*, Wall St. J., Sept. 12, 2010, http://blogs.wsj.com/speakeasy/2010/09/12/halo-reach-review-an-advance-look-at-the-video-game/ (reviewing video game *Halo: Reach* (Bungie 2010));

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telling features in uniformly holding that video games are entitled to First Amendment protection. *See, e.g.*, *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) (holding that the First Amendment protects video games because, like books and movies, they contain stories, imagery, themes and messages); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004) (same); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) (same). Simply put, video games are a continuation in the evolution of protected expressive media, much like the motion pictures that preceded them. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).[7]

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Nicholson Baker, *Painkiller Deathstreak*, New Yorker, Aug. 9, 2010, at 53 (reviewing several video games, including *Halo 3: ODST* (Bungie 2009), *Uncharted 2: Among Thieves* (Naughty Dog 2009), *Call of Duty: Modern Warfare 2* (Infinity Ward 2009), and others); John Lanchester, *Is it Art?*, London Rev. Books, Jan. 1, 2009, at 18-20, *available at* http://www.lrb.co.uk/v31/n01/john-lanchester/is-it-art (discussing relationship between video games and art).

[7] As Respondents and other *amici* have discussed at length, government as well as society at large historically have overreacted to purported harms inflicted on youth by new forms of expressive media, such as comic books, rock and roll, and movies. *See, e.g.*, *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244-45 (1915) (permitting state censorship of movies based in part upon their

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Video games can also go beyond storytelling and serve a variety of purposes for gamers. Indeed, people play video games because they provide a wide range of experiences. Some choose to play educational games like *The Oregon Trail* (The Learning Company, 5th ed. 2001) or the *Carmen Sandiego* series (various developers 1985–2009) because they offer adventure while teaching history and geography. Some video game users enjoy playing Christian games like *Left Behind: Eternal Forces* (Inspired Media Entertainment 2006) or *Catechumen* (N'Lightning Software 2000) because they resonate with personal religious beliefs and reference the Bible. Other users prefer action games that use mythology as their premise, like *Rune* (Human Head Studios 2000) or the *God of War* series (SCE Santa Monica 2005–10), which are based on, respectively, Norse and Greek mythology. Some people play strategy games like *Stronghold: Crusader* (Firefly Studios 2002) or *Civilization IV* (Firaxis Games 2005), which challenge their ability not only to lead simulated warfare but also to manage the resources that support their forces. Some players prefer less high-concept action games like *Postal*^{2} (Running with Scissors 2003) or *Mortal*

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capability of evil), *overruled by Joseph Burstyn, Inc.*, 343 U.S. at 502; *see generally* Christopher J. Ferguson, *Blazing Angels or Resident Evil? Can Violent Video Games Be a Force for Good?*, 14 Rev. Gen. Psychol. 68 (2010).

Kombat vs. DC Universe (Midway Games 2008), but even these test players' skill and strategy. Some choose to play music games like *Guitar Hero 5* (Neversoft Entertainment 2009) because they challenge players to perform on simulated instruments set to popular music. Some people even use exercise games like *Wii Fit* (Nintendo 2008) as an alternative to traditional gym workouts.

There are also simulation games that give players the ability to interact with and learn about a host of subjects. One example is *The Political Machine 2008* (Stardock 2008), which simulates the experience of running a 2008 presidential election campaign. Players learn about the process of campaigning as they are tasked to build campaign headquarters, give speeches, raise money, and approve ad campaigns while using limited resources. Similarly, *SimCity 4* (Maxis 2003) puts a player in the role of mayor of a fictional city. The player must build the city while managing its resources and budget, and consequently learns about city planning, budget management and municipal governance. These games may not have stories, but they certainly deliver ideas worthy of First Amendment protection.[8]

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[8] There is even a simulation game available online that seeks to educate players about the Supreme Court, its decision-making process, and the complexity of First Amendment jurisprudence. The game, called *Supreme Decision*, puts

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Some of the games mentioned above, like the *God of War* series, *Postal*[2], and *Mortal Kombat vs DC Universe*, include depictions of violence. They may or may not be excepted from California's Act under its serious-value exception. Cal. Civ. Code § 1746(d)(1)(A)(iii). Under California's scheme, this content-based decision would be up to the state—a dangerous practice the First Amendment shields against. *See R.A.V.*, 505 U.S. at 382. Contrary to Petitioners' claims, however, the use of violence in video games should not affect the First Amendment protection they deserve.

B. Video Games Occasionally Communicate Ideas With Depictions Of Violence, A Characteristic That Does Not Affect First Amendment Protection.

Violence is ubiquitous throughout history, and throughout the expression of thought in all its forms. As such, consumers, both adult and minor, are not strangers to it. Perhaps Judge Richard Posner put it

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players in the shoes of a Supreme Court law clerk who must assist a Justice with a case based on *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). The game is part of a web-based education project known as iCivics, which was inspired by Justice Sandra Day O'Connor and uses video games to teach civics. *See* iCivics, http://www.icivics.org/about (last visited September 14, 2010).

best when he wrote in *American Amusement Machine Association v. Kendrick*: "Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault are aware." 244 F.3d 572, 577 (7th Cir. 2001).

Certainly, history and the media used to record it are replete with violence. The public would be unable to comprehend the gravity of the June 6, 1944 invasion of Normandy without knowledge of its violence. Thus, books, movies, and now video games use extremely violent images to convey that event. The book *Band of Brothers* graphically describes the killing of a German soldier during the invasion: "Guarnere missed the third Jerry, but Winters put a bullet in his back. Guarnere followed that up by pumping the wounded man full of lead from his tommy-gun. The German kept yelling, 'Help! Help!' Winters told Marlarkey to put one through his head." Stephen E. Ambrose, *Band of Brothers* 81 (Touchstone 2001). The HBO television adaptation of that book, as well as the lengthy and wrenching opening scene of the movie *Saving Private Ryan* (Amblin Entertainment 1998), similarly depict this kind of intense violence, showing graphic scenes of soldiers being killed and maimed in various ways. Likewise, the video games *Medal of Honor: Frontline* (EA Los Angeles 2002) and *Call of Duty 2* (Infinity

Ward 2005) attempt to convey the brutality of D-Day by using comparable images of soldiers being mowed down by machine gun fire as they land on Normandy beaches.

Media depictions of criminal violence also are filled with graphic images that video games seek to emulate. For example, as one court cites, the *Book of Judges* relates the story of Jael driving a peg through the temple of Sisera into the ground. *Entm't Software Ass'n v. Swanson*, 519 F.3d 768, 772 (8th Cir. 2008) (quoting from *Judges* 4:21 (NIV)). Another example is *Crime and Punishment*, where Dostoyevsky describes the murder of an old woman: "He struck once more, then again, full strength, with the blunt side of the ax, and on the top of her head. The blood gushed as from an overturned glass, and the body fell backward. . . . She was dead." Fyodor Dostoyevsky, *Crime and Punishment* 74 (Sidney Monas trans., Signet Classic 1968) (1866). Movies like *The Godfather* (Alfran Productions 1972), based on the novel by Mario Puzo, also use graphic violence to depict criminal acts, like the scene in which Virgil Sollozzo stabs Luca Brasi in the hand while Brasi is garroted to death. *Compare* Mario Puzo, *The Godfather* 103 (New American Library 1969) ("The cord pulled tight, choking off Luca's breath. His face became purple, the strength in his arms drained away. Tattaglia and Sollozzo held his hands easily now, and they stood there curiously childlike as the man behind Luca pulled the cord around Luca's neck tighter and tighter."). Video games like *The*

Godfather (EA Redwood Shores 2006), which is based on the movie and book, seek to imitate these scenes through their own graphic depictions of assassinations and violence.

While the novel *Crime and Punishment* and the film *The Godfather* are considered masterpieces, there are many other books and movies that have far less value than these titles, yet still enjoy First Amendment protection. *See Winters*, 333 U.S. at 510 ("What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines [that depict violence], they are as much entitled to the protection of free speech as the best of literature."). The First Amendment does not ignore lowlier (at least in some eyes) forms of expression like potboilers or horror movies, or less expensive forms of expression like pulp magazines from the first half of the twentieth century, comic books or today's graphic novels. Audiences have always enjoyed watching critically panned action movies filled with explosions and senseless violence simply because they find them fun to watch—even if social critics fear those movies glorify violence and antisocial behavior. The movie *Death Wish* (Dino De Laurentiis Co. 1974), for example—a graphically violent film that depicts a man stalking and murdering criminals in New York City in revenge for the brutal rape and murder of his wife and daughter (also seen on screen)—ran to packed and wildly cheering movie theaters in the crime-plagued cities of 1974. Movie and social critics alike not only excoriated the movie but warned that it condoned vigilantism.[9] Yet it was entitled to full First Amendment protection. Like *Death Wish*, even though some games may have questionable value, they are just as deserving of First Amendment protection, no matter how much the government may desire to weigh their content against its perception of their value. *See United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (discussing how the First Amendment does not weigh the quality of speech).

Given the omnipresent nature of violence and its use in expression, it makes sense that there is no special exception that exempts depictions of violence from First Amendment protection. Violence has never been categorized as "obscene" within the meaning of First Amendment jurisprudence. This Court has carefully limited "obscenity" to content depicting sexual conduct. *Miller*, 413 U.S. at 23–24. Unlike violence, minors have been traditionally restricted from access to depictions of sex, and thus a body of guiding definitions and authority has developed that government officials can use to regulate the sale to minors of such depiction. *See*

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[9] *See, e.g.*, Vincent Canby, *Screen: 'Death Wish' Hunts Muggers: The Cast Story of Gunman Takes Dim View of City*, N.Y. Times, July 25, 1974, *available at* http://movies.nytimes.com/movie/review?res=9804E3DB1131EF34BC4D51DFB166838F669EDE.

Ginsberg v. New York, 390 U.S. 629, 643 (1968); *see also Miller*, 413 U.S. at 16–30. There are no similar rules for violence: "Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial. The notion of forbidding not violence itself, but pictures of violence, is a novelty, whereas concern with pictures of graphic sexual conduct is . . . the traditional concern with obscenity." *Am. Amusement*, 244 F.3d at 575–76; *see also Winters*, 333 U.S. at 519 (recognizing that, in legal context, indecency and obscenity do not encompass violence).

The Act's "serious-value" exception, California Civil Code section 1746(d)(1)(A)(iii), modeled after the obscenity test laid out in *Miller*, does not save the legislation. This standard is not applicable to violent content. The Court in *Miller* specifically limited this test to "works which depict or describe sexual conduct." 413 U.S. at 24. The Court recently reaffirmed this limitation in *United States v. Stevens*, when it invalidated a federal statute that criminalized the commercial creation, sale or possession of depictions of living animals being intentionally maimed, mutilated, tortured, wounded or killed. 130 S. Ct. at 1582, 1592. Although the statute contained an exception clause based on the *Miller* standard, the Court refused to allow the application of that standard to images depicting violence, noting that "*[m]ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Id.* at 1591 (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971)).

As in *Stevens*, this Court should hold that including a serious-value exception clause does not make an otherwise unconstitutional restriction of expression permissible. In *Stevens*, the Court found that many hunting videos are recreational in nature and thus not within the ambit of serious value, yet merit full First Amendment protection. *Id.* at 1590–91. Many books and movies also are designed purely for entertainment purposes, yet enjoy full First Amendment protection. Likewise, many video games, including some that depict violence, primarily have entertainment value. They nevertheless deserve First Amendment protection as well, despite the fact that some government officials may believe they lack serious value.[10]

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[10] In the controversial video game *Call of Duty: Modern Warfare 2*, one of the player's characters is a U.S. commando who infiltrates a terrorist cell and participates in the terrorists' massacre of civilians at an airport (and may choose whether to shoot or not). State officials conceivably might consider this game a candidate for restriction under the Act. Yet, as a review in the *New York Times* put it, the game is "intense, bloody, intelligent, painstaking in its design and inescapably gripping," and its greatest innovation is the way it "manipulates the emotions of players." Seth Schiesel, *Choices in Infiltrating a Terrorist Cell*, N.Y. Times, Nov. 11, 2009, at C1, *available at* http://www.nytimes.com/2009/11/12/arts/television/12call.html. The review describes the airport massacre scene as "the

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The Court should avoid any invitation to weigh the benefits of expressive media depicting violence against its costs, even assuming such benefits and costs can be measured in a reasonably objective way. (*See* Petrs.' Br. 40.) The First Amendment does not protect speech that purportedly benefits society more than it hurts it; the First Amendment protects the value of free speech against the harm of government intrusion. *Stevens*, 130 S. Ct. at 1585.

C. The Interactive Nature Of Video Games Does Not Affect Their Status Under The First Amendment.

There is no reason to distinguish video games from other media merely because they seem more "interactive." The fact that players use electronic controllers to navigate a digital world should not diminish First Amendment protection. If anything, the interactive nature of video games actually enhances their expressive content because it makes them more engaging to the user. *See Wilson*, 198 F.

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most provocative, forcefully uncomfortable and emotionally disturbing scene yet built into interactive entertainment." *Id.* The First Amendment simply does not permit government officials to pass judgment about the artistic, political and social value of this kind of speech, no matter how controversial.

Supp. 2d at 181. The user, in effect, can "speak back" to the author.

Indeed, all media—books, music, plays, movies, television, internet websites, or any other form of expression—strive to be "interactive" in the sense of engaging the consumer as fully as possible. Each form of expression is at its best when it draws its user into its world, invites her to identify with its characters, and lets her experience the challenges that await its protagonists. *Interactive Digital Software Ass'n,* 329 F.3d at 957 (citing *Am. Amusement,* 244 F.3d at 577). This is not a new concept.

Theater has long used interactivity—also known as audience participation—as a way of drawing audiences into performances. For example, in Ayn Rand's 1933 play, *Night of January 16th,* audience members were selected to play the role of jury members at each performance. The ending of the play varied as it depended on the verdict reached by each audience's jury.[11] Today, improvisational comedy acts, like those performed by The Second City, utilize suggestions solicited from the audience to create material for performances.[12] *Avant-garde* and experimental theater, as well as performance art, also make frequent use of audience participation.[13]

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[11] *See* Ayn Rand Institute Three Plays, http://www.aynrand.org/site/PageServer?pagename=objectivism_fiction_three_plays (last visited September 14, 2010).

Interactivity is not limited to theater. Some books, like video games, already invite the reader to interact with them by making decisions, as in the *Choose Your Own Adventure* and *Choose Your Own Nightmare* series. *See Interactive Digital Software Ass'n*, 329 F.3d at 957–58; *e.g.*, Edward Packard, *The Cave of Time (Choose Your Own Adventure #1)* (Bantam Books 1982) (1979); E.A.M. Jakab, *The Halloween Party (Choose Your Own Nightmare)* (Skylark 1995). Movies on DVD allow users to select alternate endings or scenes, or skip content that they do not wish to see. *See Interactive Digital Software Ass'n*, 329 F.3d at 957. As technology continues to evolve, all types of media are experimenting with, and increasing the use of, interactivity in order to further engage their users, such as, for example, multimedia e-books and more advanced media platforms and applications.[14] Given the rapid pace of advancement in technology, a ruling distinguishing video games based on their interactive nature would dangerously open up all types of media to government restriction based on content and format.

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[12] *See* The Second City Frequently Asked Questions, http://www.secondcity.com/faq/ (last visited September 14, 2010).

[13] *See, e.g.*, The Museum of Modern Art, *Marina Abramović: The Artist is Present*, http://www.moma.org/interactives/exhibitions/2010/marinaabramovic/index.html (last visited September 14, 2010) (noting that visitor participation in artwork was encouraged during exhibition).

Petitioners' attempt to distinguish video games from other types of media is meritless. They claim that the interactive nature of video games can teach minors to be aggressive when they are exposed to extreme violence. (Petrs.' Br. 54–55.) Petitioners offer nothing but speculation to support this assertion. A wide chasm separates the moving of an analog stick and pushing of a button from loading live ammunition into a gun, aiming it at an actual human being, and pulling the trigger. *See Maleng*, 325 F. Supp. 2d at 1189 n.4 (finding that the only things video games "teach" are "improved reaction time, eye/hand coordination, and how to score points in the game"). Playing laser tag or "cops and robbers" with water guns (neither which is regulated by the Act) would teach a minor to use a gun much better than a video game would.

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[14] *See, e.g.*, Trevor Sheridan, *The Most Deluxe iPad App So Far—The Elements: A Visual Exploration*, AppAdvice, Mar. 29, 2010, http://appadvice.com/appnn/2010/03/deluxe-ipad-app-elements-visual-exploration/ (reviewing iPad application that allows users to manipulate images of periodic table elements included with e-book); Julie Bosman, *E-Books Fly Beyond Mere Text*, N.Y. Times, July 29, 2010, at C1, *available at* http://www.nytimes.com/2010/07/29/books/29ebook.html (discussing multimedia e-books that integrate video with books, like *Nixonland* by Rick Perlstein, and noting that e-books with video, photos and other media could become widely available in the near future). At what point does an e-book become sufficiently "interactive" that, in Petitioners' view, it becomes subject to government content-based regulation?

Ultimately, authors use interaction simply as another tool to create engaging expressive content. No one can dispute that J.R.R. Tolkien's *Lord of the Rings* trilogy (Houghton Mifflin 2002) (1954–55) can mentally transport a reader into Middle Earth and make the reader experience the harrowing adventure of its characters. Fans can complement that experience by watching Peter Jackson's recreation of the trilogy on the movie screen, which gives stunning visual depiction to the world of Middle Earth. Video games like the immersive *Lord of the Rings Online* (Turbine 2007) takes this process one step further—they invite consumers to step into the shoes of a human, elf, dwarf or hobbit and experience adventures throughout Middle Earth.[15] Notably, all three media include graphic depictions of violence, but California's Act would only potentially restrict access to the video game version. A consumer should be able to choose which of these media to use when he wishes to explore the world of Middle Earth; the government should not have the ability to restrict his access to one because it is, in the government's view, more "interactive" than the others.

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[15] *See* http://www.lotro.com (last visited September 14, 2010)); Kevin VanOrd, *Lord of the Rings Online Review*, Gamespot, May 10, 2007, http://www.gamespot.com/pc/rpg/middleearthonline/review.html.

II. CALIFORNIA'S CONTENT-BASED RESTRICTION ON THE DISSEMINATION OF VIDEO GAMES VIOLATES THE FIRST AMENDMENT.

Because video games, including ones that depict violence, are a form of expression entitled to full First Amendment protection, any attempt to regulate such speech based on content is subject to strict scrutiny. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The regulation will be upheld only when it seeks to promote a compelling government interest, is narrowly tailored to achieve that interest, and is the least restrictive alternative available that serves the legislature's asserted interest. *Id.; United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The Act fails each of these tests.

First, as Respondents and other *amici* have fully addressed, neither of California's two asserted interests justify the Act's restriction on speech. Parents do not need the state's assistance in controlling what kinds of video games their children play because they already enjoy excellent and highly effective tools that assist them with this task, such as the ESRB rating system and video game console parental controls. And, as the court of appeals and district court below both found, there is no sound evidentiary support for Petitioners' assertion that violence in video games causes harm to the physical and psychological well-being of minors. *Video Software Dealers Ass'n*, 556 F.3d at 964; *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472, at *32-33 (N.D. Cal. Aug. 6, 2007).[16]

The Act is not subject to any lesser degree of scrutiny because it purports to protect minors or impose content-based restrictions only on the dissemination of speech to minors.[17] As Respondents

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[16] Given the widespread use of video games by adolescents and young adults, if Petitioners were correct, one would expect to see an upward national trend in youth violence. Just the opposite is true. For example, the juvenile arrest rate has declined by 33% since 1996, and the overall juvenile arrest rate was lower in 2008 than in 1980. U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Protection, *Juvenile Arrest Rate Trends* (Oct. 31, 2009), http://www.ojjdp.ncjrs.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200. Likewise, the number of fights on school grounds and elsewhere has decreased since 1993. Nat'l Ctr. for Educ. Statistics & Bureau of Justice Statistics, *Indicators of School Crime and Safety: 2009* at 48 (Dec. 2009), http://nces.ed.gov/pubs2010/2010012.pdf.

[17] The restrictions on minors cited by Petitioners and their supporting state *amici*—*e.g.*, jury service, driving age, purchasing tobacco, *etc.*—do not even implicate the dissemination to minors of expression protected by the First Amendment. Indeed, these kinds of age restrictions

(Footnote continued on next page)

and other *amici* have amply demonstrated, the First Amendment's protections, including the corollary right to receive information, extend to minors. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867–68 (1982) (plurality op.); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). While the rights of minors may not be fully co-extensive with the rights of adults, this Court has held that the government may not bar dissemination of protected expression to minors, except in narrow and circumscribed instances, such as in and around a school setting. *See Erznoznik*, 422 U.S. at 212–13 (citing *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Rabeck v. New York*, 391 U.S. 462 (1968)). None of these circumstances is present in this case.

Second, the Act is not narrowly tailored to achieve California's stated interests of assisting

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(Footnote continued from prior page)
involve conduct that manifests in the public realm; none of these limitations seeks to restrict *feeling* or *thought* as the California Act attempts to do. *See* 2005 Cal. Legis. Serv. Ch. 638, § 1(a) (A.B. 1179) (West) (legislative finding as basis for the Act that "[e]xposing minors to depictions of violence in video games . . . makes those minors more likely to experience feelings of aggression."); *see also* Petrs.' Br. 53 (relying on a finding that students who played a violent video game for 20 minutes were more likely to complete the word "explo_e" as "explode" instead of "explore"); *Amici Curiae* Cal. State Sen. Leland Y. Yee, Ph.D, *et al.* Br. 5 ("[P]articipating in the playing of violent video games by children increases aggressive thought and behavior.").

parents and protecting minors. The Act fails to recognize that children of different ages have different maturities, and may comfortably be exposed to varying levels of violence. *See Erznoznik*, 422 U.S. at 214 n.11 (noting that age of a minor is a significant factor when assessing capacity for choice). For example, it is not rational to restrict a 17½-year-old from access to video games that depict violence to the same extent as a 10-year-old. *See Video Software Dealers Ass'n*, 2007 U.S. Dist. LEXIS at *28. Yet this is exactly what California's Act will do if it is upheld. By contrast, the more nuanced ESRB rating system calibrates ratings based on children's different ages and maturities.

Moreover, the Act is underinclusive. The legislature expresses concern with the harm that violent images may cause to minors' psychological and neurological health. *See* 2005 Cal. Legis. Serv. Ch. 638, § 1 (A.B. 1179) (West). Yet the Act extends its restrictions only to video games, despite the fact that extremely violent images are present in movies, television, the Internet, books, comic books and music lyrics. Cal. Civ. Code § 1746.1.

In addition, the Act's definition of a "violent video game" is overinclusive. California claims to be concerned that minors may be desensitized to violence given the realism of current video games. (*See* Petrs.' Br. at 43.) The Act's restrictions, however, are triggered by images of violence upon an "image of a human being." Cal. Civ. Code § 1746(d)(1). This is a vague and overbroad term that goes far beyond the realm of realism when applied to video games. As the district court found, this term is "not limited to what appears to be an actual living human being." *Video Software Dealers Ass'n*, 2007 U.S. Dist. LEXIS at *29. In video games, most of the images used to depict human beings, as well as to depict violent acts committed against those beings, are actually stylized and easily distinguished from reality. *See, e.g.*, *Am. Amusement*, 244 F.3d at 575 (discussing the "stylized and patently fictitious . . . cartoon-like depiction" of zombies used in the *House of the Dead* series). "Images of human beings" as used in the statute arguably include depictions of demons (*e.g.*, *Devil May Cry* series (Capcom 2001–08)), zombies (*e.g.*, *Resident Evil* series (Capcom 1996–2009)), aliens (*e.g.*, *Mass Effect* series (BioWare 2007–10), and stylized images of humanlike creatures (*e.g.*, *Final Fantasy* series (Square Enix 1987–2010)). Indeed, the imprecision of the term will permit the Act to cover games that are fantastic in nature and pose no more risk of desensitizing minors to real violence than a *Road Runner and Wile E. Coyote* cartoon or a Roger Corman horror movie. *See, e.g.* *Maleng*, 325 F. Supp. 2d at 1190 (expressing uncertainty as to whether a game involving *The Simpsons* or *Looney Tunes* characters would be deemed realistic under a similar statute).

Third, the Act's restrictions are not the least restrictive—let alone most effective—means available to California to accomplish its stated goals.

Respondents and other *amici* have addressed the effectiveness of the ESRB rating system and game console parental controls. From the perspective of consumers and parents, when deciding on the suitability of a game for a particular child, the ESRB rating system is far more valuable than the Act. Unlike the Act, which draws one hard line restricting games at age 18, the ESRB system recognizes the range of content available for different maturities by assigning age ratings to video games that span from early childhood ("EC") to adults only ("AO"), and by using descriptors to provide additional detail regarding a variety of topics, including, for example, adult themes, tobacco and alcohol use, sexual content, and many others.[18] There are over a half-dozen descriptors relating to violence alone that convey with some precision the intensity of the content (*e.g.*, "Intense Violence—Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons and depictions of human injury and death").[19] Thus, ESRB's system better informs parents of a video game's content than the Act, thereby allowing more effective purchasing decisions.[20]

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[18] ESRB Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited September 14, 2010).

[19] *Id.*

Moreover, parents have been using the ESRB system for over a decade, and have come to rely on it.[21] If upheld, the Act is likely to disrupt well-developed consumer expectations and cause customer confusion. For example, the Act may impose its "18" label upon a game that the ESRB labels as Teen (suitable for ages 13 and older), because it contains a representation of violence against a stylized character that looks human. The conflicting labels on the video game's package would confuse parents and consumers. Additionally, each state may impose its own labeling system based on its own subjectively determined standards.[22] Different states may rate the same game differently. Some may draw different age-prohibition lines, resulting in a game being marked as appropriate for 16-year-olds in one state, but labeled as inappropriate for those under 18 in another state—both of which could differ from the ESRB rating. A parent or consumer researching that game on the Internet easily could become uncertain about what age the game is recommended for. If anything, a welter of state legislation like California's is likely to confuse, not assist, parents.

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[20] Parents can also use video game magazines, like *PC Gamer* or *Game Informer*, and video game websites, like www.gamespot.com or www.ign.com, to learn more about the content of specific video game titles.

[21] ESRB Consumer Research, http://www.esrb.org/about/awareness.jsp (last visited September 14, 2010).

[22] Given that eleven other states are supporting California's Act, there is a very real possibility that each of them may impose its own labeling requirements. Other states may feel political pressure to follow suit.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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September 17, 2010

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[23] Patrick Hightower, Esq., of the ECA assisted in the preparation of this brief.

AMICUS CURIAE BRIEF

No. 08-1448

In The
Supreme Court of the United States

◆

ARNOLD SCHWARZENEGGER, in his
official capacity as Governor of the State of California;
EDMUND G. BROWN, JR., in his official capacity
as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and
ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF OF *AMICUS CURIAE* FIRST AMENDMENT COALITION IN SUPPORT OF RESPONDENTS

◆

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INTEREST OF *AMICUS CURIAE*[1]

The First Amendment Coalition, formerly known as the California First Amendment Coalition, is a nonprofit organization (incorporated under California's nonprofit law and tax exempt under Section 501(c)(3) of the Internal Revenue Code) that is dedicated to freedom of expression, resisting censorship of all kinds, and to promotion of the "people's right to know" about their government so that they may hold it accountable. The Coalition is supported mainly by grants from foundations and individuals, but receives some of its funding from for-profit news media, law firms organized as corporations, and other for-profit companies.

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party, and their consents were filed with the Clerk on May 10 and 27, 2010. This brief was not written in whole or in part by counsel for any party, and no persons other than *Amicus* have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners' primary justification for California Civil Code §§ 1746, *et seq.* ("the Act") is that violent video games *might* contribute to aggressive behavior in *some* minors.[2] This, Petitioners argue, is a reason to censor Respondents' speech to minors. Petitioners' contention cannot be squared with this Court's precedent.

The concept of "violent speech" is not new to this Court. Prior decisions already strictly circumscribe the regulation of speech that is purportedly likely to lead to violent or unlawful behavior. Petitioners completely ignore this critical precedent, which requires a showing that unlawful behavior following speech is not only theoretically possible, but that the speech is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Historically, this Court's approach to violent speech has not changed even where the government's stated interest is to protect minors. This Court repeatedly has rejected arguments similar to Petitioners' here, striking down laws that were unconstitutionally vague and overbroad despite the government's argument that the primary rationale for the government's proposed censorship was to insulate minors from the effects of violent speech.

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[2] *See* Petitioners' Brief ("PB") 36, 43-44, 52-54, 56; *see also Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 954 (9th Cir. 2009) (*Schwarzenegger*) (quoting Legislative finding to support the Act: "[e]xposing minors to depictions of violence in video games . . . makes those minors more likely . . . to exhibit violent antisocial or aggressive behavior").

A decision in Petitioners' favor here would require creating a dangerously vague new category of unprotected speech. It would require revisiting and reversing decades-old precedent. The Court's tested and reasoned approach to speech in this field should not be disturbed. Video games are a rapidly evolving medium. Exceptions to the First Amendment could easily lag behind technology. Neither the First Amendment nor this Court's jurisprudence on violent speech, even as it applies to minors, leaves room for a result that would create new exceptions to the Constitution, particularly in a field that may be different by the time this Court's decision is entered.

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ARGUMENT

THIS COURT ALREADY HAS SETTLED JURISPRUDENCE STRICTLY CIRCUMSCRIBING THE REGULATION OF "VIOLENT SPEECH"

The jurisprudence of speech as an incitement to violence and lawlessness is nearly a century old. It has evolved considerably from "encouraging an actual breach of law" banning indecent exposure, *Fox v. Washington*, 236 U.S. 273, 277-278 (1915), to the supposedly "clear and present danger" of urging resistance to the military draft, *Schenck v. United States*, 249 U.S. 47, 49-51 (1919), to the "bad tendency" of speech to bring about harmful results, *Abrams v. United States*, 250 U.S. 616, 629 (1919), to upholding convictions for merely "advocating" violent means, *Whitney v. California*, 274 U.S. 357 (1927), to a reformulated "clear and present danger test," that balanced the seriousness of the danger to the interest in free speech, *Dennis v. United States*, 341 U.S. 494, 510 (1951), finally to the seminal decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curium*).

In *Brandenburg*, this Court reversed the conviction of a Ku Klux Klan leader under Ohio's Criminal Syndicalism statute. 395 U.S. at 444-445. The Klansman appeared on film, accompanied by a pistol, a rifle, a shotgun, ammunition, and 12 other hooded figures carrying firearms, while making racial epithets to "[b]ury the niggers" and warning of "revengeance [*sic*]." *Id.* at 446. This Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed to* inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." *Id.* at 447 (emphasis added). Quoting that same passage, this Court recently reaffirmed the *Brandenburg* test, adding further that "[t]he government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curium*)).

Petitioners cannot satisfy any part of the *Brandenburg* test. They present no evidence or argument that any video games are "directed to" inciting "imminent" violence or other lawless action. Nor do Petitioners have support for the notion that such action is "likely" to occur. Without even referencing *Brandenburg* in their brief, Petitioners insist that they should not be forced to show that there is any imminent threat of harm or that harm is likely to occur. PB 48-56. Petitioners' position is a throwback to *Gitlow v. New York*, 268 U.S. 652, 671 (1925), where the Court held that, because the defendant's speech was proscribed by statute, the imminence or likelihood of harm was irrelevant under the First Amendment. That is no longer the law, and has not been for nearly half a century. As it has for the last 40 years, the *Brandenburg* test covers the field.[3]

For this Court to decide in Petitioners' favor it would have to narrow *Brandenburg*, create a heretofore unrecognized exception to that 41-year-old case, and reject the conclusions of every federal district and appellate court to have evaluated the constitutionality of restrictions on the content of video games.[4] It would have to make a categorical exception to the First Amendment for minors in the field of violent speech. That is something this Court has never done, and should not do now.

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[3] Earlier this year, in *U.S. v. Stevens*, _ U.S. __, 130 S.Ct. 1577, 1584 (2010), this Court rejected the Government's argument that depictions of violence and cruelty to animals should be a new category of unprotected speech. *See id.* at 1586. This Court also cautioned that new categories of unprotected speech could not simply be created because the government believed that such speech was harmful to society: "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Id.* at 1585.

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[4] *See Schwarzenegger*, 556 F.3d 950; *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Entertainment Merchants Ass'n v. Henry*, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

THIS COURT'S PRECEDENT CANNOT BE SQUARED WITH A VAGUE NEW CATEGORY OF UNPROTECTED "VIOLENT SPEECH" PURPORTEDLY DESIGNED TO PROTECT MINORS

A. There Is No Precedent For Categorically Restricting Minors' Access To Content Outside The Contexts Of Schools, Indecency Over A Broadcast Medium, Or Sexually Obscene Materials

This Court has stated that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975) (internal citation omitted). "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Id.* at 213-214. Under very narrow circumstances, the States may impose categorical restrictions on minors' First Amendment rights to access materials or speech. This Court's jurisprudence has limited those circumstances to three contexts: disruptive speech in schools, indecent material on broadcast radio and television during particular hours of the day, and speech that is sexually obscene. Historically, the Court has been careful to stress that the unique characteristics of these contexts justify a departure from the otherwise inviolable protections of the First Amendment. Those characteristics are absent from the Act in this case, and Petitioners' analogies to the contrary fail.

In *Morse v. Frederick*, 551 U.S. 393, 410 (2007), this Court held that a high school principal had not violated a student's First Amendment rights by confiscating a banner promoting illegal drug use. In so holding, the Court emphasized that the student was waving the banner at a "school-sanctioned and school-supervised event," and it placed great weight on "the special characteristics of the school environment." *Id.* at 396, 408. The Court also noted that while some lewd and indecent speech by minors may be prohibited in schools, if the student speaker "delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 405 (discussing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

In a concurring opinion joined by Justice Kennedy, Justice Alito explained his view that the school principal's confiscation of the banner in *Morse* stood "at the far reaches of what the First Amendment permits" because "[i]n most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence." *Morse*, 551 U.S. at 425 (Alito, J., concurring) (citing *Brandenburg*). It was only permissible because, "due to *the special features of the school* *environment*, school officials must have greater authority to intervene before speech leads to violence." *Id.* at 425 (emphasis added). The justification for similar restrictions on speech do not extend outside the school setting. *See id.* at 424-425; *see also* PB 21 (Petitioners acknowledging that " . . . school cases present their own unique circumstances . . . ").

This Court also has approved limited restrictions on indecent, but not obscene, material over broadcast media during certain hours of the day. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (*Pacifica*). Petitioners here try to draw an analogy to *Pacifica*. *See, e.g.*, PB 19-20. Again, however, the Court in *Pacifica* relied heavily on the "special justifications for regulation of the broadcast media that are not applicable to other speakers" in other media. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (holding that the Internet, for example, is unlike the broadcast medium, because the Internet is comparatively unregulated, is not scarce, is not invasive and does not suddenly appear "unbidden" or "by accident" the way broadcast radio and television might). The Court in *Pacifica* emphasized that broadcast radio and television are "*uniquely* pervasive" and "*uniquely* accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 748-749 (emphasis added). Here, by contrast, children must have money and the wherewithal to purchase a video game system and a video game that can be played on it, and must make the conscious decision to load that video game and play it on their own. That is not the same as simply turning on a radio.[5]

In *Ginsberg v. State of New York*, 390 U.S. 629, 646 (1968), this Court held that the States may restrict the dissemination of sexually-themed obscene material to minors where the material "(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors." Petitioners urge an extension of *Ginsberg* from sexually obscene speech to violent speech, *see* PB 8-9, 12-13, but the decision in *Ginsberg* explicitly contrasted sexually obscene materials, which may be restricted for dissemination to minors, with speech that may only be restricted if it poses a "clear and present danger." *Id.* at 641. This distinction undercuts Petitioners' proposition that *Ginsberg's* holding is fungible such that it may be facilely transferred from sexually obscene speech to speech that supposedly might lead to violent behavior in some minors.[6]

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[5] Even under *Pacifica*, a child who stays awake late enough would be able to hear that which she might not otherwise hear earlier in the day. *See id.* at 733. Here, on the other hand, a 17-year-old would not be able to purchase a violent video game at any time.

[6] The decision in *Ginsberg* predates *Brandenburg* by one year, so, rather than the "clear and present danger" test, the

(Continued on following page)

Petitioners ask this Court to do what it has never done before: approve a categorical ban on minors' independent ability to access an entire class of otherwise protected material outside school grounds that is neither sexually obscene nor indecent speech over a broadcast medium that may be accessed "by accident" during waking hours. In order to advance this proposition, Petitioners hope to create the impression that a ban on the sale of violent video games is no different than the rigors of a school setting, limitations on pornography or restrictions on indecent material over the airwaves. Petitioners' proposition fails. This Court already has evaluated minors' access to violent speech, and it has consistently rejected the contention that shielding minors from violent speech is a sufficient justification to create any new exceptions to well-established First Amendment jurisprudence.

B. This Court Repeatedly Has Struck Down Laws Designed To Protect Minors From Accessing "Violent Speech"

In *Winters v. New York*, 333 U.S. 507, 508 (1948), this Court struck down a New York law that criminalized the distribution to minors of materials devoted to "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." *Id.* at 508; *see also id.* at 511 (the law

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appropriate distinction now would be under the *Brandenburg* test.

"originally was aimed at the protection of minors from the distribution of [such] publications," but "was later broadened to include all the population"). The "principal reason for the enactment of the statute," like the Act here, was that such materials were "vehicles for inciting violent and depraved crimes." *Id.* at 513 (internal quotation marks omitted). This Court held that the law was unconstitutionally vague and uncertain because publishers and distributors could not reasonably ascertain before publication whether certain materials such as war tales and detective and crime stories would violate the law. *See id.* at 519-520. The Act here is similarly vague for reasons addressed in Respondents' Brief on the Merits.

Likewise, in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 682 (1968), this Court held that a city ordinance requiring the classification of motion pictures based on their perceived suitability for minors was "unconstitutionally vague." As with the Act in this case, one of the city's proffered justifications for the ordinance was to protect minors from materials "likely to incite or encourage crime or delinquency on the part of young persons." *Id.* at 681. But the Court struck down the ordinance and emphasized that the City was not excused from compliance with the First Amendment simply because the ordinance was designed to protect children:

> Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary

> purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

Id. at 689.[7]

Similarly, in *Butler v. Michigan*, 352 U.S. 380, 381 (1957), this Court held unconstitutional a State law criminalizing the dissemination of books "tending to incite minors to violent or depraved or immoral acts" or "to the corruption of the morals of youth." The Court held that the law was unconstitutionally overbroad and took an approach akin "to burn[ing] the house to roast the pig." *Id.* at 383.

In *Erznoznik*, the Court likewise held that an ordinance was unconstitutionally overbroad despite the government's attempt to justify its reach based on a desire to protect minors. *See* 422 U.S. at 213-214.

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[7] In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001), this Court held that a State law restricting the advertising of tobacco "may not avoid the application of strict scrutiny simply because it seeks to protect children." This Court also held that tobacco advertising restrictions that were meant to protect minors "clearly fail the *Brandenburg* test" even though the advertisements purportedly solicit future illegal activity (*i.e.*, minors using tobacco products), and further held that "[i]t is difficult to see any stopping point to a rule that would allow a State to prohibit all speech in favor of an activity in which it is illegal for minors to engage." *Id.* at 579-580. Here, the underlying conduct (playing video games) is legal, but the direct sale of the games to minors is illegal under the Act. Thus, California defaults to a system that censors as a first resort.

The Court reasoned that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 214. Here, the Act is unconstitutionally overbroad because it lumps all persons under the age of 18 together in one group and prohibits the same video games for them all, regardless of age. *See id.* ("[i]n assessing whether a minor has the requisite capacity for individual choice" supporting more robust First Amendment rights, "the age of the minor is a significant factor").

Laws restricting minors' access to violent materials for the purported purpose of protecting those minors are closely scrutinized for the same constitutional infirmities that invalidate laws restricting the rights of adults. California is not relieved of its constitutional obligation to comply fully with the First Amendment simply because the Act is designed to protect children from violent speech, and this Court has never held otherwise.

C. Government Recommendations, Instead Of Criminal Penalties, Constitute A Less Restrictive Means To Further Petitioners' Interests

Content-based restrictions on speech such as the Act are subject to strict scrutiny and "must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*; *see also id.* at 814 ("the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"). Moreover, "[w]hen a plausible, less restrictive alternative is offered to a content-based restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Id.* at 816.

Here, there are less restrictive alternative means to further the State's articulated interests in preventing harm to minors and criminal and antisocial behavior. First, the State could recommend in an advertising campaign that certain types of violent video games should not be purchased or sold to minors and publicize its recommendations as part of an educational campaign directed at retailers and parents, without creating criminal penalties for the purchase or sale of the games. Particularly when considered in conjunction with the voluntary video game ratings and descriptions already provided by the Entertainment Software Rating Board, the State's recommendations and educational campaign could help achieve the State's interests in protecting minors and preventing criminal conduct without resorting to censorship.

Second, parental controls on gaming systems could allow parents, rather than the government, to decide which sorts of games are suitable for their children. *See Reno v. ACLU*, 521 U.S. 844, 876-877 (1997) (finding significant the fact that a reasonably effective method by which parents could prevent children from accessing Internet material that parents believed to be inappropriate "will soon be widely available"). Such parental controls and other types of less restrictive alternatives are likely to evolve rapidly.

The Court should not create new exceptions to the First Amendment in a context like videogames that is acutely subject to rapid technological change. Petitioners acknowledge that the industry changes rapidly. *See* PB 42-47. That could mean a watershed decision from this Court changing its jurisprudence on violent speech would lag behind a technological change that offers new and creative less restrictive alternatives beyond those already available. More importantly, the same rapid changes in technology that Petitioners lament as harmful may actually lead to changes in society's attitude toward permitting minors' access to violent video games and minors' responses to the same. *See City of Ontario v. Quon*, ___ U.S. ___, 130 S.Ct. 2619, 2629 (2010) ("[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior").

◆

CONCLUSION

The Court should not depart from, or create any new exceptions to, its decades-old jurisprudence regulating speech directed to inciting or producing imminent lawless action. Rather, the Court should follow its precedent and err in favor of the First Amendment rights of minors and video game manufacturers. Video gaming, which is today largely based on a software purchase model, could readily shift to online gaming that is free to users because it is supported by advertising. The absence of a sales transaction could make the California law irrelevant, but a decision adverse to the First Amendment would have profound vestigial effects.

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ARNOLD SCHWARZENEGGER,
GOVERNOR OF THE STATE OF CALIFORNIA, AND
EDMUND G. BROWN JR., ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION
AND ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF OF FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

◆

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INTEREST OF THE *AMICUS*[1]

Amicus Curiae First Amendment Lawyers Association ("FALA") is a non-profit association incorporated in Illinois, with over 180 members throughout the United States, Canada, and Europe. Its membership predominately consists of attorneys whose practice emphasizes the defense of First Amendment rights, and related liberties. FALA members have litigated cases involving a wide spectrum of such rights, including free expression, free association, and privacy issues.

Members of FALA frequently litigate cases before this Court, and as in this case, are often enlisted to represent or support parties before this Court after certiorari is granted. The Free Speech cases briefed and argued by FALA members include such landmark decisions such as *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Of particular relevance to the issues before the Court in this case, FALA members have briefed and argued virtually every major case in the realms of obscenity, censorship and adult entertainment, including, in chronological order:

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[1] Pursuant to Supreme Court Rule 37.6, no person or entity, other than the *Amicus Curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of the brief. Both parties have consented to the filing of this brief, and those consents have been filed separately with this Court.

Roth v. United States, 354 U.S. 476 (1957)

Kaplan v. California, 413 U.S. 115 (1973)

United States v. Orito, 413 U.S. 139 (1973)

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Young v. American Mini Theatres, 427 U.S. 50 (1976)

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FALA also submitted an *amicus* brief in the recent case of *U.S. v. Stevens*, 559 U.S. ___, 130 S.Ct. 1577 (2010), which, like the instant case, involved a governmental attempt to restrict speech based solely on its violent content. FALA has followed the cases interpreting violent video game regulation closely and was intrigued by this Court's decision to grant certiorari in the case at bar; having very recently held that a statute attempting to utilize violence as a basis for content regulation does not comport with the First Amendment. *Id.* The membership is concerned with the arguments asserted in Petitioners' Brief, which urges this Court to extend the limited, narrow exception made for regulation of erotic speech to violent video games. Never in First Amendment jurisprudence has violence served to support a constitutional regulation on expressive material, and all of the Circuit Court decisions interpreting violent video game regulations agree that no exception may be constitutionally made for interactive media.

FALA anticipates that this Court will agree that violence does not constitute a basis for stripping expressive material of First Amendment protection, consistent with the opinions of the lower courts throughout the Nation that have considered this issue. However, the Association offers its perspectives on the wisdom of extending the rationale for regulating sexually explicit material to violent media, and related concerns, in light of FALA members' half-century of experience with the impact of First Amendment doctrine upon free expression.

◆

SUMMARY OF ARGUMENT

This case involves a novel attempt to restrict First Amendment protection from a category of speech. Petitioners urge this Court to consider violence as a basis for depriving interactive media of its presumed constitutional protection. This Court recently rejected a similar request to create a category of unprotected speech based on violence in *Stevens*, 130 S.Ct. at 1585. The restrictions proposed by Petitioners in this case should be rejected under the same reasoning utilized by this Court in *Stevens* to invalidate a law banning depictions of animal violence.

Petitioners' attempt to draw parallels between regulation of sexually-oriented speech, and violent content, are unavailing. This Court has never tolerated a restriction on speech based solely on its violent characteristics. Petitioners' reliance on *Ginsberg v. New York*, 390 U.S. 629 (1968) as a basis for upholding §1746, *et seq.*, *Cal. Civ. Code*, is misplaced. The *Ginsberg* rationale – prohibiting certain sexually-oriented communications deemed harmful to minors from being distributed to juveniles – is limited in category and narrow in scope. It is based, in part, on prior precedent holding that obscene materials do not enjoy First Amendment protection. The underlying, historical justifications for regulating sexually explicit speech do not translate to the realm of violence. Beginning with the early obscenity decisions, and continuing through *Miller* and its progeny, this Court has focused on concepts of modesty and decency as the bases for tolerating a limited exception to full First Amendment protection, in regards to erotic communications. The historical justifications for regulating obscenity and "harmful" materials simply do not apply to depictions of violence.

The subject of violence is pervasive throughout historical literature – including stories written for children. Even fairy tales written by The Brothers Grimm included graphic depictions and descriptions of violence, utilized as a means to punish villains and enforce morality. Any paternalistic attempt by Petitioners to shield juveniles from exposure to concepts involving violence, whether in video games or other forms of media, will leave them ill-equipped to function in the modern world.

Ultimately, parents retain the primary obligation of controlling media consumption by their children. This Court should not condone Petitioners' attempt to supplant primary parental responsibilities by imposing government-mandated restrictions on the dissemination of interactive media involving violence. Upholding the challenged statute would permit the state to override the decision of those parents who authorize their teenagers to purchase or rent the restricted games. Petitioners' attempt to forge new ground in media censorship should be rejected by this Court under well-established First Amendment principles.

The statute's reliance on the "prevailing standards in the community" as a basis for defining the video games covered by the law constitutes an independent basis for invalidation. The inconsistent decisions regarding the geographic scope of the relevant "community" in obscenity cases illustrates the concerns with utilizing that problematic concept to regulate an entirely new category of depictions, i.e., violence. Retailers of videogames sold in California will be unable to discern, in advance, which community's standards will be applied in evaluating whether a particular game is "patently offensive." §1746(d)(A)(ii). The amorphous and inconsistently applied concept of community standards utilized in the statute renders it vague in all its applications. The chilling effect imposed upon retailers, who are faced with self-censorship in attempting to comply with the community standards determination, renders the statute overbroad as well.

Should this Court consider allowing violence to serve as a basis for restricting expressive communications consistent with strict scrutiny review, and otherwise find the statute not to be vague and/or overbroad, FALA asserts that a reliance on national (as opposed to local or state) community standards must be read into the statute, in order to address First Amendment concerns. As online sale and distribution of video games begins to overtake brick and mortar retail distribution, the impact of the statute on Internet retailers must be considered. Web publishers and distributors do not have the ability to geographically block consumers in certain "communities" from receipt of digital media. In the event that some formulation of local community standards were accepted as the basis for determining whether a video game is "patently offensive" under the statute, such circumstance would create a "heckler's veto" by the most restrictive community whose standards would have to be utilized by online publishers. In other words, the inability to geographically target online distribution of video games renders distributors subject to the most restrictive community's standards. Accordingly, in the event that this Court considers upholding the statute in the face of the numerous other legal challenges asserted in this case, only reliance on national standards could address the legal concerns generated by Internet retail distribution.

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ARGUMENT

I. This Court should reject the state's invitation to extend the *Ginsberg* analysis to violent material.

Petitioners ask this Court to make an unprecedented judicial leap by extending the rationale set forth in *Ginsberg v. New York*, 390 U.S. 629 (1968), approving a restriction on the sale of obscene material deemed "harmful to minors," to authorize similar restrictions on video games, solely based on their violent characteristics.[2] Never has this Court authorized governmental regulation of a category of media, premised exclusively on violent content. *Ginsberg* and its progeny carved out an exceedingly narrow exception to the principle that all expressive communications are presumed to be protected by the First Amendment, given society's traditional treatment of erotic communications.

Over time, only a limited few "exceptions" to the First Amendment's protection of speech have been recognized by this Court. The justification utilized to exempt these limited subjects from constitutional protection is premised on the assumption that they are "of such slight social value as a step to truth that any benefit that might be derived from them is clearly outweighed by the social interest in order and morality." *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 385 (1992), citing *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). Historically, the recognized limits on free speech protection involve; defamation, incitement of violence, obscenity, and child pornography. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002). Notably, since the 1960's, this Court has narrowed (not expanded) the scope of the traditional categorical exceptions for defamation and obscenity. *R.A.V., supra* at 382.

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[2] PB at 12-19

Content-based regulations, such as the challenged California statute restricting video games based on violence, are presumptively invalid under the First Amendment to the United States Constitution. *R.A.V.*, 505 U.S. at 382. In order to overcome this presumption, content-based restrictions on speech must survive strict judicial scrutiny, which requires the government to demonstrate that the law is narrowly tailored to promote a compelling interest and uses the least restrictive means to accomplish its goals. *See, e.g., Hill v. Colorado,* 530 U.S. 703 (2000); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). The government bears the burden of identifying the compelling interest justifying the law and must come forward with facts and evidence to establish that the statute is narrowly drawn to specifically serve that interest. *Reno v. ACLU,* 521 U.S. 844 (1997). Where the designed benefit of a content-based restriction on speech is to shield the sensibilities of listeners, the general rule is that the right of expression prevails even where no less restrictive alternative exists. *Playboy Entertainment Group, supra* 529 U.S. at 813. "We are expected to protect our own sensibilities 'simply by averting [our] eyes.'" *Id.* citing *Cohen v. California,* 403 U.S. 15 (1971). The challenged statutory prohibition on sale or rental of video games to minors, based solely on the level of violence contained in the game, constitutes a content-based restriction on speech that must be evaluated using strict scrutiny review. Consequently, all of the circuit courts of appeal that have considered violent video game restrictions have correctly concluded that the laws do not meet constitutional muster, when subjected to strict scrutiny.[3]

Petitioners seek to avoid strict scrutiny review – presumably because they recognize the statute is doomed to fail if the correct standard of review is applied.[4] Tellingly, Petitioners argue that "offensively violent speech aimed at minors can be harmful, and our nation's traditional interest in protecting minors *outweighs* any benefit derived from such speech."[5] Essentially, Petitioners are suggesting that this Court engage in a balancing test, weighing the benefit derived from the speech at issue against the nation's interest in protecting minors. This Court recently rejected a similar balancing test proposed by the government in *Stevens*, 130 S.Ct. at 1585. There, the petitioner suggested a simple balancing test for determining the applicability of First Amendment protection of speech: "Whether a given category of speech enjoys First Amendment protection depends on a categorical balancing of the value of the speech against its societal cost." *Id.* citing *Brief for the United States* at 8. This Court called such a free-flowing test for determination of First Amendment protection "startling and dangerous." *Id.* Petitioners' proposal to utilize the limited *Ginsberg* rationale – relating to sexually-oriented materials – as a basis for stripping yet another category of speech from First Amendment protection, should be flatly rejected for the same reasons recently announced by this Court in *Stevens*.

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[3] *James, et al. v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002); *American Amusement Machine v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *ESA v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *ISDA v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *VSDA v. Webster*, 968 F.2d 684 (8th Cir. 1992); *ESDA v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006); *VSDA v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), *cert. granted*, 559 S.Ct. 1448 (2010).

[4] PB at 12-13.

[5] PB at 33-34 (emphasis added).

Notably, the boundaries between the vast plateaus of protected expression and the narrow "holes" carved up by the exceptions, are abrupt constitutional cliffs, not broad and gentle slopes of decreasing protection. Accordingly, where expression falls on the protected side of the constitutional boundary, even just by a bit, it remains fully protected by the First Amendment. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 251 (2002). Merely because this Court has recognized a strong societal interest in prohibiting minors from consuming sexually-oriented materials that are found to be "harmful," this narrow exception should not be utilized as an entrenching tool to chip away at constitutional protection of free expression afforded to video games, solely because of fantasy violence committed on an "image of a human being." §1746(d)(1), *Cal. Civ. Code*. "Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children." *Ginsberg*, 390 U.S. at 638 n.6, citing Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938-39 (1963).

FALA members are exceedingly familiar with the struggle that this Court engaged in to piece together an acceptable legal test for determining obscenity, *vel non*, of materials – for both adults and minors. As noted by this Court in *Miller v. California*, 413 U.S. 15 (1973): "We have seen 'a variety of the views among the members of the court unmatched in any other course of constitutional adjudication.'" *Miller*, 413 U.S. at 22. This Court struggled with the "*Roth* Test," the "*Memoirs* Test," the "*Redrup* policy," and ultimately settled on the three-pronged obscenity test announced in *Miller*. Interestingly, Justice Brennan, the original architect of the early obscenity theories, abandoned his position, and maintained - in *Miller* – that no formulation of the Court, the Congress, or the states, could adequately distinguish between material unprotected by the First Amendment and protected expression. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 83 (1973) (Brennan, J., dissenting). Various justifications have been advanced for the adoption of laws regulating sexually explicit material; from enforcement of morality,[6] to protection of juveniles, to guarding the unwilling adult from inadvertent exposure. *Paris Adult Theatre I v. Slaton*, 413 U.S. at 57-58. However, this Court has never found such justifications sufficient outside the narrow realm of sexually-oriented communications.

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[6] The continued viability of the morality justification for obscenity law is in substantial doubt after this Court's ruling in *Lawrence v. Texas*, 539 U.S. 588 (2003), holding that enforcement of a moral code is not sufficient justification for statute's impacting fundamental liberties.

Petitioners now seek to inflate the *Ginsberg* rationale to the point where it reaches violent media. Given the monumental problems and continuing controversy surrounding the dubious experiment with stripping certain sexually-oriented material of its constitutional protection, this Court should reject Petitioners' invitation to open yet another Pandora's Box of censorship by approving a statute restricting the dissemination of interactive media based solely on its violent content.

As noted by Judge Posner in *American Amusement Machine v. Kendrick*, 244 F.3d at 577:

> Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales by Grimm, Andersen, and Perault is aware. To shield children right up to the age of eighteen from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

The Brothers Grimm utilized extreme violence in their stories in the attempt to deter bad behavior in children. For example, in "The Robber Bridegroom," a young woman watches in horror as her betrothed and his accomplices drag a young girl to their lair, rip off her clothes, lay her on a table, hack her body to pieces, and sprinkle them with salt.[7] The authors often made it a point to add or intensify violent episodes in subsequent editions of their fairy tales. For example, it was only in the second edition of the story of Cinderella that her stepsisters' eyes were pecked out by doves, in vivid detail, "for being so wicked and false."[8] Similarly, in the second edition of the Rumpelstiltskin story, the character becomes so beside himself with rage that he tears himself in two. *Id.*

However, issues such as pregnancy and illicit sexual relationships made the Grimm's uncomfortable. *Id.* This is but one example of how violence has historically been treated much differently than sexual content with respect to children. The historical justification for treating sexually explicit materials differently than all other categories of speech involved society's desire to regulate offensive material that people find "disgusting" or "degrading." *James, et al. v. Meow Media, Inc.*, 300 F.3d at 698 (refusing to extend obscenity jurisprudence to violent, as opposed to sexually explicit, material), citing *Kendrick*, 244 F.3d at 574. Obscene and "harmful" material is regulated in an attempt to put a limit on the extent to which the community's sensibilities can be shocked by speech, but not as a protection against behavior that the speech creates. *Id.*

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[7] Maria Tatar, *The Hard Facts of the Grimms' Fairy Tales*, 2nd Ed. (1987).

[8] *Id.* citing *The Nursery and Household Tales*, 2nd Ed. (1814).

Violent speech can only be regulated if it falls within the category of speech designed to incite violence. *R.A.V. v. City of St. Paul*, 505 U.S. at 384-85. The test for determining whether speech constitutes an unprotected incitement to violence was set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), which permits the states to regulate only that speech which is "directed to inciting or producing imminent lawless action that is likely to incite or produce such action." As held in the numerous cases to have considered the issue, violent video games fall "well short of this threshold." *Meow Media* at 698; *Kendrick*, at 572; *ESA v. Granholm*, 426 F.Supp.2d 646 (E.D. Mich. 2006); *EMA v. Henry*, 2006 WL 2927884 (W.D. Okla. 2006); *ESA v. Swanson*, 519 F.3d at 768; *ISDA v. St. Louis County*, 329 F.3d at 954; *Webster, supra*; *ESA v. Foti*, 451 F.Supp. 823 (M.D. La. 2006); *VSDA v. Maleng*, 325 F.Supp.2d 1180 (W.D. Wash. 2004); *ESDA v. Blagojevich*, 469 F.3d at 641; *VSDA v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) *cert. granted* 559 S.Ct. 1448 (2010). Petitioners do not claim that the violent video games they seek to regulate meet the *Brandenburg* incitement standard. Instead, they argue that the regulation should be upheld under the same rationale used to justify obscenity laws.

As noted in *VSDA v. Maleng*, 325 F.Supp.2d at 1185, "the historical justifications for the obscenity exception simply do not apply to depictions of violence." Certain sexually explicit materials were excluded from First Amendment protection because "lewd speech has very little, if any, impact on the free expression of ideas, and government regulation of the sexually obscene has never thought to raise constitutional problems." *Id.*[8] In crafting the original obscenity decisions, this Court focused on enforcement of "decency" and preserving "the interest of the public and the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris Adult Theatre I*, 413 U.S. at 58. While this Court observed that there was no scientific data to conclusively demonstrate that exposure to sexually-oriented material adversely affects the consumers of such material, it was more concerned with the "right of the nation and of the states to maintain a *decent* society." *Id.* (citations omitted) (emphasis added). The concepts of decency and indecency have traditionally referred to erotic or sexual matters, not violence. *Black's Law Dictionary*, 5th Ed., defines "indecent" as:

> Offensive to common propriety; offending against modesty or delicacy; grossly vulgar;

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[8] FALA does not concede that these historical justifications for regulating sexually explicit speech are valid, or that no constitutional concern exists with such regulation – but merely seeks to identify the traditional justifications for regulating obscenity and harmful materials for the purpose of evaluating the impropriety of extending those justifications to regulation of violent media.

obscene; lewd; unseemly; unbecoming; indecorous; unfit to be seen or heard.

Similarly, the offense of "indecent exposure" contemplates exposure of one's private parts (i.e. sexual organs) in a lewd manner. *Id.*; *see also, e.g.*, *Minn. Stat.* §617.23 (2009); §800.03, *Fla. Stat.* (2009). Judicial justifications for obscenity laws based on concepts of 'decency' have, therefore, typically been associated with sex, not violence. The underlying rationale for treating sexually-oriented materials differently than all other forms of communication is likely based on a pervasive and deep-rooted sense of modesty regarding sex and nudity that dates back to ancient history. Fantasy violence has simply not impacted civilized society's collective sense of propriety in the same way that open and explicit representations of sexual matters have. FALA is not suggesting that societal taboo's surrounding sexual expression are appropriate, healthy, or consistent with First Amendment values. It merely observes that the justifications and policy considerations for shielding minors from sexually-oriented materials simply do not translate to allow a similar approach for violent content.

This Court struggled for decades with the proper constitutional approach toward regulating obscene materials before settling on the *Miller* Test. It should resist Petitioners' invitation to unleash a new judicial cancer, by permitting states to regulate the violent content of movies, magazines, books, websites, and video games. "The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with the conditions as they are,' and even to stir 'people' to anger." *Miller*, 413 U.S. at 44 (Douglas, J., dissenting) (quoting *Terminiello v. Chicago*, 337 U.S. 1 (1949)). Leaving aside the vagaries generated by the non-defined terms in §1746 seeking to describe a "violent video game," the general proposition of regulating violent expression should be flatly discarded as creating an impermissible conflict with cherished First Amendment rights.

II. The challenged statute constitutes an attempt by the state government to supplant the role of parents – who have the primary obligation to rear their children – by controlling the content of media purchased and consumed by minors.

Petitioners argue that the challenged statute merely "supports,"[10] "reinforces,"[11] and "assists,"[12] parents in their effort to control the types of media their minor children intake. However, instead of supporting the child-rearing role of parents, the statute *supplants* that role, by forcibly substituting the decision of the government for that of the parent.

Petitioners expressly recognize that parents have the primary responsibility for the well-being of their children.[13] FALA agrees with this proposition; however, it disagrees with the impact of the law at issue. Section 1746.1 imposes a restraint on the availability of a specific category of speech to minors. In recognizing that the parents are the primary decision-makers with respect to minors' access to media, Petitioners must also accept the reality that some parents may deem certain video games, i.e., those covered by the statute, appropriate for their children – particularly those in their later teen years. By imposing a flat ban on the sale of so-called "violent video games" to all minors, the state fails to make room for those parents who have made the informed decision to permit their teenagers to purchase or rent the regulated media. The statute makes a half-hearted attempt to address this concern by allowing parents (along with grandparents, aunts, uncles, or legal guardians) to purchase or rent the games themselves for the minor. However, such regulation does not allow for acquisition of the media by minors whose parents have given them permission to obtain the restricted game, and more importantly, imposes an intolerable barrier to the free flow of information in the marketplace of ideas. The statute therefore creates a circumstance where the government, not the parent, makes the decision whether a minor can access specified types of expression. Such governmental paternalism is inconsistent with both the free expression rights of minors and the rights of adults to make the primary decisions with regard to the custody, care, and nurture of their children. *See*, *Tinker, et al. v. Des Moines Independent Community School District, et al.*, 393 U.S. 503 (1969); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

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[10] PB at 6; 12.

[11] PB at 7.

[12] PB at 9.

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[13] PB at 8; 17.

Petitioner argues that it should have the same freedom to regulate minors' access to video games in the general marketplace as it does with student speech in the public school setting.[14] Petitioners assert: "To hold otherwise would effectively grant public schools (arms of the state) greater authority to directly restrict minors' speech rights than a state itself has when it acts to reinforce parental rights over their own children."[15] Petitioners' argument in this regard turns student speech jurisprudence on its head. It is precisely because of the unique pedagogical interests of educational institutions that a greater restriction on expressive activity by students is tolerated in the school setting. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681-82 (1986). Petitioners' proposal would permit the same level of restriction on minors' expressive activities irrespective of whether the minor is in school or in the general public.

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[14] PB at 21-22.

[15] PB at 22.

This Court has never suggested that the same restrictions on speech found to be constitutionally permissible in *Bethel* and *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988) would be tolerated outside of a school setting. As noted by Petitioners, "the Constitution guarantees parents full authority to direct their children's development."[16] Accordingly, the effort by Petitioners to interfere with this parental authority by deciding, *ab initio*, what video games should be made available to minors in the marketplace, should be recognized as inconsistent with such authority. Parents should be supported in their decision to expose their children to a wide range of topics and issues to prepare them for adulthood. As noted by Judge Posner in *Kendrick*: "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." *Kendrick* at 577.

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[16] PB at 24.

III. The use of "prevailing standards in the community" as a basis for triggering applicability of the statute renders it overbroad, and imposes a substantial chilling effect on the distribution of video game content; both online and in the traditional retail environment.

A. Although *Miller* permitted the use of community standards as a valid factor in determining whether sexually oriented material can be declared obscene, reliance on any determination of the "prevailing standards in the community" to determine whether a video game loses its First Amendment protection is unworkable and renders the statute unconstitutionally vague and overbroad.

Notably, the statute can be triggered alternatively by the game allowing the player to inflict serious injury upon images of human beings, or by meeting a modified *Ginsberg* "harmful to minors" test that includes a determination of whether the violence is "patently offensive to prevailing standards in the community as to what is suitable for minors." §1746(d)(A)(ii). FALA members have substantial experience with the difficulties created by any test that delineates the scope of constitutional protection for media based on "community standards." As noted *supra,* FALA members have litigated many of the major cases involving obscenity and "harmful" material before numerous courts of appeal, as well as this

Court. The obscenity test established by *Miller,* which also relies on application of community standards, has produced the absurd result of the identical film being declared legally obscene in one jurisdiction, and constitutionally protected in another.[17]

The concept of community standards has only been approved by this Court as a factor for evaluating legality of sexually explicit media, in the context of distribution of 'hard copies' of allegedly obscene material into or from a particular jurisdiction in which the defendant has chosen to do business. The general rule, as announced by this Court, with respect to application of "contemporary community standards" is that no precise geographical area need be applied in defining the concept for a jury. *Hamling v. United States,* 418 U.S. 87, 105 (1974). Instead, this Court has permitted the trial courts to either define the relevant community for the jury, or allow jurors to determine for themselves where the geographic boundaries of the community lie. *Id. Hamling, supra*; *Jenkins v. Georgia,* 418 U.S. 153, 157 (1974).

The community standards applied in *Miller,* itself, included those prevalent in the entire state of California. *Miller,* 413 U.S. at 30-31. Later cases have predictably struggled with identifying the proper geographic scope of the community. For example, in *Skyywalker Records, Inc. v. Navarro*, 739 F.Supp. 578, 587-88 (S.D. Fla. 1990), *rev'd on other grounds*, 960 F.2d 134 (11th Cir. 1992), the United States District Court for the Southern District of Florida, again evaluating 'hard copies' of material sold in a specific local community, held that the jury must apply the standards of a tri-county area consisting of Palm Beach, Broward, and Dade Counties (which coincided with the boundary of the jury pool for that court). *Both* of the parties in that case asserted that a smaller geographic community should be used; that of Broward County alone, but the court disagreed, holding that "the boundaries of the relevant community under *Miller* are a matter for judicial, not legislative, determination." The Florida Supreme Court, in *Davidson v. State*, 288 So.2d 483, 486-87 (Fla. 1973), considered the appropriate scope of the geographic community in an obscenity case involving the shipment of tangible 'hard copies' of allegedly obscene materials. While acknowledging that it would have been permissible to employ statewide standards, the court in *Davidson* indicated that, at least in the context of mailing hard copies of materials to a specific address, it was also constitutionally permissible to apply the community standards of the *county* in which the materials were shipped. *Id.* As noted above, this Court in *Jenkins* also authorized the trial courts to provide *no* instruction on the scope of the community – leaving the determination solely to the jurors. *Jenkins*, 418 U.S. at 157; *see also*, *Airline*

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[17] For example, compare *People of the State of New York v. Mature Enterprises, Inc.*, 76 Misc.2d 660, 332 N.Y.S.2d 346 (N.Y. 1974) (*Deep Throat* found constitutionally obscene) with *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir. 1983) (*Deep Throat* included in list of films found *not* to be obscene under prevailing community standards).

Adult Video v. St. Charles Parish Council, 609 So.2d 320, 322 (La. Cir. Ct. App. 1992) (rejecting reliance on 'parish' standards, in favor of jury-determined community boundaries). Thus, a defendant facing a prosecution premised on application of a 'community standard' may be judged by the community standards of the entire state; a county; some geographic area in-between; or the jurors' own concept of the relevant community.

The above-cited cases illustrate the inconsistency in how the troublesome concept of community standards has been interpreted and applied by the courts in obscenity cases. Any attempt to import the community standards concept as a factor for identifying violent video games is doomed to constitutional failure. A distributor of so-called 'violent video games' in California will be unable to ascertain in advance which geographic communities' standards will be applied in the event of a prosecution. Under the challenged statute, it is incumbent upon the retail distributor of video games in California to determine whether a particular game meets the definition of the statute, and whether it has been properly labeled with the "18" identifier. Irrespective of whether the game contains the "18" label, a retailer may still be found liable for selling or renting a violent video game to a minor if a court or a jury should, at some future time, determine that the game meets the definition set forth in §1746(d), based partly on application of "prevailing standards in the community."

It is axiomatic that individuals are entitled to fair notice of conduct that is proscribed by a statute so the individual can conform his or her behavior to the dictates of the law. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). "Vague laws trap the innocent by not providing fair warning." *Id.* Given the inconsistent manner in which the concept of community standards has been applied in the obscenity context, the courts will no doubt struggle similarly with attempting to define the relevant "prevailing community" whose standards relating to violence should be applied in determining whether a particular video game is "patently offensive" under §1746(d)(A)(ii). It would not be surprising for the same video game to be found "patently offensive" by one jury, and not "patently offensive" by another in the same geographic area – simply based on differing notions of the level of violence that may be accepted by prevailing community standards. As noted by Justice Stevens in *Ashcroft*, *supra*, the potential for inconsistent and arbitrary application of the concept of community standards, itself, renders the statute substantially overbroad. *Ashcroft*, 542 U.S. at 674. The amorphous notion of community standards – particularly when combined with the undefined concepts of "deviant" and/or "morbid" in the definitional provisions of the statute, renders it vague in all its applications, in addition to overbroad. *See*, *Chicago v. City of Morales*, 527 U.S. 41, 71 (1999) (Breyer, J., concurring) (ordinance was vague in all its applications where its terms provided undue discretion to law enforcement in every instance). Reliance on a concept such as "community standards" to separate protected from unprotected expression cannot stand – particularly outside the realm of obscenity.

B. The inability of online game retailers to geographically select the communities in which their games are made available for sale and download, at a minimum requires the application of national as opposed to local, community standards.

Section 1746.1 prohibits any "person" from selling or renting a video game that has been labeled as a "violent video game" to a minor. The statute, on its face, applies to *all* methods of sale and/or rental of video game content, including dissemination and delivery via the World Wide Web. Digital downloading of computer games has surged in recent years and has now reached parity with traditional brick and mortar retail sales.[18] Accordingly, the restriction on sale or rental of violent video games is just as likely to be applied to an online retailer in today's market environment.

In addition to the problems associated with arbitrary and inconsistent determinations of the geographic makeup of the community discussed

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[18] Chris Morris, *PC games surge in digital download*, VARIETY, July 22, 2010, http://www.variety.com/article/VR1118022025.html (last visited Sept. 10, 2010)

supra, a relatively new and unique constitutional concern has arisen with respect to application of community standards as a basis for evaluating expressive materials made available digitally, whether via the World Wide Web or other Internet-connected devices. This Court first recognized the concern in its decision invalidating the indecency provisions of the Communications Decency Act ("CDA") in *Reno v. ACLU*, 521 U.S. 844 (1997). The provision at issue in *Reno* attempted to regulate indecent or offensive communications on the Internet by relying on contemporary community standards to define the contours of the regulated expression. *Reno*, 521 U.S. at 858-60. In invalidating the statute on grounds of facial overbreadth, this Court listed as one of the considerations "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id* at 877-78. This would undermine the underlying rationale for incorporating the community standards element in the first instance; i.e., to allow each community to decide for itself what level of sexually explicit material to tolerate in the marketplace. *Miller*, 413 U.S. at 32-33.

The issue next presented itself in this Court's fractured decision in *Ashcroft v. ACLU*, 535 U.S. 564 (2002). There, this Court considered the constitutionality of the Child Online Protection Act ("COPA"), the successor to the CDA, which limited its application to material "harmful to minors" transmitted via the

World Wide Web "for commercial purposes." *Ashcroft*, 535 U.S. at 569. The Third Circuit Court of Appeal's decision leading up to this Court's consideration of the case held that the use of contemporary community standards, alone, rendered the Act unconstitutionally overbroad. *ACLU v. Reno*, 217 F.3d 162, 173-74 (3d Cir. 2000). The circuit court observed that "web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users." *Id* at 175. While this Court found that COPA's reliance on community standards does not "by itself" render the statute substantially overbroad under the First Amendment, *Ashcroft* 535 U.S. at 585, a majority of the sitting justices in that case viewed the application of local community standards as generating serious constitutional concerns.[19]

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[19] Justice O'Connor, in her specially concurring opinion, expressed concern over the possibility that use of local community standards will cause problems for regulation of obscenity on the Internet for adults as well as children, in future cases. *Id.* at 587. Justice Breyer agreed with Justice O'Connor that "adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler's Internet veto affecting the rest of the nation." *Id.* at 590. The remaining Justices in the majority joined with Justice Kennedy, who expressed concern over the national variation in community standards, and its particular burden on Internet speech. The lone dissenter, Justice Stevens, found that *any* reliance on community standards, even national standards, would not obviate the unconstitutional variances in the standards applied by jurors. *Id.* at 607 n.3.

The most recent circuit court decision to address the online community standards issues was *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009). There, the Ninth Circuit Court of Appeals applied the *Marks* rule announced in *Marks v. United States,* 430 U.S. at 193, to divine the holding from the fractured decision in *Ashcroft*: "When a fragmented court decides a case and no single rational explaining the result enjoys the assent of five Justices, 'the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Kilbride*, at 1254, citing *Marks*, quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15 (1976). The *Kilbride* case involved one of the first prosecutions for distribution of "SPAM" email containing obscene materials. In determining whether the emails were obscene, the court was required to consider a challenge to the jury instructions delivered by the trial court, and in so doing determine whether a local or national community should be utilized when evaluating material transmitted via the World Wide Web. In applying the *Marks* rule, the Ninth Circuit concluded that the holding in *Ashcroft* required that a national community standard must be applied in regulating obscene speech on the Internet. *Kilbride* at 1254. The court noted the constitutional problems identified by the five Justices in *Ashcroft* in applying local community standards to regulate obscenity and expressed "grave constitutional doubts" as to the use of such standards in online obscenity cases. *Id.* Accordingly, the court held that juries evaluating online obscenity must apply the standards of the nation as a whole, as opposed to a local community. *Id.*

FALA vigorously asserts that the challenged statute is patently unconstitutional, and cannot survive strict scrutiny given its attempt to strip video game media of its constitutional protection based solely on violent content. However, in the event that this Court were to consider expanding the categories of speech that can constitutionally be regulated by the government to include violent video games, the statute must be read to include a requirement of evaluating such media distributed via the Internet by national, as opposed to local, community standards. Online distributors of video game content throughout the United States, and throughout the world, will be unable to deduce the potentially conflicting community standards relating to the level of violence that is acceptable for viewing by minors – to the extent such standards can be said to exist.[20]

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[20] FALA does not concede that any viable community standard can be articulated or understood in this regard, particularly in light of the increasing lack of any articulable standards that can be quantified as shared by residents in a particular geographic area. For a critical discussion of the concerns generated by current use of community standards in obscenity cases, *see*, DeAnn M. Kalich; Rhonda D. Evans; Craig J. Forsyth, "Empirical Evidence, Community Standards, and the Boundaries of Obscenity: A Test Case," *Deviant Behavior*, 1521-0456, Volume 31, Issue 7, 2010, pp. 579 95.

Even if online video game retailers could divine the existence of some homogenous standard pertaining to violence, based on geographic location, they could not select their intended recipients in such a way so as to control distribution of their product by such location. The Court of Appeals for the Third Circuit has recognized that Web publishers do not have the means to limit consumption of digital material based on geographic location of the user. *Reno*, 217 F.3d at 175. Any attempt to identify the existence of community standards relating to violence is complicated by the fact that violence has never been approved as a valid basis for restricting or regulating the content of media. Accordingly, unlike obscenity and harmful materials, video game retailers do not have decades of case law and statutory interpretation available for such analysis. While FALA agrees with the position of former Justice Stevens in *Ashcroft* that irrespective of how the community is defined, any attempt to regulate material based on application of community standards renders the statute unconstitutional, FALA asserts that at a minimum, national community standards must be utilized to evaluate whether a particular video game falls within the purview of the challenged statute.

CONCLUSION

For all the foregoing reasons, the judgment of the circuit court below should be affirmed on grounds that the statute is facially unconstitutional under the First Amendment.

Respectfully submitted,

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No. 08-1448

In the Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN JR., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FIRST AMENDMENT SCHOLARS (PROFESSORS COLE, KARST, POST, REDISH, VAN ALSTYNE, VARAT AND WINKLER) AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF FIRST AMENDMENT SCHOLARS IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

The *amici curiae* are law professors who have written about the speech clauses of the First Amendment.[1] They teach at geographically diverse institutions and their perspectives on many issues are equally diverse. They share the conviction, however, that the First Amendment's free speech protections should not be undermined by imprecise legislation that responds to passing *causes célèbres* but that can have chilling effects that long outlast political and cultural fashion.

The *amici* are listed below along with their academic affiliations, which are included for informational purposes only. The views expressed in this brief are those of the *amici* alone, and do not necessarily reflect the views of the institutions where they teach.

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. See S. Ct. R. 37.6. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The sponsors and defenders of the California statute restricting the sale of "violent video game[s]" to minors, CAL. CIV. CODE §§ 1746-1746.5 ("the Violent Video Games Act"), maintain that the law escapes invalidity because it mechanically mimics the terms of minor-specific obscenity laws that have been upheld against void-for-vagueness challenges. But obscenity standards applicable to depictions of sexual conduct and excretory functions cannot constitutionally be transplanted to the culturally far different context of simulated violence.

The Violent Video Games Act borrows language approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which upheld a law that restricted the distribution of sexually themed material to minors. But the Court's opinion in *Ginsberg* rested on the premise that there was a broad and longstanding social consensus about what sort of sexually themed material was unsuitable for minors. It was this consensus that clarified the facially vague terms of the *Ginsberg* statute sufficiently to meet the constitutional standards prevalent at the time.

No such broad and longstanding consensus exists as to materials that depict violence. Thus, even if the "prurient interest," "patent offensiveness," and "serious value" tests are clear enough under existing law—perhaps just barely clear enough—to pass muster for sexually themed material, similar formulations are not clear enough when it comes to portrayals of violence.

Obscenity standards are not easy to define and apply with predictability and precision, even when applied to sexually themed speech. But deprived of their legal and cultural context, and instead applied to depictions of violence, the words used in the legal tests for obscenity provide no practical guidance.

Sellers of video games cannot adequately predict whether a game will be found to "appeal[] to a deviant or morbid interest of minors," as opposed to an acceptable interest in competition and fictional entertainment, perhaps coupled with an interest in dark humor. CAL. CIV. CODE § 1746(d)(1)(A)(i). They cannot adequately predict whether the game will be found to be "patently offensive to prevailing standards in the community" with regard to which cartoonish (and often absurdly exaggerated) depictions of violence are "suitable for minors." *Id.* § 1746(d)(1)(A)(ii). And they certainly cannot adequately predict whether a game—one that may have programmed into it many hours of potential twists and turns that may or may not be exposed in a game-player's first-person narrative—will be found, "as a whole, * * * [to] lack serious literary, artistic, political, or scientific value for minors." *Id.* § 1746(d)(1)(A)(iii).

Nor can video game creators or distributors simply transfer the common understanding underlying *Ginsberg* and this Court's obscenity jurisprudence to give meaning to the terms of the Violent Video Games Act. American culture has long treated depictions of violence and depictions of sex quite differently. Indeed, the differences are especially pronounced when it comes to the access of minors to materials with violent themes and those with sexual themes. Accordingly, terms that this Court has considered sufficiently definite in the context of depictions of sexual conduct remain vague when separated from their roots and applied to depictions of violence.

ARGUMENT

A statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply [it]." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). "[A] more stringent vagueness test" applies to statutes that "interfere[] with the right of free speech." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). This principle fully applies when the restricted audience consists of minors. As this Court recognized in voiding a different statute aimed in part at limiting minors' exposure to violent expression, "'it is * * * essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.'" *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 689 (1968) (quoting *People* v. *Kahan*, 206 N.E.2d 333, 335 (N.Y. 1965) (Fuld, C.J., concurring)).

By parroting obscenity standards, the Violent Video Games Act indirectly seeks to draw clarity from the "universal judgment that obscenity should be restrained." *Roth* v. *United States*, 354 U.S. 476, 485 (1957). But no such "universal judgment" about violent speech exists. Accordingly, under this Court's First Amendment precedents, the Act does not provide the constitutionally mandated measure of fair notice.

A. Current Obscenity Jurisprudence Relies on the Existence of a Social Consensus Regarding Depictions of Sexual Conduct.

This Court and courts throughout the United States have long grappled with how to define obscenity. See Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 311-325 (2008) (tracing development of obscenity law in the United States); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-16, at 906-912 (2d ed. 1988); William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960). Indeed, as one scholar observed, "between 1966 and 1973, the Court disposed of thirty-one cases" by "summarily revers[ing], via per curiam decisions, any conviction that at least five Justices, applying their separate tests, found to be unconstitutional." Eric Jaeger, *Obscenity and the Reasonable Person: Will He "Know It When He Sees*

It?" 30 B.C. L. REV. 823, 839-840 (1989). The resulting obscenity standard—which extends only to depictions of sexual and excretory conduct (see *Miller* v. *California*, 413 U.S. 15, 24-25 (1973))—relies on this history and the development of a social consensus to give meaning to its terms.

The petitioners thus misplace their wholesale reliance on *Ginsberg*. In *Ginsberg*, this Court upheld a statute that prohibited the sale of depictions of nudity, sexual conduct, and sadomasochistic abuse that "(i) predominantly appeal[ ] to the prurient, shameful or morbid interest of minors, and (ii) [are] patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) [are] utterly without redeeming social importance for minors." 390 U.S. at 646. That law added "of minors" (or a similar phrase) to each element of the then-existing obscenity standard, a standard soon thereafter modified in *Miller*.[2] We use the term "the *Ginsberg / Miller* formula" to refer to the rote addition of "of minors" (or the like) to each element of the *Miller* test in order to regulate the sale of sexually explicit material to minors. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 387 (1988) (quoting addition of "to" or "for juveniles" to each *Miller* element in Va. Code § 18.2-390(6) (1982)).

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[2] "The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24 (internal quotation marks and citations omitted).

The Court upheld the *Ginsberg* statute against void-for-vagueness challenge on the ground that "the New York Court of Appeals construed [the terms of the statute] to be 'virtually identical to the Supreme Court's most recent statement of the elements of obscenity'" in *Roth, supra,* and that the statute therefore "gives 'men in acting adequate notice of what is prohibited[.]'" *Ginsberg,* 390 U.S. at 643 (quoting *Roth,* 354 U.S. at 492). And in *Roth,* the Court concluded that the obscenity test "'conveys sufficiently definite warning as to the proscribed conduct when measured by *common understanding and practices.*'" 354 U.S. at 491 (quoting *United States* v. *Petrillo,* 332 U.S. 1, 7-8 (1947)) (emphasis added).

The Court likewise quoted *Roth*'s "common understanding and practices" language in concluding that the test enunciated in *Miller* "provide[d] fair notice" of what was illegal. 413 U.S. at 27 & n.10. And the Court relied on that language in *Hamling* v. *United States,* 418 U.S. 87 (1974), when it concluded that pre-*Miller* obscenity law was not unconstitutionally vague. *Id.* at 110-11.

Thus, the current law of obscenity-as-to-minors depends for its meaning—and for its constitutionality—on the existence of a "common understanding" regarding what depictions of sexual conduct meet the elements of the obscenity standard for adults and as a consequence are entirely unprotected. That "common understanding" also provides guidance as to the constitutional limits on efforts to draw the line between material suitable for minors and that suitable only for adults. But there is no "common understanding" with respect to what (if any) depictions of violence would meet the elements of the Violent Video Games Act's standard as to adults (that is, without the *Ginsberg*-inspired qualifiers), much less for minors. Indeed, with few and transitory exceptions (such as the late-Victorian reaction to explicit crime literature, and the comic-book hysteria of the early 1950s), the regulation of minors' exposure to depictions of violence has been a matter for families rather than the States.

B. The *Ginsberg/Miller* Formula Is Made More Administrable Precisely Because of Its Proximity to the *Miller* Test.

The *Ginsberg/Miller* formula is also made more predictable by its proximity to the *Miller* test. "The statute at issue in *Ginsberg* did not create an entirely new category of unprotected speech * * * ." *Video Software Dealers Ass'n* v. *Maleng*, 325 F. Supp. 2d 1180, 1186 (W.D. Wash. 2004). Rather, the formula "simply adjusts the definition of obscenity" to assess "the appeal of this type of material * * * in terms of the sexual interests of * * * minors." *Ginsberg*, 390 U.S. at 638 (citations and internal quotation marks omitted). Material that is obscene as to minors is more or less near-obscene material, defined by how closely it approaches speech that would be obscene for adults. Thus, the *Ginsberg* "statute was not unconstitutionally vague" precisely because it "merely incorporated a modified form of the adult test of obscenity previously enunciated by the Court"—a test that was sufficient to justify banning speech altogether. *Freedom of Speech and Association: Obscenity*, 82 HARV. L. REV. 124, 124-26 (1968).

But here there is no similar test from which to draw meaning. No test permits the government to categorically prohibit any expressive material as too violent even for adults. While the obscenity-as-to-minors standard rests on its relation to a category of speech that falls beyond First Amendment protection altogether, those categories are few and well-established. See *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010) (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct). Indeed, because those "historic and traditional categories" are "long familiar to the bar," this Court has declined to expand the list to include categories without the same social and legal grounding. *Ibid.* Depictions of violence are not among those "historic and traditional categories" of speech that can be prohibited outright, so that there is no point of reference that could serve as a baseline for an expanded prohibition as to minors.

As a result, the people whom the Violent Video Games Act seeks to regulate entirely lack benchmarks for deciding whether a particular work is unsuitably violent for minors. And this is so even if their neighbors who sell sexually themed material have a sufficient basis for deciding whether that material is unsuitably sexual for minors.

Under this Court's current jurisprudence, where there is a historic basis for an exception to free speech rights along with a continuing tradition of community standards that define a category of speech that constitutionally may be abridged, the First Amendment may tolerate the difficult line-drawing and less-than-perfect notice associated with the law of obscenity. But the Constitution cannot accommodate similarly obscure boundaries between protected and potentially unprotected speech with respect to violence, as to which there is no historical basis for an exception, and as to which there is no comparable tradition of community standards.

C. The Current Obscenity Standard Cannot Be Extended to the Culturally Distinct Context of Depictions of Violence.

1. *There Is No Developed Doctrine Supporting a Complete Ban on Depictions of Violence That Could Sustain Application of the* Ginsberg / Miller *Formula When Detached From Its Firm Roots in Obscenity Doctrine.*

By contrast with California's effort here to transplant the *Ginsberg / Miller* formula to the context of fictional portrayals of violence, this Court has recognized that "the *Miller* definition" itself is limited to "'sexual conduct.'" *Reno* v. *ACLU*, 521 U.S. 844, 873 (1997) (quoting *Miller*, 415 U.S. at 24). As the Seventh Circuit recognized, "[t]he notion of forbidding not violence itself, but pictures of violence, is a novelty"—at least where tests similar to the *Ginsberg /Miller* formula are concerned—"whereas concern with pictures of graphic sexual conduct is of the essence of the traditional concern with obscenity." *American Amusement Machine Ass'n* v. *Kendrick*, 244 F.3d 572, 575-76 (7th Cir. 2001).

This Court recognized a related point in striking down a prohibition on depictions of animal cruelty in *Stevens*: an ingrained social tradition of prohibiting offensive conduct does not necessarily reflect a similar, established social consensus supporting the prohibition of entirely fictional depictions of that conduct—much less what amount to well-rendered cartoon depictions. With violence to humans as with cruelty to animals, "despite widespread bans on" the conduct itself, "there is no tradition, much less a common standard, excluding 'depictions' of" the same conduct "from the category of protected speech." *Stevens*, 130 S. Ct. at 1584. The sole exception is when (as in child pornography that uses real children) "the creation of the speech is itself the crime" that is depicted in it. *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 254 (2002). See *New York* v. *Ferber*, 458 U.S. 747, 759 (1982) (finding constitutional a prohibition of child pornography that uses real children and thus records actual crime).

Thus, it might be permissible to prohibit the "snuff" films that purportedly document actual murders that were solicited and committed in order to create the films (at least if the murders were real).[3] Those films would fall within the established category of "speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Stevens*, 130 S. Ct. at 1586 (quoting *Ferber*, 458 U.S. at 761-62, and *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). But "there is no indication that [depictions of violence] have ever been excluded from the protection of the First Amendment or subject to government regulation," *Maleng*, 325 F. Supp. 2d at 1185, when the expression "creates no victims by its production." *Free Speech Coalition*, 535 U.S. at 250.[4] That is surely the case with animated depictions of violence in video games; when only virtual renderings of conduct are at issue, "there is no underlying crime at all." *Id.* at 254.

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[3] Compare Catharine A. MacKinnon, *Commentary: Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 33 n.61 (1985) (noting 1983 prosecution for snuff film) and 130 CONG. REC. 29169 (1984) (statement of Senator Specter introducing the Pornography Victims Protection Act) ("In the movies known as snuff films, victims sometimes are actually murdered."), with 2 JOSEPH W. SLADE, PORNOGRAPHY AND SEXUAL REPRESENTATION: A REFERENCE GUIDE 641 (2001) ("Frenzied searches and huge awards offered by the FBI and the Adult Film Association failed * * * to turn up any authentic snuff films * * *.").

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[4] Justice Frankfurter's dissent in *Winters* v. *New York*, 333 U.S. 507 (1948), reported that in 1948 about half the states had laws banning the distribution of "any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," *id.* at 521, though in practice they "ha[d] lain dormant for decades," *id.* at 511. Yet this uneven (and unenforced) series of prohibitions stands in sharp contrast with obscenity laws, which were present in almost all the states, *Roth*, 354 U.S. at 485 & n.16, and were enforced far more often than the crime story laws were, *Winters*, 333 U.S. at 513. Second, the Court held in *Winters* that the laws were themselves unconstitutionally vague, *id.* at 518-19, partly because they were *not* limited to sexually themed materials, *id.* at 520. See also *Interstate Circuit*, 390 U.S. at 681 (likewise striking down, again on vagueness grounds, a city ordinance that sought to regulate films that "[d]escrib[e] or portray[] brutality, criminal violence or depravity in such a manner as to be, in the judgment of the [Motion Picture Classification] Board, likely to incite or encourage crime or delinquency on the part of young persons"). And third, whatever social currents between 1880 and 1950 may have been reflected in the unconstitutional definitions in the crime-story statutes, the statutes' decades-long dormancy underscores their failure to embody abiding attitudes toward violent expression. Those laws, and the comparatively brief and inconsistent anti-violence passions they reflect, provide no practical guidance to a game designer or vendor confronted with the very different definition in the Violent Video Games Act today.

In any event, the prohibition of speech that is integral to criminal conduct bears no analytical relation to the obscenity-based standards in the Violent Video Games Act. And because there is no established history of altogether prohibiting depictions of violence, American society has not yet developed a "common understanding" of what depictions of violence violate community standards, appeal to a deviant or morbid interest, or lack serious value. Nor is there reason to believe that any consensus on objectionable depictions of sexual conduct can give adequate guidance about what depictions of violence are objectionable.

2. *American Law And Culture Treat Depictions of Violence Much Differently From Depictions of Sex.*

In fact, American culture accords radically different treatment to depictions of violence and depictions of sex. Few parents, for example, would strongly disapprove of their children's playing "Cops and Robbers"; but few would countenance their children's playing "Honeymooning Couples In The Bedroom," even if all the sex were as simulated as the violence in "Cops and Robbers." Indeed, children's theaters mount productions of the musical "Sweeney Todd"—where the protagonist-barber slits his customers' throats and bakes their flesh into meat pies—not just in New York or San Francisco, but in Fresno, California and Columbus, Ohio. See Donald Munro, *A Razor-sharp Production: Children's Troupe Takes on the Chilling "Sweeney Todd,"* FRESNO BEE 19, 2008 WLNR 14886164 (Aug. 8, 2008); Margaret Quamme, *Young Cast Accents Drama in Line with Bleak Subject,* COLUMBUS DISPATCH 08D, 2008 WLNR 13083269 (July 12, 2008) (discussing Columbus Children's Theatre's production of Sweeney Todd). Yet no children's theater would produce a work with overtly sexual themes—much less one involving simulated sex.

Likewise, Hollywood movies—including ones rated PG-13 or below—have long been much more tolerant of depicting violence than sex. Even in the era of routine censorship by industry codes, religious organizations, and local governments, films depicting violence were rarely banned or censored. See TOM POLLARD, SEX AND VIOLENCE: THE HOLLYWOOD CENSORSHIP WARS 184 (2009). "[T]he movie industry's permissive approach to violence and its strict approach to sex" may reflect "the split 'frontier mentality' relating to violence and the 'puritan streak' relating to sex in the American psyche." Jacob Septimus, *The MPAA Ratings System: A Regime of Private Censorship and Cultural Manipulation*, 21 COLUM.-VLA J.L. & ARTS 69, 84 (Fall 1996) ("For European audiences the taboo is violence while sex is seen as acceptable, while for American audiences the taboos are vice versa.").

Similarly, in the *Ginsberg* era, the common assumption was that it was shameful and morbid even for adults to *watch or read* about sexual behavior that would be perfectly proper for them to *engage in*: A film graphically depicting a married couple having sex may well have been obscene in many jurisdictions, though the depicted act itself was legal (and of course socially necessary). See, *e.g.*, *State* v. *Lebewitz*, 202 N.W.2d 648, 649-650 (Minn. 1972) (affirming convictions of theater owner and manager for "exhibiting an obscene motion picture entitled 'The Art of Marriage,'" which depicted "actual sexual intercourse demonstrated by two nude allegedly married male and female couples"); David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 53-54 (1974) ("It does not follow, of course, that obscene depictions are only of obscene acts. Normal hetero-sexual intercourse between a married couple is not typically viewed as obscene; but a public depiction of such intercourse would, by some people, be viewed as obscene."). But throughout American history, American society has had comparatively little objection to adults' viewing or reading about horrific violent behavior—such as piracy, torture, or murder—that would be criminally, even capitally punished, if engaged in.

Indeed, the one category of crime that until recently has been treated gingerly in American press accounts is sex crime. See HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES 27, 25 (1992) (up until the 1950s, "the press ran few stories about * * * sex crimes," unless "they occurred as the supposed reason for a lynching"). As a leading film critic observed, "those who believe in censorship are primarily concerned with sex, and they generally worry about violence only when it's eroticized." PAULINE KAEL, *Stanley Strangelove*, *in* DEEPER INTO MOVIES 373, 377 (1973).

And so petitioners and their *amici* predictably try to color the Court's perception of the broad and vague statute at issue by framing the objectionable content addressed by the Violent Video Games Act in a way that resonates with the *Miller* obscenity test's focus on sexual and excretory content. They cite scenarios in one game that involve the "[s]laughter [of] nude female zombies" (*Amicus* Br. of Louisiana, *et al.*, at 2), or the option of urinating on victims who have been set afire (Pet. Br. 3). In doing so, they follow a well-worn course for proponents of speech-restricting statutes that are not phrased in terms of obscenity; the proponents invoke sexual elements in order to make the ban seem more familiar and acceptable to this Court's First Amendment jurisprudence. Cf. *Stevens*, 130 S. Ct. at 1591 (noting that "the Executive Branch announced that it would interpret" a statute prohibiting depictions of animal cruelty to apply only to depictions "'designed to appeal to a prurient interest in sex'") (quoting Statement by President William J. Clinton upon Signing H.R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999)).

But of course the Violent Video Games Act is not limited to depictions of fictional violence with sexual overtones. And the overlap between sex and violence in some expressive works does not change the substantial differences in how depictions of sex and violence have been treated by American law and society.

One reason for the differing social and legal attitudes towards sexual content and violent content may be that people often watch or read pornography as a form of sexual stimulation—what one leading First Amendment scholar characterizes as a "sex aid" or "sexual surrogate." FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 181-82 (1982). The same may be true of games in which one pretends to engage in sexual acts. By contrast, watching or reading about violent acts, or playing games in which one pretends to engage in violent acts, is not itself a form of violence.

Of course, some think that the American cultural difference in attitudes towards sex and violence is unwise. People who take this view may believe that society *should* be patently offended by depictions of violence when those are shown to minors.

But what is important under this Court's analysis is that American society *in fact* widely accepts, and has long accepted, many depictions of violence in contexts where it has not accepted similar depictions of sex. So even if there is a shared understanding of what sexually themed material ought not be distributed to minors—a shared understanding sufficient to give relatively clear meaning to laws that focus on sexually themed material—no similar understanding can sufficiently clarify laws that try to adapt the *Ginsberg/Miller* formula to depictions of violence.

3. *The Differing Cultural Treatments of Violence And Sex Exacerbate the Unconstitutional Vagueness of Efforts to Apply a* Miller*-based Test to Animations Depicting Violence.*

This divergence between attitudes towards depictions of sex and attitudes towards depictions of violence helps explain the problems in applying the elements of the *Miller* obscenity test to depictions of violence. Consider the "morbid interest" prong. Of course, depictions of violence are not objectionable because of an appeal to the "prurient interest" mentioned in *Miller*—the "'shameful or morbid interest in nudity, sex, or excretion.'" *Roth*, 354 U.S. at 487 n.20 (quoting A.L.I., Model Penal Code § 207.10(2) (Tent. Draft No. 6, 1957)). As a result, the Act simply replaces "prurient" with "deviant or morbid." CAL. CIV. CODE § 1746(d)(1)(A)(i). See generally Kevin W. Saunders, *Media Violence and the Obscenity Exception to the First Amendment*, 3 WM. & MARY BILL

RTS. J. 107, 174 (1994) (advocating restrictions on depictions of violence and suggesting that, "[s]ince 'prurient' seems to have developed an attachment to sexual activities, * * * the best approach might be to substitute 'morbid or shameful' for 'prurient.'").

But the term "morbid interest" has "no clear meaning" in the context of violent video games. *Entertainment Software Ass'n* v. *Foti*, 451 F. Supp. 2d 823, 836 (M.D. La. 2006); *Entertainment Software Ass'n* v. *Granholm*, 426 F. Supp. 2d 646, 656 (E.D. Mich. 2006). Indeed, "deviant" and "morbid" interests in depictions of violence are much more difficult to identify and measure than "prurient" interests in depictions of sexual conduct: "[W]hereas prurience has a common reference point—'sex' and sexual stimulation—the same is not true of violence. Violence may evoke a variety of emotional reactions. Some persons may be stimulated by violent images, others, however, may be disgusted or revolted. Still others, may discern social commentary or sarcasm from the scenes of violence." Benjamin P. Deutsch, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101, 1155 (1994).

More broadly, the "appeal to the prurient interest" element of obscenity law captures an important facet of pornography: Much hard-core pornography is watched precisely because of a desire for sexual stimulation; there is little other appeal to it (especially when it lacks serious literary, artistic, political, or scientific value). But video games are chiefly played because they pose a challenge to the player. Whether the player is pretending to shoot Nazis, behead zombies, or race motorcycles, the underlying "interest" to which the works "appeal" is the desire to play a game—to compete, whether against others or the computer.

The "deviant or morbid interest" test in the Act thus requires one to look at whether a game that chiefly appeals to minors' interest in competition also appeals to some other interest that is deviant or morbid—an inquiry for which no standards are given. And any shared understanding of how the "prurient interest" test may play out as to hard-core pornography, which is consumed for very different reasons, provides no help in furnishing such standards.

The brief of the state *amici curiae* further illustrates how hard it is to identify a common understanding of what depictions of violence appeal to a minor's deviant or morbid interests—as opposed to the minor's acceptable sense of humor or entertainment—and therefore are unsuitable for minors. The state *amici curiae* worry that "[t]en-year-olds * * * may fail to grasp the satiric content in an exploding cat." *Amicus* Br. of Louisiana, *et al.*, at 2.

But generations of ten-year-olds have spent Saturday mornings watching fictional images of a coyote being crushed under a boulder, thrown off cliffs, flattened by a truck, and, yes, exploding, after the dynamite he is holding detonates—as "the fleet-footed Road Runner and his constant pursuer, Wile E. Coyote" entertained on network television. JEFF LENBURG, THE ENCYCLOPEDIA OF ANIMATED CARTOONS 401 (1995).[5] Those who insist on explosions involving *cats* can find them as well, as Sylvester the

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[5] See generally *To Beep or Not To Beep*, Looney Tunes: Golden Collection (DVD), Vol. 3, Disc 4.

Cat, in his pursuit of the canary Tweety, found himself shot in the rear end with a rifle, set ablaze after the rocket tied to his back exploded, and wounded by the detonation of the stick of dynamite he mistakenly swallowed.[6] Unsurprisingly, older minors may enjoy more elaborate (though still cartoonish) versions of the same theme, without having any trouble grasping the satire or dark humor in those depictions. And even the best-rendered video game is at bottom no more than a realistic cartoon.

Similarly, generations of minors have read the Spy vs. Spy comic strip in Mad magazine, where two spies try to kill each other with knives, grenades, guns, and bombs. See ANTONIO PROHIAS, SPY VS. SPY: THE COMPLETE CASEBOOK (2001). "[Video] games with their cartoon characters and stylized mayhem are continuous with an age-old children's literature on violent themes." *Kendrick*, 244 F.3d at 578.

The second prong of the current obscenity standard—"whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" (*Miller*, 413 U.S. at 24)—similarly loses its meaning when applied to depictions of violence. Society has long found something offensive in the distribution to minors of sexually arousing material. But that view does not smoothly translate to a minor's viewing of depictions of violence.

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[6] *A Bird in a Guilty Cage*, Looney Tunes: Golden Collection (DVD), Vol. 2, Disc. 3 (rifle and dynamite); *Ain't She Tweet*, Looney Tunes: Golden Collection (DVD), Vol. 2, Disc. 3 (rocket). See also *Gift Wrapped*, Looney Tunes: Golden Collection (DVD), Vol. 2, Disc. 3 (shot in the face).

Section 1746(d)(1)(B) of the Violent Video Games Act helps illustrate this point. That section makes it illegal to distribute to minors any video game that "[e]nables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim"—a test borrowed from one of the aggravating circumstances that may make murderers eligible for the death penalty. Pet. App. 6a.[7] The State conceded that this section is invalid because it lacks an exception for material that has sufficient value to minors. *Id.* at 6a n.5. But even if that exception had been included, Section 1746(d)(1)(B) would be unenforceably vague; the deeper problem is that there is no clearly understood way of applying concepts from laws that govern *real* killing to laws that govern depictions of *fictional* behavior.

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[7] Section 1746(d)(2)-(3) further defines some of the terms:

"(2) ... (A) 'Cruel' means that the player intends to virtually inflict a high degree of pain by torture or serious physical abuse of the victim in addition to killing the victim.

"(B) 'Depraved' means that the player relishes the virtual killing or shows indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim.

"(C) 'Heinous' means shockingly atrocious. For the killing depicted in a video game to be heinous, it must involve additional acts of torture or serious physical abuse of the victim as set apart from other killings.

"(D) 'Serious physical abuse' means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

"(E) 'Torture' includes mental as well as physical abuse of the victim. In either case, the virtual victim must be conscious of the abuse at the time it is inflicted; and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the victim.

What does it mean to "intend[ ] to *virtually* inflict a high degree of pain by torture or serious physical abuse," CAL. CIV. CODE § 1746(d)(2)(A) (definition of "cruel") (emphasis added), on a nonexistent character who, being fictional, is incapable of feeling actual pain? What does it mean for a player to "relish[ ] the virtual killing," *id.* § 1746(d)(2)(B) (definition of "depraved"), given that there is no actual physical act to be relished? Is it enough that the player may "relish" receiving 15,000 points in the game for the fictional killing?

Likewise, what does it mean to "show[ ] indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim," CAL. CIV. CODE § 1746(d)(2)(B) (definition of "depraved"), given that there is no actual victim that actually suffers, and given that indifference to the reconfiguration of 1s and 0s inside a computer is actually a psychologically proper reaction? Excessive empathy for a cartoon character in a video game would be more psychologically disturbed. What does it mean when the law defines "torture" to mean "mental as well as

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"(3) Pertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim."

physical abuse of the victim" in a situation where "the virtual victim [is] conscious of the abuse at the time it is inflicted," *id.* § 1746(d)(2)(E), given that "conscious[ness]" is not a meaningful characteristic of video game characters?

These definitions inadvertently illustrate—and highlight—the wide gulf between people's understanding of what is cruel, depraved, heinous, and thus "patently offensive" violence in real life, and what is "patently offensive" violence in fiction. Killing a real person by decapitating him is a horrific crime. Fictionally killing a fictional person-turned-zombie by fictionally decapitating a cartoon representation of the zombie is an act of no serious moral consequence to most people. There is therefore no reason to believe that there is any consensus about whether it is "deviant or morbid" for 17-year-olds to be "interest[ed]" in fictionally killing fictional zombies this way, or whether it is "patently offensive" under "community standards" for them to do so.

Moreover, this Court has observed that, under *Miller*, "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974). Instead, *Miller* "fix[ed] substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to * * * a determination [that material was patently offensive]," *ibid.*, by including examples of what would satisfy the patent offensiveness prong:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

> (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of genitals.

Miller, 413 U.S. at 25.

But it is not clear that any such limiting principles could help determine what depictions of violence are patently offensive:

> Patently offensive sex can be described with specific reference to organs and acts, regardless of dramatic context. The same limiting references, however, cannot be applied to violence. There are no corollaries to sexual organs or acts that would help the trier of fact determine whether or not certain violent acts are offensive under the second prong of *Miller*. Quite simply, there are too many variations of violence to derive a consistent, predictable and constitutional sound determination of what is *too* violent.

Deutsch, *supra*, at 1156.

And even if such narrowing rules are theoretically available, the Violent Video Games Act does not contain them. The statute does focus on video games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being," but that clause is far from a sufficient limit on the statute's scope. CAL. CIV. CODE § 1746(d)(1). Indeed, by including "killing" a video image, it encompasses entire genres of first-person war or adventure games.

The sexual conduct specified in the *Miller* examples was (when *Miller* was decided) a relative rarity in most movies. The *Miller* language thus narrowed the coverage of the statute to material that was fairly likely to be seen as appealing to the prurient interest, being patently offensive, and lacking serious value. Such narrowing helped "reduce[] the vagueness inherent in the open-ended term 'patently offensive.'" *Reno*, 521 U.S. at 873 (rejecting the application of the "patently offensive" element of *Miller* to a broader definition of indecent Internet communication).

On the other hand, mere "killing" of "an image of a human being" is commonplace in movies, including movies that are rated PG-13 or below. Indeed, "nearly all PG-13 films * * * contain significant amounts of violence," POLLARD, *supra*, at 187, as do such classics as the 1959 *Ben-Hur* and Errol Flynn's 1938 version of *The Adventures of Robin Hood*, which have never been seen as unsuitable for minors. See *ibid.* (reporting "high correlation between violent depictions and films made for children"). And it is commonplace in video games, including ones that have routine war-gaming themes. The Act's limitation to depictions of "killing" and other conduct therefore does not suitably narrow the zone in which the Act's other, far vaguer, provisions come into play.

* * * * *

To the extent obscenity statutes are not unconstitutionally vague, they require the existence of a "common understanding" (*Roth*, 354 U.S. at 491) about what sexual material is offensive, appeals to the prurient interest, and lacks serious value. But there is no common understanding as to what depictions of violent—as opposed to sexual—conduct satisfy the elements of obscenity. The Act, which seeks to regulate depictions of violence simply by adapting the existing obscenity standard, is therefore void for vagueness.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN JR., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE FUTURE OF MUSIC COALITION, NATIONAL ASSOCIATION OF MEDIA ARTS AND CULTURE, AND FRACTURED ATLAS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Future of Music Coalition ("FMC"), National Association of Media Arts and Culture ("NAMAC"), and Fractured Atlas (collectively, the "Arts and Music *Amici*") respectfully submit this brief as *amici curiae* in support of respondents Entertainment Merchants Association and Entertainment Software Association.

FMC is a national nonprofit organization that works to ensure a diverse musical culture in which artists flourish and receive fair compensation for their work, and in which fans can find the music they want. Founded in June 2000 by musicians, artist advocates, technologists, and legal experts, FMC works to ensure that musicians have a voice in the issues that affect their livelihood. FMC's work is rooted in the real-world experiences and ambitions of working musicians, whose perspectives are often overlooked in policy debates. FMC seeks to educate the media, policymakers and the public about issues at the intersection of music, technology, policy, and law, while bringing together diverse voices in an effort to identify creative solutions to challenges in this space. FMC also aims to document historic trends in the music industry, while highlighting innovative and potentially rewarding business models that will empower artists and establish a healthier music ecosystem.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made such a monetary contribution. This brief is filed with the consent of all the parties, pursuant to consents recorded in the docket as received from petitioners on May 10, 2010, and from respondents on May 27, 2010.

NAMAC was founded in 1980 by an eclectic group of media arts organization leaders who realized they could strengthen their social and cultural impact by working as a united force. Their idea was as bold as it was simple: to create a national organization that would provide support services to its institutional members, and advocate for the field as a whole. Since its founding, NAMAC has worked to raise the profile and influence of the media arts on behalf of its growing and changing membership. NAMAC members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, digital arts and online groups, and policy-related centers. Combined, these organizations serve approximately 400,000 artists and other media professionals nationwide.

Founded in 1998, Fractured Atlas is a non-profit organization that serves a national community of artists and arts organizations. Its programs and services facilitate the creation of art by offering vital support to the artists who produce it. Fractured Atlas is an arts industry leader in the use of technology to address challenges facing the arts community, share information and resources, and empower arts organizations with practical tools for managing their operations. The organization helps artists and arts organizations function more effectively as businesses by providing access to funding, healthcare, education and more, and works with talented but underrepresented voices in the arts to foster a dynamic and diverse cultural landscape.

Proper resolution of this case is a matter of concern to the Arts and Music *Amici* and their members. As explained herein, the positions advocated by the petitioners conflict irreconcilably with the First Amendment. Implementation of the challenged statute, and acceptance of its purported rationales, would contradict this Court's decisions regarding the protections that the First Amendment provides for fully protected forms of expression, including but not limited to video, audio, graphic, and literary works of art. Under a proper reading of the First Amendment and prior cases, the Court should affirm the decision of the Ninth Circuit, and should reject petitioners' invitation to create new categories of unprotected artistic expression and, thereafter, to permit the prohibition of the distribution of such expressive works to minors.

STATEMENT

The parties have set forth the procedural history and facts of the case in their submissions to the Court. Arts and Music *Amici* offer this Statement to provide details regarding the increasingly electronic and decentralized distribution and sale today of music and other forms of creative expression. Because of these relatively new and increasingly prevalent models for distributing protected speech, unconstitutionally vague laws such as the challenged statute here, California Civil Code Sections 1746 – 1746.5, would have especially chilling effects on the creation and exhibition of protected works distributed and sold in the current marketplace for artistic works of all varieties.

Each of the groups joining in the submission of this *amicus* brief work with a large number of partners in the creative cultural community, including individual musicians, arts organizations, venues and tech industry innovators. All of these partners, collaborators and allies are at the forefront of creating and delivering speech and content across multiple platforms. Inhibiting the creative environment in which this expression is facilitated, through the application of vague and unprecedented penalties for a newly unprotected category of materials (*i.e.*, violence that would be considered obscene as to minors), would interfere directly with artistic freedoms for all manner of creators.

Over the past two decades, government policymakers have frequently relaxed the media ownership rules for radio and television, which has led to a breathtaking amount of consolidation of both ownership and access to audiences for both of these media platforms. This has made it enormously difficult for the majority of creators to reach audiences through these media. By contrast, technological innovations inspired by the Internet have transformed how creators and content producers exercise their right to speech and facilitate the transmission of cultural and artistic material for both commercial and non-commercial purposes.

Historically, the cultural and music sectors have operated at a considerable disadvantage due to the inequities of a physical marketplace structured on a hierarchical system of gatekeepers. Traditional broadcast media such as commercial terrestrial radio and television have been notoriously reluctant to air potentially challenging content, due in large part to a relaxed regulatory environment that allowed for widespread consolidation among broadcast station owners and the subsequent loss of local programming autonomy.

Individual artists have long been dependent on intermediaries such as record labels, book publishers, motion picture studios and television networks to reach their audiences. This has come at a high price to artists. In exchange for taking the risk of investing in new and unknown artists, these aggregators have extracted a very substantial proportion of the revenues those artists help generate.[2] Thus, even successful musicians have historically received little revenue from sound recordings, and "performance remains the means by which most musicians are compensated for their talents." Troutt, *I Own Therefore I am: Copyright, Personality, and Soul Music in the Digital Commons*, Rutgers School of Law-Newark, Research Papers Series Paper No: 049, at 2, *accessed at* http://ssrn.com/ abstract=1462344 (2009) (footnote omitted).[3]

Technology has begun to transform how artists interact with their audiences. A widely held thesis, articulated in Chris Anderson's best-selling book,

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[2] While this statement focuses on musicians, similar circumstances apply to artists working in film and video.

[3] *See, e.g., Music on the Internet: Is There an Upside to Downloading?*, Hearing Before the S. Comm. on the Judiciary, 106th Cong. (2000) ("My performing work is how I make my living. Even though I've recorded over twenty-five records, I cannot support my family on record royalties alone.") (Testimony of Roger McGuinn, founder of The Byrds).

THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (Random House Business Books, 2006) is that

> with decreased barriers to entry on the Internet, consumers would have access to more music than ever before. The traditional structure—in which commercial success is enjoyed by only a small number of hits (making up the "head") while a large number of obscure independent songs are unable to achieve success due to record label market control (the "tail")—would be turned on its head, so to speak.
>
> * * *
>
> Based on his research, Anderson surmises that the concept of hit songs will give way to the new "micro-hit" market, in which music fans adopt a more diverse music appetite.

Day, *In Defense of Copyright: Creativity, Record Labels, and the Future of Music, accessed at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1609689, at 20-22 (citing Anderson, *supra*, at 33-34 and 50-52) (footnotes omitted).

While few predict the demise of traditional distribution channels, it is increasingly possible for artists to establish direct relationships with their fans.

> Internet tools have made it possible for [musical] artists who are completely outside of the traditional label system to make money from music. Fifteen years

> ago, if you didn't have a label and a management team, you were lucky to get a couple hundred bucks for a gig, where you could sell a few demo tapes or self-produced CD's (which cost hundreds or thousands of dollars to produce). Promotion involved stapling fliers to light poles and sending postcards through the mail—expensive, time-consuming, and not very effective.
>
> Today, you can create, distribute and promote your music to many more people for much less money—plus set up tours, sell merchandise, and find partners—all without leaving your computer.

Rosoff, *Does the Internet Help Aspiring Rock Stars*, http://news.cnet.com/8301-13526_3-10439710-27.html (Jan. 22, 2010). Alternative financing models, in which established artists typically retain greater proportions of literary rights, are emerging.[4] Emerging artists are finding ways to obtain startup money directly from their fans.[5] New distribution channels such as CDBaby afford artists a distribution channel even when only a few units are likely to be sold.[6] Social media sites such as MySpace and Facebook allow artists to communicate with their fans in real time.

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[4] *See, e.g.*, Bintliff, *Investment Fund Backs Singer's Album*, http://www.ft.com/cms/s/0/9a4102b8-2bb2-11df-a5c7-00144feabdc0.html (Mar. 10, 2010) ("Ms. Church said: '[The deal] provides me with a financial commitment equivalent to that of a major record company but with a much greater degree of control and ownership over my career.'").

[5] Websites like sellaband.com, pledgemusic.com, and kickstarter.com solicit funding in small amounts from large numbers of fans. Pledged investments or donations are payable only if a threshold amount is reached. Donors typically receive premiums such as signed CDs if the project goes forward.

A consequence of these changing distribution models, in which a large and increasing number of working artists function independently of traditional intermediaries, is that these creators do not have assistance in addressing legal issues that may arise. Thus, even more than videogame writers and publishers, musicians and visual artists lack the capacity to undertake the complicated analysis that would be required by provisions such as California Civil Code Sections 1746 – 1746.5. Moreover, however difficult it may be to apply the vague and amorphous standards here at issue to video games, it would be at least as challenging to apply any similar standards to music lyrics and videos, which often deal with far more symbolic and abstract themes.

These changing technologies have unleashed a new golden age of expression. More individuals than at any time in history have the ability to speak without the structural barriers that have to a large degree limited the scope of expression, creative and otherwise. Such exchanges often occur directly between speakers, which means that any attempt to curb this dynamic via arbitrary and vague content-based standards would be injurious to free expression.

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[6] CDBaby operates on a consignment basis, and never refuses an account because it is too small. According to its website, as of December 2009, more than 275,000 artists had sold music through CDBaby; it has sold more than 5 million CDs with a retail value in excess of 100 million dollars. *About Us*, http://www.cdbaby.com/about. The company also helps distribute digital downloads.

If the voices of America's creators were to be thus foreclosed from full participation in the national discourse, there would be a tremendous loss to communities across the country. The Arts and Music *Amici* firmly believe that the full cultural potential of artists and content producers may likewise be stymied if the exchange of art, ideas and information on technological platforms such as the Internet were restricted by laws such as the challenged statute here.

Were the vague statute adopted by the State of California to become a normative standard, that result would have a tremendous chilling effect on free expression within the cultural community. The net effect of such restrictive pressures is incalculable. Creators would be forced to speculate about how far their creativity and expression may extend before triggering a punitive response based on a vague and indecipherable statute, and may limit their expression accordingly. The burden of this loss would ultimately be shouldered by a public unknowingly deprived of access to a broad assortment of expression from a diverse array of speakers.

Artists are also consumers of television, radio, live performances, and Internet content, albeit with a heightened interest in observing and building upon the work of other creators in their industry. Be they painters, writers, playwrights, or television creators, artists do not work in isolation, but rather within the context of each other's works. Creators often build upon or distinguish their work from that of their peers. Thus, a critical aspect of the creative process is to have access to diverse and wide ranging work, which enables and fosters further creative expression. This access to original, wide-ranging creative work is what requires the strongest First Amendment protections.

The groups represented in this brief understand that the California statute applies at this time only to video games, and not to artists and musicians working in other media. Yet Arts and Music *Amici* recognize, as the Court must as well, that there is a thin line indeed between video games and other media content. For example, the music industry has struggled with issues regarding the labeling of musical content based on definitions of the suitability of its lyrics. Were the California statute upheld, it is possible to envision a scenario in which certain live performances by musicians, dance, or theatre organizations are unduly restricted.

If upheld, the California statute (or similar laws) could lead to a landscape in which 50 different states apply statutes defining "violent" speech in 50 different ways. Any legislative solution to harmonize standards may result in an extremely broad new category of restricted speech. More pressing is the concern that the adoption of state statutes governing depictions and descriptions of violence could create a slippery slope in which, for example, a local theatre company might halt production of a play for fear of exceeding limits on the "distribution" of certain imagery and language to minors.

While the subjectivity of the definition of violent video games in the California statute is certainly an issue that could produce artistic self-censorship, the lack of specificity regarding the method and means of content distribution is also of tremendous concern for creators and producers of all stripes. Presently, the most attractive new market for artists and content providers is the digital realm. A statute pinned to distribution of physical copies of a work, and which does not acknowledge or account for the inherent differences between such physical distribution and online distribution across all market platforms, could quash the distribution opportunities for and even chill the production of original creative works, stifling innovative online business models in the process. If such a statute imposes penalties on brick and mortar distributors, would the same penalties apply to online creators and distributors for products not amenable to any physical labeling? The answer to that question is unclear.

The musicians and independent music labels, filmmakers, writers, and arts and service organizations that make up today's creative community all depend on the Internet to conduct business and contribute to the rich tapestry that is American arts and culture. Since its inception, the Internet has represented a powerful tool for the exchange of information and ideas, and in recent years, its structures have contributed greatly to the emergence of novel platforms for the dissemination of creative content. As the digital marketplace matures, it is essential not to prevent growth through restrictive legislation and vague restrictions on speech.

SUMMARY OF ARGUMENT

The video games much discussed by Petitioners and their *amici*,[7] and briefly described in the decision below,[8] are not on trial in this case. Some such games undoubtedly do contain violent imagery and content. They may be objectionable to not a few members of society, and may be deemed unsuitable for minors by such minors' parents. Whether these "violent video games" (in the parlance of the invalidated California statute) are in fact objectionable is not at issue here.

Rather, the question before the Court is whether a state may enact a clearly and concededly content-based restriction on protected speech, attempting to ameliorate the presumptively invalid nature of such a restriction through the use of two disparate and ultimately ineffective tactics for overcoming that presumption. Petitioners first claim that a different standard of review should apply to laws prohibiting the distribution of such expression to minors. If that argument prevails—and it did not in the decision below—petitioners still must rely on terms borrowed from cases regarding the regulation of sexually explicit materials to craft a new regime for the regulation of putatively violent materials. In sum, they must resort to language heretofore undefined in the context of descriptions and depictions of violence in order to narrow the statute and overcome the inherently vague nature of its basic proscriptions.

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[7] *See* Pet. Br. at 3-4; *see, e.g.*, Br. for *Amici Curiae* Louisiana, Connecticut, Florida, Hawaii, Illinois, Maryland, Michigan, Minnesota, Mississippi, Texas, and Virginia at 1-2.

[8] *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 955 (9th Cir. 2009).

The state's content-based restriction here created an entirely new and unprecedented category of unprotected expression. It limited the sale and distribution to minors of expression purportedly fitting within an irremediably vague and ill-defined category of "violent video games," and required distributors of such material to adhere to a labeling requirement expressly tied to the distribution of physical copies of affected works.

The respondents have discussed at length the first element above: the contention that a different standard of review should apply for distribution of such materials to minors. Other *amici* supporting respondents likely will answer petitioners' contentions on this point as well. The Ninth Circuit correctly declined to adopt the lesser standard promoted by petitioners, and its decision should be affirmed on the ground that the challenged statute is a content-based restriction that fails both prongs of the strict scrutiny test.

Having found that the statute violated the First Amendment on that basis, the Ninth Circuit did not reach the question of the statute's precision, or lack thereof. In the event that this Court does have occasion to consider whether the statute is impermissibly vague, however, the statute fails that test as well. The vagueness inquiry is distinct from, yet related to, the strict scrutiny analysis. Whether or not the limiting language imported wholesale into the statute from laws prohibiting the distribution of obscenity would be considered vague in the context of sexually explicit materials, these limitations are impermissibly vague in the context of heretofore protected speech such as "violent video games" and likewise would be vague with respect to other forms of artistic expression depicting or describing violence. The basic proscriptions in the statute are unclear, and the limitations intended to narrow them fail to do so sufficiently.

As a result, in today's marketplace for distribution of ideas described above, *see supra* at 3-11, a vague law such as the statute at issue here would chill a wide range of artistic, political, and commercial expression fully protected by the First Amendment.

ARGUMENT

I. THE STATUTE IS IMPERMISSIBLY VAGUE, AND WOULD CREATE A NEW CATEGORY OF UNPROTECTED SPEECH.

A. Vague Laws Prohibiting Expressive Conduct Violate the First Amendment.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Williams*, 553 U.S. 286, 304 (2008) ("Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause...."). The Court in *Grayned* explained that

> where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone...

> than if the boundaries of the forbidden areas were clearly marked.

Grayned, 408 U.S. at 109 (internal quotation marks omitted; alterations in original).[9]

In the context of laws pertaining to curtailment of expression, vague prohibitions are problematic for at least two other reasons as well: they do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and thus "may trap the innocent by not providing fair warning"; and they "impermissibly delegate[ ] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-109.

In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court invalidated provisions of the Communications Decency Act ("CDA")[10] ostensibly designed to prohibit the transmission of not only obscene but also indecent material to minors. Without reaching Fifth Amendment vagueness issues presented by the statute and discussed in the decision under review in that case, *see id.* at 864, the

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[9] The *Grayned* Court cited and quoted at length from several earlier cases for these basic propositions of law, including *Interstate Circuit v. Dallas*, 390 U.S. 676, 684 (1968); *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Smith v. California*, 361 U.S. 147, 150-152 (1959); *Speiser v. Randall*, 357 U.S. 513, 526 (1958), *Winters v. New York*, 333 U.S. 507 (1948); and *Stromberg v. California*, 283 U.S. 359, 369 (1931).

[10] 47 U.S.C. § 223(a) (1994 ed., Supp. II).

Reno Court nonetheless found that "the many ambiguities concerning the scope of [the CDA's] coverage render it problematic for purposes of the First Amendment." *Id.* at 870. Echoing *Grayned*, the Court in *Reno* once again noted that the vagueness of any content-based regulation of speech "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Id.* at 871-872; *see also NAACP v. Button*, 371 U.S. 415, 432-433 (1963) (noting in the context of a criminal statute that "[t]he objectionable quality of vagueness...does not depend upon absence of fair notice...or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application").

Because First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society" and "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," the Court has determined that these freedoms "need breathing space to survive" and, therefore, that "government may regulate in the area only with narrow specificity." *NAACP*, 371 U.S. at 433 (internal citations omitted). As explained in greater detail hereafter, the California statute invalidated by the court below does not possess the requisite specificity, and therefore must be deemed invalid for vagueness if this Court reaches that issue. The *Williams* decision indicated that "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." 553 U.S. at 304 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). Nevertheless, as *Williams* makes clear, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306.

That is precisely the problem with the challenged statute here. No court has determined the facts that might place certain games within the category of materials for which the invalidated law prohibits distribution to minors. Petitioners themselves have been unwilling or unable to determine whether particular video games described and included in the record below are in fact "violent video games" under the statute.[11] The statute is void for vagueness because of the undefined terms used to describe material deemed unsuitable for minors, and because of the ill-defined limiting factors approved in cases dealing with sexually explicit materials but inaptly borrowed now for violent imagery.

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[11] Despite petitioners' repeated incantation of the violent imagery and plotlines in some video games, respondents noted in their brief in opposition to the petition for *certiorari* that "the record does not contain even a single game that Petitioners can claim would be covered by the statute." Resp. Br. in Opposition at 18; *see also id.* at 18 n.4 ("Respondents placed six video games containing depictions of violence into the record, but Petitioners have refused to say whether they would be covered by the Act. The State's hesitancy on this score points to the Act's vagueness.")

B. The Court's Decisions Have Confined Obscenity to Sexually Explicit Materials, and Petitioners' Invitation to Expand That Category Would Result in Vague Prohibitions.

Arts and Music *Amici* do not undertake discussion in depth of the strict scrutiny analysis that the Ninth Circuit utilized to invalidate the challenged statute, nor that court's rejection of the petitioners' argument for use of the "variable obscenity" standard adopted in *Ginsberg v. New York*, 390 U.S. 629 (1968). Nevertheless, Arts and Music *Amici* do note that the Ninth Circuit's analysis regarding the limits of the obscenity doctrine were correct, because the limits articulated in the Court's obscenity jurisprudence and recounted by the Ninth Circuit are relevant to the vagueness analysis.

As the decision on review here explained at length, "[t]he Supreme Court has carefully limited obscenity to sexual content. Although the Court has wrestled with the precise formulation of the legal test by which it classifies obscene material, it has consistently addressed obscenity with reference to sex-based material." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d at 959 (citing *Roth v. United States*, 354 U.S. 476, 487 (1957) ("Obscene material is material which deals with sex in a manner appealing to prurient interest); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966)). The Ninth Circuit decision also looked to *Miller v. California*, 413 U.S. 15, 24, (1973), which postdated *Ginsberg* and definitively confined the permissible scope of the obscenity doctrine to sexually explicit materials. *See id.* at 23-24 ("We acknowledge [ ] the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct.") (internal citation omitted).

Petitioners claim that *Winters v. New York*, 333 U.S. 507 (1948), preserves states' ability to limit minors' access to "offensively violent material." Pet. Br. at 42 & n.6. Conceding that the *Winters* Court struck down the law challenged in that decision on vagueness grounds, petitioners nonetheless maintain that the statute's objective of preventing the distribution of violent materials to minors did not trouble the Court. *See id.* Whether the Court was troubled by such legislative motives in 1948, however, some twenty-five years later it clearly confined the permissible scope of obscenity regulations to sexually explicit materials.

The *Winters* Court concluded by indicating in *dicta*: "To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, ***assuming that it is not protected by the principles of the First Amendment***, by the use of apt words to describe the prohibited publications." *Winters*, 333 U.S. at 520 (emphasis added). Of course, a state may adopt any content-based restriction that it likes for objectionable materials, provided that such presumptively invalid restrictions pass strict scrutiny. However, *Miller* and *Winters* taken together demonstrate that the "variable obscenity" test petitioners would apply here has not been made applicable by the Court to depictions of violence. *Winters* stands for the proposition that definitive statutes may prohibit the distribution of materials not protected by the First Amendment, and *Miller* does not include violent content within the scope of such unprotected materials.

Thus, in *Miller*, the Court adopted the now-familiar three-pronged test for obscenity, noting that statutes prohibiting such unprotected material "must be ***specifically defined*** by the applicable state law," *id.* at 24 (emphasis added), and that materials must be limited to works which "appeal to the prurient interest in sex, [ ] portray sexual conduct in a patently offensive way, and...do not have serious literary, artistic, political, or scientific value." *Id.* Arts and Music *Amici* support but do not discuss in detail the Ninth Circuit's holdings with respect to *Ginsberg* and *Miller*. Yet, without regard to the standard of scrutiny this Court adopts, wholesale importation of the *Miller* test into a statute purporting to regulate materials depicting violence rather than sex does not suffice to define with requisite specificity the prohibitions that California intended to enforce under the invalidated law. *See infra* Part II.A.

C. Vague Content Restrictions Cannot Withstand Review Merely Because Speech Is Objectionable, or Because It Is Made Unlawful In Some Way by the Challenged Statute Itself.

As the Court has long recognized, even disfavored or objectionable speech—and, perhaps, especially such disfavored forms of expression—need and must receive the protections afforded by the First Amendment. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 310-311 (1940). Moreover, laws intended to prohibit or restrict speech that some or even most members of society would find objectionable must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *See id.* at 311.

Petitioners note in their merits brief here that "[o]ffers to engage in illegal behavior are...unprotected since 'offers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection.'" Pet. Br. at 33 (quoting *Williams*, 553 U.S. at 298). While this may be so, petitioners cannot by way of circular reasoning determine that the distribution of violent video games to minors is unlawful activity—hence, unprotected by the First Amendment—just because the challenged statute itself makes such distribution unlawful. *Williams* dealt with offers to distribute child pornography depicting actual children, with the Court there holding that "offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment." *See id.* As explained in Part I.B *supra*, this Court has not deemed unlawful (or otherwise placed outside of the protections of the First Amendment) expression concerning but not inciting[12] violence.

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[12] The decision below indicated that petitioners have abandoned their claim that the state relies on a "compelling interest" in "preventing violent, aggressive, and antisocial behavior" to support this content-based restriction. *Video Software Dealers Ass'n*, 556 F.3d at 961. That decision also explained in a footnote the confusion and disagreement between the parties during the case as to the application of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See Video Software Dealers Ass'n*, 556 F.3d at 961 n.15. Because the state apparently no longer relies on the suggestion that minors' exposure to "violent video games" would cause such minors to engage in violent and

Likewise, earlier this year the Court reaffirmed the limited number of classes of speech that go unprotected by the First Amendment, declining to add something as likely objectionable as depictions of animal cruelty to that list. *See United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) ("As the Government notes, the prohibition of animal cruelty itself has a long history in American law,... But we are unaware of any similar tradition excluding ***depictions*** of animal cruelty from 'the freedom of speech' codified in the First Amendment[.]") (emphasis in original). As the Court there explained, its decisions in this area "cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment" merely because such speech depicts an unlawful activity. *Id.* at 1586. The *Stevens* Court thereafter invalidated the statute at issue in that case as overbroad, in violation of the First Amendment. *See id.* at 1592.

The Ninth Circuit therefore correctly declined to create a new category of unprotected speech in the case below. Any result to the contrary in the instant case would strike an improper balance with regard to the delicate, vulnerable, and precious free expression that the First Amendment guards. The threat of wholly new sanctions for presently protected descriptions and depictions of violence would deprive a wide range of creative works distributed in today's market of the "breathing space" that the creators and distributors of these works need. Such sanctions, if upheld for the first time for putatively violent mate

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lawless behavior, petitioners citation to laws restricting incitement are of no weight. *See* Pet. Br. at 14.

rial rather than sexually explicit material, would open the door to content-based regulation of heretofore protected material, and to a range of vague statutes purporting to limit access to "obscene" violence in forms of artistic expression other than video games.

II. THE STATUTE'S DEFINITIONS COMPOUND RATHER THAN CURE ITS VAGUE PROSCRIPTIONS.

A. Other Courts Have Found Similar Statutes Restricting Depictions of Violence to be Vague, Even When Such Laws Import *Miller* Test Provisions.

Although the Ninth Circuit did not reach the question of the statute's vagueness, having affirmed invalidation of the content-based restriction on other grounds, courts that have considered similarly worded statutes have found them to be impermissibly vague in the context of depictions and descriptions of violence.

For example, the California statute restricts the distribution to minors of "violent video games" that allow game players to commit violence against "an image of a human being," provided that such games (i) taken as a whole "appeal[ ] to a deviant or morbid interest of minors," (ii) are "patently offensive to prevailing standards in the community as to what is suitable for minors," and (iii) "as a whole, [ ] lack serious literary, artistic, political, or scientific value for minors" because of the violence depicted. *See* Cal. Civ. Code § 1746(d)(1)(A).[13]

When considering similar language in other states' statutes that likewise attempted to prohibit in some fashion the distribution of violent video games, reviewing courts have uniformly found limitations akin to those adopted by the California legislature to be impermissibly vague in the context of violent content. *See, e.g., Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1077 (N.D. Ill. 2005) (finding that prohibition of games depicting violence against humans was vague in the context of a fanciful medium that often depicts non-human and superhuman characters); *see also Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 656 (E.D. Mich. 2006); *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 836 (M.D. La. 2006). Perhaps especially in video games, but in any form of art depicting characters that are non-human, superhuman, and everything in between, a statute that restricts the distribution of materials showing violence against an image of a human being would be vague and difficult to administer even for courts, let alone for individual creators and artists attempting to discern in advance if their fantastical or symbolic narratives might fall within the strictures of such laws.

Likewise, the limiting factors that California borrowed from *Miller* and its progeny have little if any discernible meaning in the context of violent rather than sexually explicit materials. Thus, in *Video Soft-*

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[13] Petitioners have conceded that the definition adopted in Cal Civ. Code § 1746(d)(1)(B) is unconstitutional. *See Video Software Dealers Ass'n*, 556 F.3d at 954 n.5

ware Dealers Ass'n v. Webster, 968 F.2d 684, 689 (8th Cir. 1992), the Eighth Circuit affirmed the invalidation of a Missouri statute found to be "unconstitutionally vague." The *Webster* decision explained first that a state's "assertion that the statute aims to protect minors does not change the vagueness analysis." *Id.* at 690 (citing *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968)). The Eighth Circuit then went on to refute Missouri's claim that adopting the *Miller* test and merely substituting the word "violence" for the term "sexual conduct" could rescue the statute, with the court noting that phrases such as "morbid interests in violence" were elusive and vague at best in this context. *See id.* at 690; *see also Granholm*, 426 F. Supp. 2d at 655-56; *Foti*, 451 F. Supp. 2d at 835.

The Communications Decency Act provisions at issue in *Reno* concerned sexually explicit materials rather than depictions of violence, but the Court found that statute to be impermissibly vague because it failed to define proscribed material specifically. *See Reno*, 521 U.S. at 873. Moreover, the Court noted that the *Miller* test criteria concerning prurient interests and patently offensive material are inherently subjective and fact-based determinations, whereas the serious literary, artistic, political, or scientific value determination at least sets "a national floor for socially redeeming value." Whatever the merit of these criteria in the context of obscenity cases dealing with sexually explicit material, the subjective nature of the first two prongs and the untested nature of the redeeming value test in statutes about violent material make all three components of the *Miller* test hopelessly vague for creators of content who would have "no reasonable opportunity to know what is prohibited." *See Grayned*, 408 U.S. at 109.

B. Artists Today Are as Likely as Not To Serve as Distributors, and Are Ill-Positioned to Parse Language That Perplexes Even Appellate Advocates and Judges.

Such vague prohibitions on distribution are especially problematic in light of the manner in which artists now distribute their work online, often bypassing retailers, studios, and other gatekeepers and making materials available directly to fans and consumers. Artists can more or less instantaneously create and distribute their works today, but vague statutes such as the invalidated California prohibition at issue here would chill expressive activity and curtail lawful speech. Laws prohibiting the distribution to minors of violent video games, if upheld, would lead inexorably to the enactment of new statutes prohibiting violent depictions or descriptions in other artistic media.

Independent artists now work quite often without the need, desire, or ability to consult with record labels, film studios, or publishing houses that might provide agents and lawyers devoted to the study of such proscriptions.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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ARNOLD SCHWARZENEGGER, in his official capacity
as Governor of the State of California, and
EDMUND G. BROWN, JR., in his official capacity
as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and
ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF OF *AMICUS CURIAE* ID SOFTWARE LLC IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Id Software LLC ("Id Software") is a limited liability corporation organized under the laws of Delaware.[1] It has been recognized as a pioneer in the creation and development of video games. *See Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1109 n.1 (9th Cir. 1998). Id Software has also been active in explaining why the First Amendment protects video games as much as any other artistic medium, having been a party in *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), and *Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002). It also submitted a brief *amicus curiae* in *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003).[2] In addition, two briefs submitted in the instant case make specific, negative references to Id Software's work. *See* Brief of *Amicus Curiae* Eagle Forum Educ. & Legal Def. Fund in Support of Petitioners, 2010 WL 2895470, at *11, 13 ("Eagle Forum") (referring to the video game *Doom*); Brief of *Amici*

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[1] No counsel for a party wrote this brief in whole or in part, nor did any person or entity, other than *amicus curiae*, its counsel, or its corporate affiliates, make a monetary contribution to its preparation or submission. The parties have given their written consent to the submission of this brief. Evidence of such consent is on file with the clerk.

[2] Id Software LLC is a subsidiary of ZeniMax Media Inc., a corporation organized under the laws of Delaware. On June 23, 2009, Id Software LLC acquired substantially all of the assets of Id Software, Inc. All references herein to "Id Software" prior to June 23, 2009, are to Id Software, Inc.

Curiae California State Senator Leland Yee, Ph.D. et al., 2010 WL 2937557, at *13 (referring to the video game *Wolfenstein 3D*). These *amici* have thus put Id Software's interests directly at issue.[5]

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[5] *Doom* is widely seen as having revolutionized the medium. *See* Thierry Nguyen, *The CGW Hall of Fame*, Computer Gaming World, Feb. 1, 2001, at 62 (emphasis added):

> For the population at large, the events that people knew would change history were the assassination of J.F.K. and the fall of the Berlin Wall. For gamers, it was seeing Doom. . . . Doom was the product of a small group of developers at id Software, but we all know who created the underlying technology. John Carmack's reputation as a programming wunderkind was founded the moment Doom went live (and subsequently crashed several servers due to overwhelming demand). *This is all the more remarkable considering that most of his programming knowledge was self taught.*

In its brief, *amicus* Eagle Forum asserts that *Doom* was responsible for the tragedy at Columbine, despite the fact that a federal court sitting in Colorado reached precisely the opposite conclusion in a published decision. *See Sanders v. Acclaim Entm't Inc.*, 188 F. Supp. 2d at 1276. As the court concluded in that case, "no reasonable jury could find that the Video Game and Movie Defendants' conduct resulted in Mr. Sanders' death in the natural and probable sequence of events." *Id.* (internal quotation marks omitted). *See* Brief of *Amicus Curiae* Eagle Forum in Support of Petitioners, at *11.

Citing David Grossman, Eagle Forum also makes the untoward claim that "the Marine Corps use a modified version of [*Doom*] to teach recruits how to kill." *Id.* The thesis behind Lt. Colonel Grossman's claim has been ably refuted. As Henry Jenkins of the Massachusetts Institute of Technology asks, "where is meaning, interpretation, evaluation, or expression in Grossman's model? Grossman assumes almost no conscious

(Continued on following page)

This brief addresses the issues raised by California's Civil Code § 1746 *et seq.* from the perspective of individuals who create and develop video games, whose livelihood depends on such activity, and one of whose primary forms of expression consists of such activity. The statute under review not only threatens their expression, but also threatens to destabilize an artistic movement of which these individuals form part of the vanguard.[4] A decision by this Court affirming the Ninth Circuit would protect important constitutional interests, confirm the status of video games

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cognitive activity on the part of the gamers, who have all of the self-consciousness of Pavlov's dogs." Henry Jenkins, *Fans, Bloggers, and Gamers: Exploring Participatory Culture* 211 (2006).

[4] Id Software plays a prominent role in the world of video games, and its simplest decisions can have ramifications across the medium. *See* Seth Schiesel, *Going a Few Rounds With the Newest Console*, N.Y. Times, Oct. 8, 2005, at D7 (reviewing a trade show).

> It is difficult to overstate the long-term importance of Id Software's announcement here that for much of the development for the next version of its Castle Wolfenstein series, the company is using the [Xbox] 360's software creation tools rather than PC software tools. "The Xbox 360 is the first console that I've ever worked with that actually has development tools that are better for games than what we've had on PC," John Carmack, Id's technical director, said in a videotaped announcement. In the world of game development, that was a bombshell akin to one of the snobbiest restaurants in Paris's announcing that it would start recommending mostly American wines.

as a fully protected form of expression, and substantially serve the interests of Id Software.

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SUMMARY OF ARGUMENT

As a matter of content and form, video games are a projection of such traditional media as literature and film, both of which the First Amendment protects in full. In fact, the themes on which video games rely are staples of fiction. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir. 2001) (*Kendrick*) (giving the examples of "[s]elf-defense, protection of others, dread of the 'undead,' [and] fighting against overwhelming odds"); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) (*IDSA*). This being true, this Court could not deny full protection to video games without making an artificial distinction among forms of art.

This Court would not ask whether a book or film lacks serious value, either for minors or for adults. The First Amendment fully protects such works, leaving the individual to decide what his or her expressive fare will be. As this Court has made clear, the First Amendment does not permit any department of the government, or even a majority of the voters, to dictate the expressive activities of others. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) (observing that a weakened First

Amendment "would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups"). In fact, this Court should abhor such a notion, if only to avoid the nightmare of having to make the kind of ephemeral distinctions that such an endeavor would entail. In light of this, and in light of the conceptual continuity between video games and traditional artistic media, the state may not regulate video games for an asserted lack of "serious . . . value" unless it can overcome strict scrutiny. Cal. Civ. Code § 1746(d)(1)(A).

Numerous lower courts have reached this very conclusion, and this Court should confirm the correctness of their decisions. Video games are a form of art presumptively entitled to the protection of the First Amendment. Moreover, this exercise of freedom falls into no category of unprotected speech. They are not incitement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), and *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam); they are not obscene as per *Miller v. California*, 413 U.S. 15, 23-24 (1973); they do not constitute "variable obscenity" under *Ginsberg v. New York*, 390 U.S. 629, 641 (1968), which requires an explicit sexual component; and they are not "fighting words" within the rubric of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Cohen v. California*, 403 U.S. 15, 20 (1971).

The distinctive characteristics of video games do not affect the foregoing analysis. A game can be every bit as expressive as any other work of art. In addition, to seek to deny protection to video games because of their interactivity mistakes a virtue for a flaw. As more than one court has recognized, expression is enhanced by interactivity. *See, e.g.*, *Kendrick*, 244 F.3d at 577 ("All literature . . . is interactive; the better it is, the more interactive.").

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ARGUMENT

I. VIDEO GAMES HAVE THE SAME CLAIM TO CONSTITUTIONAL PROTECTION AS TRADITIONAL FORMS OF CREATIVE EXPRESSION.

No legislature subject to the First Amendment could prohibit a minor from purchasing a copy of the *Iliad*. After all, the *Iliad* is a bedrock of western civilization and a staple of many a curriculum. But the *Iliad* – actually read – is not a polite book. People die horrible deaths in this epic, after they have cooperated with their killers, after they have begged for mercy, after we have learned about their loving families. Consider the fate of Dolon, a young man caught spying by the Greeks. After he has helped his captors, revealing his comrades' positions, he learns that Diomedes will do away with him:

> With that, just as Dolon reached up for his chin
> to cling with a frantic hand and beg for life,
> Diomedes struck him square across the neck –

> a flashing hack of the sword – both tendons snapped
> and the shrieking head went tumbling into the dust.

Homer, *The Iliad*, Book 10, Lines 523-27 (Robert Fagles trans. 1990) (*Fagle's Iliad*). To describe this scene as "graphic" or "violent" – "a flashing hack of the sword" – "both tendons snapped" – a "shrieking head went tumbling into the dust" – is almost superfluous. The imagination allows us to see and hear Dolon's decapitation.

The *Iliad* is full of such images, for Homer does not flinch in his descriptions. A god does not simply walk in anger. Instead, "arrows clang[ ] at his back as [he] quake[s] with rage." *Id.*, Book 1, Line 53. And this goes as much for violence as for anything else. In the *Iliad*, as Fagles has noted:

> There is no attempt to gloss over the harsh realities of the work of killing . . . and no attempt, either, to sentimentalize the pain and degradation of violent death. . . . Men die in the *Iliad* in agony; they drop, screaming, to their knees, reaching out to beloved companions, gasping their life out, clawing the ground with their hands; they die roaring, like Asius, raging, like the great Sarpedon, bellowing, like Hippodamas, moaning, like Polydorus.

Id., Introduction, at 26. Rodney Merrill makes a similar observation in his translation:

> The musical energy of Homer sounds, too, in the varieties of suffering and death, grimly precise in detail. No poet has looked

> more directly at the horrors of warfare. Men get struck in the back between the shoulders; through the buttocks into the bladder; through the neck and up through the teeth, severing the tongue; into the skull, shattering the brain. Arms get cut off, the blood gushing out; heads are severed and sent rolling through the army.

Homer, *The Iliad* 18, Introduction (Rodney Merrill trans. 2007) (*Merrill's Iliad*). In short, the *Iliad* – an ineluctable part of our cultural canon – is gruesome.

A person might respond that Homer should sanitize his violence, that he should tell his story without being graphic. Homer chooses the contrary. "The *Iliad*," Fagle notes, "accepts violence as a permanent factor in human life and accepts it without sentimentality, for it is just as sentimental to pretend that war does not have its monstrous ugliness as it is to deny that it has its own strange and fatal beauty. . . ." *Fagles' Iliad*, Introduction, at 29.

Needless to say, the First Amendment fully protects the *Iliad* as a work of creative expression, for minors as well as for adults. In precisely the same way, the First Amendment would protect the *Iliad* – or the epic story of the Spartans at Thermopylae – as a comic book. *Cf. Winters v. New York*, 333 U.S. 507, 508, 510 (1948) (recognizing "pictures, or stories, of deeds of bloodshed, lust or crime" as protected expression); *Eclipse Enters., Inc. v. Gulotta*, 134 F.3d 63, 66-67 (2d Cir. 1997) (same for trading cards depicting "heinous crimes"); *see also* Frank Miller & Lynn

Varley, *300* (1998) (graphic novel of Thermopylae). And so too would the First Amendment protect a film of the *Iliad*, or of Thermopylae, as much for minors as for adults. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also 300* (Warner Bros. Pictures et al. 2007) (cinematic adaptation of the graphic novel). The question then arises how a video game with the same expressive characteristics can somehow lose commensurate protection. The answer must be that it cannot. Although video games entertain, they are also a significant medium of artistic expression, and should be protected under the First Amendment as much as comparable arts.

In their current state, video games bear many of the same formal qualities as books and film, including attention to plot, characters, dialogue and setting. With these qualities in mind, the authors of a video game create narrative parameters in a fictional world to reflect their vision, and the player navigates through the game in relation to these parameters. As with other artistic media, a successful video game creates for the player a rhythm through the story it tells, using both visual and aural tableaux, including such facets as animated figures, props, architecture, landscape, narration and music. And, like other narrative forms of art, including polyphonic music, video games draw a thematic arc from exposition to climax and denouement. Consider the following description of one of Id Software's most famous titles, *Doom*, where the hero (*i.e.*, player) navigates through a surreal, dangerous world in the hope of understanding why an experiment has gone awry:

> *Doom* . . . comprises environments filled with realistic details, details that flesh out laboratories, torture rooms, infernal landscapes, and military installations. Such visual details are accompanied by sound effects that include background music, the alien-monsters' cries of attack, and groans of pain coming from the hero's aching body. The result is an atmosphere of suspense, action, horror, and grueling tension. The movements of the hero further enhance the player's convincing experience of the alien world.

Angela Ndalianis, *Neo-Baroque Aesthetics and Contemporary Entertainment* 100 (2004) (Ndalianis). As the foregoing makes evident, video games present fictional worlds that immerse their audiences in a broad range of aesthetic possibilities. And each technological advance enhances the immediacy and scope of such possibilities. *See* Nic Kelman, *Video Game Art* 17 (2005) (Kelman) ("As the medium most closely tied to technological advancement for its execution – more so, even, than film – the boundaries of [video games'] limitations have exploded outward exponentially, exactly in sync with advances in electronic engineering."); *Thirteenth Annual Technical Excellence Awards, After Hours*, PC Magazine, Vol. 15, No. 22, Dec. 17, 1996, at 139 (citing Id Software for *Quake*) ("Quake is the first game of its kind to offer true 3-D graphics: You can move and look anywhere in what feels like a completely immersive graphical environment.").

As with any form of art, video games draw inspiration from other media. Their narrative, for instance, often derives from myths, and their basic texture is cinematic. "With the 'hero of a thousand faces' almost always at the center of video games," writes Kelman, "we see familiar recurring themes: the triumphant underdog, the common man caught up in (and important to) events on a global scale, the outsider proving he is not so much odd as he is special, the unavoidable prophecy fulfilled, hard work rewarded, and so on." Kelman at 41. Along similar lines, Ndalianis has described *Doom* and *Doom II* as "an amalgam of action, science fiction, and horror film genres, with specific reference . . . to *Alien* (with its hybrid science fiction, horror, combat, and action structure) and to *Evil Dead II* (a film that also meditates on the slippery nature of horror)." Ndalianis at 101 (footnote omitted).

At the same time, video games often provide the template for artists working in other media. Consider film, video games' closest artistic relative. As the members of this Court may know, Id Software's *Doom* was later made into a film starring Dwayne "The Rock" Johnson. *See Doom* (Universal Pictures 2005); *Doom* (Id Software 1993). Likewise, the cinematic character Lara Croft, played by Angelina Jolie, originated in the video game *Tomb Raider*. *See Lara Croft: Tomb Raider* (Mutual Film Co. 2001); *Tomb Raider* (Core Design 1996) (video game). A more recent example of video games' influence on film is *Scott Pilgrim vs. The World*. In this film, the hero – much like Hercules – must overcome the seven former boyfriends of his new love, Ramona Flowers. *See Scott Pilgrim vs. The World* (Big Talk Films et al. 2010). "Video-game-style," observes Siobhan Synnot of *Scotland on Sunday*, "Scott must rise through the levels of battling boyfriends, transforming during each fight into a physics-bending computer star with a punch like Donkey Kong. . . ." Siobhan Synnot, *Scott Pilgrim Vs The World: Game on for Pilgrim's Progress*, Scotland on Sunday, Aug. 22, 2010, at 28. The film contains a variety of "gaming and social networking conceits," notes Betsy Sharkey of the *Los Angeles Times*, "among them snarky comments on screen to help the older-or-other-generationals among you, and provide those in the know with a laugh." Betsy Sharkey, *'Scott Pilgrim' Puts Its Game Face On*, L.A. Times, Aug. 13, 2010, at D3.

The thematic elements of video games have even translated into theater. This past summer, the off-Broadway production *Game Play* converted iconic video games into comic vignettes. As Seth Schiesel of the *New York Times* asks in his review:

> What if the gorilla in Donkey Kong is really an abusive, down-on-his-luck meathead straight out of a Tennessee Williams script who keeps his handicapped blond paramour (the princess) captive in their top floor apartment, periodically thrashing the Italian building superintendent (Mario), who

> attempts to climb the stairs to alleviate the woman's suffering?
>
> What if Pac-Man is really a gluttonous German burgher out to gorge himself while dodging the ghosts of those he has so callously wronged, à la Dickens?
>
> What if the pilots in Asteroids are merely profane technicians existentially trapped within a corporation that knows nothing more than to send them into the void to shoot rocks, until they become smaller rocks and smaller rocks, until they become nothing?

Seth Schiesel, *Tragedy and Comedy, Starring Pac-Man*, N.Y. Times, Jul. 16, 2010, at C1; *see also id.* ("[*Game Play*] is the most ambitious effort I know of to fuse the techniques and live presentation of theater with the themes, structures and technology of interactive electronic entertainment, also known as video games.").

Video games, then, have the same formal properties as traditional forms of expression. This being the case, a decision to deny full constitutional protection to video games, in addition to being impossible to square with what the First Amendment already embraces, would eviscerate what is perhaps the most vibrant, growing and influential sector of the artistic world today.

II. THIS COURT SHOULD CONFIRM THAT THE FIRST AMENDMENT PROTECTS VIDEO GAMES AS MUCH AS ANY OTHER ARTISTIC MEDIUM.

Over the last decade, many lower courts have correctly recognized that video games are a form of expression presumptively entitled to the protection of the First Amendment. *See, e.g.*, *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003) (*IDSA*); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1056 (N.D. Ill. 2005). These decisions are not surprising, given this Court's observation in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." 515 U.S. 557, 569 (1995) (Souter, J., for a unanimous Court) (internal quotation marks and citation omitted).

Moreover, the video games subject to the statute do not fall into any category of unprotected expression. First, they are not incitement. They do not meet the test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), and *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam), by way of direction, intent, likelihood or imminence. Second, they are not obscene as per *Miller v. California*, 413 U.S. 15, 23-24 (1973). Nor do they constitute "variable obscenity" under *Ginsberg v. New York*, 390 U.S. 629, 641 (1968). Finally, they are not "fighting words" within the rubric of *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and *Cohen v. California*, 403 U.S. 15, 20 (1971). They are therefore fully protected by the First Amendment, and the state may not restrict access to them on the basis of their content, unless it adopts means narrowly tailored to serve a compelling public interest. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *see also Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). A contrary holding, allowing the government to regulate video games on the basis of their content without satisfying strict scrutiny, would make a hash of this Court's jurisprudence, destabilize a vibrant artistic medium, and subject courts to the impossible task of classifying individual works of art according to their assessed social value.

The foregoing citations to authority are hardly boiler plate. The purpose of *Brandenburg* and *Hess*, for example, is to draw as much expression as possible within the protective ambit of the First Amendment as befits the government's basic authority to preserve civil order. In addition, these cases provide maximum clarity as to what the Constitution protects before people express themselves. Not much expression is "likely" to provoke "imminent" lawless conduct, and a speaker or artist has enormous editorial control over whether he or she "direct[s]" or "intend[s]" such conduct. *Brandenburg*, 395 U.S. at 447; *Hess*, 414 U.S. at 109. Loosening or blurring the protections these cases provide would have massive destructive impact on freedom of expression, not only for people who create video games, but also for people who make films and TV shows, record music and even write books. As this Court observed only last term, the "guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010); *see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in the judgment) ("When we leave open the possibility that various sorts of content regulations are appropriate, we discount the value of our precedents and invite experiments that in fact present clear violations of the First Amendment. . . .").

Similarly, the purpose of *Miller* and *Ginsberg* is to carve out from the scope of the First Amendment a narrow category of speech defined at a minimum to include some form of sexually explicit expression. In *Miller*, this Court expressly limited its holding to "works which depict or describe sexual content." 413 U.S. at 24. Although this Court did not provide similar express language in *Ginsberg*, it emphasized that the statute under review in that case "simply adjust[ed] the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of [the minors to whom the statute applied]." 390 U.S. at 638 (internal quotation marks and ellipsis omitted). The case itself was about the sale of "two 'girlie' magazines," and, notable here, no other form of expression was at issue. *Id.* at 631.

In any case, sexually explicit expression is materially distinct from violent imagery and therefore merits distinct treatment. For one thing, this Court has never excluded a category of expression from the scope of the First Amendment simply because of its violent content. *See Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1185 (W.D. Wash. 2004) ("[T]here is no indication that [depictions of violence] have ever been excluded from the protections of the First Amendment. . . ."). This Court has recently emphasized the distinction between protected *representations* of violence and unprotected *acts* of violence. *See Stevens*, 130 S.Ct. at 1585 (noting that, although "the prohibition of animal cruelty itself has a long history in American law. . . . we are unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment"); *see also Kendrick*, 244 F.3d at 575-76 ("The notion of forbidding not violence itself, but pictures of violence, is a novelty. . . .").

Moreover, sexually explicit speech simply does not play the same role in our cultural canon as violent imagery. A rule allowing the government to restrict minors' access to speech that meets the test of *Ginsberg*, therefore, effects no radical damage to the canons of our culture. A rule revising *Ginsberg* somehow to include violent imagery, however, would leave our canon in shambles. As the court correctly observed in *Maleng*:

> Sexually-explicit materials were originally excluded from the protections of the First Amendment because the prevention and punishment of lewd speech has very little, if any, impact on the free expression of ideas. . . . The same cannot be said for depictions of violence: such depictions have been used in literature, art, and the media to convey important messages throughout our history. . . .

325 F. Supp. 2d at 1185. As Marjorie Heins has noted, "violence is an eternal theme in literature, art, popular entertainment and even games invented by children at play." Marjorie Heins, *Blaming the Media: Would Regulation of Expression Prevent Another Columbine?*, 14 Media St. J. 14, 15 (2000).

This Court should confirm that the First Amendment applies as much to video games as it does to books, film, graphic novels and polyphonic music – artistic media with which it shares many characteristics. Among other things, therefore, this Court should confirm that the category of "variable obscenity" under *Ginsberg v. New York* is limited to sexually explicit speech, for the reasons given above. This being the case, California has no more authority to ask whether a video game "lack[s] serious literary, artistic, political, or scientific value for minors" than it has to ask the same question about a film. Cal. Civ. Code § 1746(d)(1)(A). The First Amendment would not turn its back on a bad film -- complete with bad acting, bad dialogue, bad sets, and a bad score. As the members of this Court are no doubt aware, such films exist. As the critic J. Hoberman observes, "[o]bjectively bad movies are usually made against all odds in a handful of days on a breathtakingly low budget. Such extreme austerity enforces a delirious pragmatism: homemade sets, no re-takes, tacky special effects, heavy reliance on stock footage." J. Hoberman, *Bad Movies, reprinted in American Movie Critics: An Anthology From the Silents Until Now* 519 (Phillip Lopate ed. 2006) (*American Movie Critics*). And yet the First Amendment would protect such films, because our courts do not judge among works that otherwise fall within a protected medium. These are lines the First Amendment will not allow the courts or any other department of the government to draw.

III. VIDEO GAMES' DISTINCTIVE CHARACTERISTICS DO NOT EXCLUDE THEM FROM FULL CONSTITUTIONAL PROTECTION.

No aspect of video games as a distinct medium undermines their claim to full protection. Their status as games, for example, is irrelevant. "Dungeons and Dragons" is a game, but at least one court has properly recognized it as a form of expression entitled to constitutional protection. *See Watters v. TSR, Inc.*, 715 F. Supp. 819, 821 (W.D. Ky. 1989), *aff'd on other grounds*, 904 F.2d 378 (6th Cir. 1990). Similarly, the Second Circuit correctly recognized that the First Amendment protected the game "Public Assistance – Why Bother Working for a Living?" *See Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 34-35 (2d Cir. 1983).

Nor is video games' status as interactive a reason to deny them full protection. For one thing, with the advent of the DVD, film is no longer necessarily passive. A viewer may choose to watch the same scene many times in a row, or skip scenes he or she does not like. As David Bordwell, a professor at the University of Wisconsin-Madison, has written, this has intriguing implications for mysteries:

> In a mystery film, say there's a clue at the half-hour mark. During a theatrical screening, we're moved forward with no time to ponder it. Watching the DVD lets us pause the film, ponder the clue as long as we like, and maybe track patiently back to earlier scenes to test our suspicions about what that clue means.

David Bordwell, *New Media and Old Storytelling*, *reprinted in American Movie Critics* at 724. And the day will come, Bordwell suggests, when studios will take such usages into account. Perhaps they will be more careful to lay the foundation for a clue. *See id.* at 727 ("[T]he viewer's possibility of rewatching a film with little fuss encourages ambitious filmmakers to 'load every rift with ore,' to pack details that might not be noticed on a single viewing. One of my examples is the 8:2 motif in *Magnolia*."). Although interactivity is already a feature of video games, Bordwell's hypothesis suggests that film may develop comparable functionalities.

Even if the distinction between "passive" film and interactive video games persists, it does not diminish the latter's claim to full constitutional protection. As many have observed, "interactivity" is inherent to the appreciation of art. As Judge Posner noted in *Kendrick*:

> *All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive.* Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.

244 F.3d at 577 (emphasis added); *see also Wilson v. Midway Games, Inc.*, 198 F.Supp. 2d 167, 181 (D. Conn. 2002) ("The nature of the interactivity set out in [the] complaint . . . tends to cut in favor of First Amendment protection, inasmuch as it is alleged to *enhance* everything expressive and artistic about

Mortal Kombat: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced.").

Consider again the *Iliad*. The *Iliad* evokes a powerful reaction precisely because it draws the reader – or the listener – into the narrative. As Merrill explains:

> It would not be accurate to say that the music softens or 'aesthetically transmutes' the unpleasantness [of the imagery] – on the contrary, it makes the wounds excruciatingly visible. But it keeps us fascinated in two ways: first, by letting us hear the matter in measured rhythm; second, by imparting an almost ritual quality to the actions on account of the [poetic devices]. Reading aloud a passage . . . will make these points clearer, as well as revealing how the grisly deaths are often both intensified and relieved by short accounts of the dead men's happy and prosperous lives before they came to Troy.

Merrill's Iliad, Introduction, at 18.

Others have made similar observations. As Alexander Pope wrote in the preface to his translation of the *Iliad*, the "unequal'd fire and rapture . . . is so forcible in *Homer*, that no man of a true poetical spirit is master of himself while he reads him." *The Iliad of Homer* 4, Preface (Alexander Pope trans., Steven Shankman ed. 1996). Pope continues:

> What [Homer] writes, is of the most animated nature imaginable; every thing moves,

> every thing lives, and is put in action. If a council be call'd, or a battle fought, you are not coldly inform'd of what was said or done as from a third person; the reader is hurry'd out of himself by the force of the Poet's imagination, and turns in one place to a hearer, in another to a spectator.

Id.; *see also* Matthew Arnold, *On Translating Homer* 3 (1896) ("[A]ll great poets affect their hearers powerfully, but the effect of one poet is one thing, that of another poet another thing. . . .").

As Pope and Arnold attest, video games are certainly not alone in transporting their audience, in "affect[ing] their [audience] powerfully." At the end of the day, therefore, petitioners' objections to video games reduce to acute anxiety over one medium of violent imagery among many. In fact, at least one scholar has observed that critics of video games tend to be more exercised by thematically rich games than by thematically poor ones. "Without fail," writes Henry Jenkins, a professor at the Massachusetts Institute of Technology, "the works that moral reformers cite are not the ones that are formulaic but those that are thematically rich or formally innovative." Henry Jenkins, *Fans, Bloggers, and Gamers: Exploring Participatory Culture* 204 (2006) (Jenkins). "It is as if," he goes on, "the reformers responded to the work's own provocation to think about the meaning of violence but were determined to shut down that process before it ever gets started." *Id.*

Needless to say, the First Amendment does not allow people to assuage their anxiety – even acute anxiety – by suppressing the expressive rights of others. As this Court has noted, the First Amendment precludes even a majority from deciding for everyone else what is palatable or correct as a normative matter. This is not because such matters are unimportant, but instead because – at least in the context of expression – they are not the government's business. As Justice Kennedy emphasized in *United States v. Playboy Entertainment Group, Inc.*, "[t]he Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed." 529 U.S. 803, 818 (2000). Who knows what expression will enable the minors of today, or of the next generation, to prepare for the demands of adulthood?

The First Amendment proceeds from the assumption that no one can answer this question well enough to dictate to others. Many of today's minors already live in a violent world, or may be on the verge of one. Some, for example, may be only a year or two away from service in the military. To be sure, parents are important to the picture, but minors have an independent and compelling claim to the protections of the First Amendment. As Judge Posner correctly observed in *Kendrick*, "[p]eople are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble." 244 F.3d at 577. To give one example, the ability to isolate and take on a fictional nemesis is an important aspect of human nature. As Kelman writes:

> As any book on formula screenwriting will tell its reader, for a satisfactory resolution of an action-based narrative, the protagonist must eventually come face-to-face with a single person whom he or she can defeat. It is not enough to solve problems or overcome obstacles – the narrative is not complete until the nemesis has been conquered. In mythological traditions, this formula, of course, predates film, by many millennia. What is *The Iliad* without Hector? What is *Beowulf* without Grendel or *Moby-Dick* without Moby-Dick?

Kelman at 227-28. Also important is the ability to engage violence as a serious subject. "Historically," Jenkins writes, "cultures have used stories to make sense of senseless acts of violence. Telling stories about violence can, in effect, remove some of its sting and help us comprehend acts that shatter our normal frames of meaning." Jenkins at 216. In sum, video games make a powerful contribution to the world of art and expression, and this Court should confirm that they lie fully within the protective scope of the First Amendment.

◆

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL GAME DEVELOPERS ASSOCIATION AND ACADEMY OF INTERACTIVE ARTS AND SCIENCES IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The International Game Developers Association ("IGDA") is a California nonprofit association serving 12,000 active members of the game industry. IGDA seeks to enhance the lives of game developers by connecting members with their peers; promoting professional development; publishing on technical, creative, and business matters of interest to the development community; and advocating on issues that affect the community. Based in Mt. Royal, New Jersey, IGDA has 34 local chapters in the United States and 80 worldwide.

The Academy of Interactive Arts & Sciences ("AIAS") is a nonprofit organization based in Los Angeles, California, that promotes common interests in the worldwide interactive entertainment community, and enhances awareness of the interactive arts and sciences by conducting a televised annual awards show and cosponsoring an annual juried exhibition of original artwork created for video and computer games.[2] AIAS has more than 20,000 members located around the world, including programmers, engineers, artists, designers, animators, writers, composers, orchestrators, performers, quality-control personnel, students, educators, and representatives of major and independent videogame companies.

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[1] Counsel for all parties have consented to the filing of *amicus* briefs, and their consents have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] Into the Pixel, *An Exhibition of the Art of the Video Game, at* http://www.intothepixel.com.

IGDA and AIAS file this brief to provide the Court foundational information about the expressive nature of today's complex videogames. *Amici* also set forth their concern that California's challenged statute, California Civil Code §§ 1746-1746.5 ("the Act"), will undermine their members' freedom of expression.

INTRODUCTION AND SUMMARY

Although the parties agree that videogames are constitutionally protected expression, the State of California nevertheless asks this Court to find that violent videogames "are simply not worthy of constitutional protection when sold to minors without parental participation."[3] The State asks the Court to make this judgment while providing only a single example of a game it deems to be violent—and offering essentially no context regarding the expressive nature of games that could fall under the Act. Meanwhile, one of the State's *amici* supporters, seizing on the State's theme that games are valueless, asks the Court to declare that videogames are not protected expression at all.

It makes little sense, however, to consider the extent to which constitutional protections apply to an expressive medium absent familiarity with the medium itself. And because videogames are not yet as ubiquitous in mainstream culture as books or movies, this familiarity cannot be presumed. IGDA and AIAS accordingly submit this brief in part to provide background about videogames.

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[3] Pet. Br. 6.

Part I explains that videogames represent an ever more important mode of artistic expression. Videogames represent the intersection of movies—a medium long protected by the First Amendment—and literature, with story lines more complex than the movie format permits, scripts performed by professional actors, cinema-quality graphics, and orchestral scores as lush and complex as any contemporary music. Both the public and the mainstream media increasingly evaluate games as works of art using the same standards applied to other forms of artistic expression.

But videogames differ from these other media in one important way: they are interactive. Of course, all literature is interactive in one sense—it succeeds when it "draws the reader into the story, makes him identify with the characters, invites him to judge and quarrel with them, to experience their joys and sufferings as the reader's own."[4] But videogames are far more concretely interactive, which makes them particularly useful for persuading and informing—not to mention entertaining.

But to truly understand videogames—including violent ones—as a serious interactive art form, one must look closely at specific games, including their genesis and influences, the gameplay itself, and the issues and ideas that the games are intended to explore. Part II of this brief does just that, discussing in detail four videogames that IGDA and AIAS fear may be deemed "violent" under the Act.

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[4] *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

Unfortunately, the term "fear" is *apropos* here, because it is not possible to *know* whether these four games would fall under the Act. Part III explains that the Act is too vague to allow game designers to determine what kinds of games could subject them to liability. As a result, the Act will force videogame authors and producers to self-censor—an outcome that clearly violates the First Amendment. Moreover, the risk of self-censorship is particularly acute here because the Act creates strict liability, thereby punishing entirely innocent violations of the vague statutory scheme.

ARGUMENT

I. VIDEOGAMES ARE AN IMPORTANT MEDIUM OF ARTISTIC EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

This Court has long recognized that the protections of the First Amendment extend not just to "political and ideological speech," but also to a wide variety of art and literature that communicates ideas more indirectly.[5] Thus, First Amendment protection applies not just to books or newspapers but also to "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works."[6] As discussed below, videogames are both expressive and culturally important—the very characteristics that the Court found relevant in determining that these other forms of speech are protected.[7]

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[5] *Schad v. Mt. Ephraim*, 452 U.S. 61, 65 (1981).

[6] *Id.*

A. The Universe of Modern Videogames.

Early interactive games enabled users to play tic-tac-toe on a mainframe computer or a simple game of table tennis on a television screen. But modern games—and particularly the sorts of games at issue in this case—bear little resemblance to these rudimentary games of ages past. Modern videogames typically tell intricate stories using crisp graphics, custom musical scores, and scripts read by talented actors. As such, videogames are complex works of narrative performance art—just like movies, television shows, and theatrical drama.

To understand the universe of modern videogames, it helps to have in mind a number of basic categories—although categorization is necessarily imprecise because genres are constantly evolving. First, games are often categorized based on whether their storyline is "linear" or "nonlinear." Linear games employ a storyline with a beginning, middle, and end, and the player cannot change the game's basic trajectory. Nonlinear (sometimes called "sandbox" or "open-ended") games present players with challenges that can be completed in many different ways and allow the player to explore an open-world environment extending beyond the game's core objectives.

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[7] *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

Beyond that basic division, games may be divided into categories reflecting the style of gameplay:

- *Action games* often focus on combat, requiring quick reflexes and accuracy to overcome gameplay obstacles.
- *Action-adventure games* may require the player to overcome obstacles through combat or using a tool obtained through gameplay. These games require problem-solving skills and exploration as well as combat skills.
- *Adventure games* often do not require fast reflexes or combat, but instead require the player to solve puzzles by interacting with the environment.
- *Role-playing games* require the player to assume the role of a character, who is then maneuvered through the world of the game. Many such games are "massively multiplayer online games" ("MMOs") that allow hundreds of different players to interact simultaneously online.
- *Simulation games* closely simulate reality or a fictional reality—for example city-building, pet-raising, or farming.
- *Strategy games* require careful thinking, often similar to the strategies of chess, Scrabble, Monopoly, or other board games.

Games may be further categorized by the *purposes* for which they are played. At one end of the spectrum are games that are primarily "serious,"—written to teach or to persuade, although they are naturally intended to be enjoyed as well. Like nonfiction literature, newspaper editorials, and documentary films, however, these games inform or argue directly. At the other end of the spectrum are games written primarily to entertain—but often also having important expressive components. Indeed, as this Court wrote in *Winters v. New York*, "the line between the informing and the entertaining is too elusive" to serve as a distinguishing factor in First Amendment analysis.[8]

On the "serious" side are "teaching" games such as Justice O'Connor's *Do I Have A Right?*, *Supreme Decision*, and *Argument Wars*, which introduce children to the judiciary. In these games, players "step into the shoes" of judges and lawyers to analyze legal issues and learn to think like a lawyer.[9] Similarly, "persuasive games" like those of Georgia Institute of Technology professor Ian Bogost are specifically designed to persuade.[10] For example, Bogost's game *Food Import Folly*—which the *New York Times* recently published as an editorial on its website—argues that "limited resources and rapidly rising food import levels have reduced import inspections to an embarrassingly small number."[11]

Toward the other end of the balance between instruction and entertainment is the game *Nier*, a third-person adventure game in which you play a devoted father searching for a cure for his daughter's terminal illness. Although *Nier* is designed primarily to entertain (and although it is also quite violent), it also communicates profound ideas, just as great literature does. The *New York Times*'s videogame critic wrote that *Nier*—like other great games—is "mostly about contextualizing and speaking to various aspects of human existence, even violence, in the service of an entertaining, interactive artistic experience."[12] Thus, *Nier* both entertains and poses philosophical questions: "Is humanity a state of being? A state of mind? A state of purpose?"[13]

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[8] 333 U.S. 507, 510 (1948).

[9] Chris Baker, *Sandra Day O'Connor: Game Designer*, Game Life, 06/04/08, *at* http://www.wired.com/gamelife/2008/06/justice-oconnor.

[10] *See, e.g.*, Ian Bogost, *Persuasive Games: The Expressive Power of Videogames* (MIT Press 2007).

[11] *Mind Games: Food Import Folly*, N.Y. Times, 05/24/07, *at* http://select.nytimes.com/2007/05/24/opinion/20070524_FOLLIES_GRAPHIC.html?_r=1.

Games from Manhattan-based developer Kuma War provide a further example of the indistinct line between entertainment and social or political commentary. Kuma War produces a variety of violent war games that encourage players to grapple with difficult political questions. For example, the game *Osama 1998* models what it would have been like to carry out the United States' failed 1998 plan to capture Osama bin Laden, allowing players to assess for themselves the merits of the plan.[14] Another Kuma game, *Assault on Iran*, simulates an attack designed to destroy nuclear facilities in Iran, and prompted a response by Iranian students who were offended by the game's message. Their game,

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[12] Seth Schiesel, *Wielding Swords in a World of Sharp Tongues*, N.Y. Times, 05/03/10, *at* http://www.nytimes.com/2010/05/04/arts/television/04nier.html.

[13] *Id.*

[14] Kuma Games, *Osama 1998*, *at* http://www.kumawar.com/Osama/overview.php.

Commander Bahman, simulates "a virtual counter-attack that will feature the rescue of an Iranian atomic scientist captured by U.S. forces in Iraq."[15] Kuma War, in turn, responded by creating a third game entitled *Assault on Iran, Pt.3: Payback in Iraq*, which picked up the plot where the Iranian students left off. These games thus represent a sort of virtual chain novel featuring arguments and responses of authors with opposing viewpoints.

In short, modern videogames comprise a highly diverse electronic art form with one common characteristic: from serious games to entertaining games, from adventure games to role-playing games, videogames tell stories. At first blush, those stories are neither more nor less entitled to First Amendment protection than stories from other media intended to entertain, inform, persuade, and teach.

B. The Cultural Significance of Games.

But to fully appreciate why videogames are entitled to First Amendment protection, it is not enough to simply catalogue the broad styles of videogame available on the market. It is equally important to appreciate the cultural significance of videogames as modern art, an issue we address here. As explained below, videogames have become a culturally significant medium of expression, a fact that is reflected in at least four ways.

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[15] Kuma LLC, *Kuma Reality Games Sparks Virtual Dialogue With Iran Over Nuclear Arms Dispute*, 06/09/06, *at* http://www.kumawar.com/PressReleases/06-16-2006.php.

First, videogames have become an important focus of critical commentary on the arts. Today, videogame reviews and criticism regularly appear in mainstream newspapers and academic literature—right alongside reviews of literature, movies, television, and theatre. For example, the *New York Times* regularly publishes its game reviews in the Arts section under the heading "Television." The *Washington Post*, for its part, publishes reviews in the Weekend section with movie reviews. This positioning represents a cultural shift: ten years ago, videogame reviews appeared (if at all) with articles about technology or business—today, however, society increasingly views videogames as popular contemporary art.

The content of newspaper reviews further underscores this view, as videogame reviews typically probe a videogame's value the same way they would probe any other work of art or literature. The *New York Times*'s review of the game *Hey Baby* is a good example. *Hey Baby* is a game that puts players in the shoes of an attractive woman who is the victim of sexual harassment. The game is a simple "revenge fantasy" in which the player can shoot men who utter coarse one-liners like "I wanna lick you all over" and "I like your bounce." The *New York Times* critic initially found the game offensive but ultimately gave *Hey Baby* a positive review "not as a game but as a provocative, important work of interactive art as social commentary." In short, the reviewer appreciated the game because, like a piece of literature, it is deeply affecting and communicates something important about the world:

> The men cannot ever actually hurt you, but no matter what you do, they keep on coming, forever. The game never ends. I found myself throwing up my hands and thinking, 'Well what am I supposed to do?' Which is, of course, what countless women think every day.... I doubt any noninteractive art form could have given me as visceral an appreciation for what many women go through as part of their day-to-day lives.[16]

Second, videogames are an increasingly important creative inspiration for other media, including books and movies. For example, Jordan Mechner's game series *Prince of Persia* gave rise to the movie *Prince of Persia: The Sands of Time*, produced by Jerry Bruckheimer (best known as producer of the *Pirates of the Caribbean* movies). The game *Hitman* inspired the 2007 film by the same title. The game *Resistance: Fall of Man* inspired William C. Dietz's book *Resistance: The Gathering Storm*. The game series *Tomb Raider* inspired the films *Lara Croft: Tomb Raider* and *Tomb Raider: The Cradle of Life* and the novels *The Amulet of Power* by Mike Resnick, *The Lost Cult* by E. E. Knight, and *The Man of Bronze* by James Alan Gardner. At the same time, the divisions between these genres are blurring. Videogames are increasingly being "played" in movie theatres.[17] And the music from games—which often consists of entire orchestral works composed specifically for the game—is frequently released for sale on audio CDs as a work apart from the game, sold online by digital download, and performed by major symphonies.[18]

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[16] Seth Schiesel, *A Woman With the Firepower to Silence Those Street Wolves*, N.Y. Times, 06/07/10, *at* http://www.nytimes.com/2010/06/08/arts/television/08baby.html.

[17] Amplitude Inc., *BIG Screen Gaming*, *at* http://www.bigscreengaming.com; *Now, Only in Theaters:*

Third, the cultural importance of videogames is reflected by the vast number of universities that now offer courses and even degrees in videogame design. For example, the University of Southern California's School of Film and Television—which educated movie titans like George Lucas, Steven Spielberg, and Ron Howard, among others—has opened an Interactive Media Division, which offers a Bachelor of Arts degree in interactive entertainment, a Master of Fine Arts degree in interactive media, and a minor in videogame design and management.[19] And prestigious art schools like the Rhode Island School of Design offer majors in Computer Animation, Design for Digital Media, and Game Design.[20] Similarly, the Pratt Institute offers a major in digital

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New Playstation Games, N.Y. Times, 10/12/09, *at* http://gadgetwise.blogs.nytimes.com/2009/10/12/now-only-in-theaters-new-playstation-games.

[18] Benjamin Frisch, *At the Concert Hall, a Symphony for Space Invaders*, NPR, 08/05/07, *at* http://www.npr.org/templates/story/story.php?storyId=12478692&ps=rs.

[19] USC, *School of Cinematic Arts*, *at* http://cinema.usc.edu/programs/interactive/about.htm.

[20] RISD, *Curriculum*, *at* http://www.risd.edu/precoll_courses.cfm#majors.

arts and the Savannah School of Art & Design offers an interactive-design-and-development program.[21]

One reason for the growing popularity of videogame studies in universities is that creating a videogame is a complex undertaking that requires both technical skills and artistic ability. As the International Center for the History of Electronic Games explains, "In the beginning, when computers were less powerful, passionate individuals could create simple electronic games. Today, most electronic games involve teams of programmers, designers, project managers, artists, and testers, often working with budgets of millions of dollars."[22] But technical complexity alone cannot account for the wide array of videogame studies programs. Colleges and universities simply would not teach videogame studies if not for the vast number of students eager to enter the field, the high-level creative and technical skill required for participation, the growing demand for talent in the videogame-development field, and the important role of videogames in modern culture.

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[21] Pratt Institute, *Digital Arts B.F.A.*, *at* http://www.pratt.edu/academics/degrees/undergraduate/digital_arts_bfa/; *see also* SCAD, *Interactive Design and Game Development*, *at* http://www.scad.edu/interactive-design-and-game-development/index.cfm; Dartmouth College, *Film & Media Studies*, *at* http://www.dartmouth.edu/~film; Globe University Minnesota School of Business, *Game & Application Development*, *at* http://www.msbcollege.edu/degree-programs/it/programming-and-game-development; Brown University, *Modern Culture & Media*, *at* http://www.brown.edu/Departments/MCM; Rochester Institute of Technology, *Interactive Games and Media*, *at* http://igm.rit.edu.

[22] International Center for the History of Electronic Games, *Concentric Circles: A Lens for Exploring the History of Electronic Games* (2010), *at* http://www.icheg.org/files/ConcentricCircles.pdf.

Finally, the importance of games is reflected by increasing scholarly interest in the relationship between games and culture. So, for example, the Strong Museum of Play features exhibits on videogames as a mirror of human play, which is "critical to learning and human development and offers a unique window into American culture."[23] The museum views videogames as both an "art" and a "science," the study of which is important because videogames "captured the American imagination and launched a powerful and continuing force in American culture."[24] There is, moreover, a growing body of academic videogame criticism.[25]

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[23] Strong National Museum of Play, *at* http://www.museumofplay.org/about_us/index.html.

[24] Strong National Museum of Play, *Videotopia*, *at* http://www.museumofplay.org/things_to_see/videotopia.html.

[25] *E.g.*, *Unit Operations: An Approach to Videogame Criticism* ("A book about comparative videogame criticism: games, philosophy, literature, and art.") *at* http://www.bogost.com/books/unit_operations.shtml.

II. ANALYSIS OF INDIVIDUAL VIDEOGAMES ILLUSTRATES THAT GAMES, LIKE LITERATURE AND FILM, ARE A SERIOUS MEDIUM OF EXPRESSION EXPLORING COMPLEX MORAL AND SOCIAL ISSUES.

Part I of this brief discusses the videogame industry generally, arguing that today's games are a complex expressive medium. To really appreciate that point, however, it is necessary to look more closely at specific games. In this section, we examine four games rated "M" or "mature" for violence. Up close, it is clear that the games are not merely violent for the sake of violence. Rather, as in much of today's cinema, television, and literature, the violence is but one integrated part of a complex story.

A. Red Dead Redemption.

Red Dead Redemption, published by Rockstar Games, is the top-selling videogame for 2010 through August. With development costs of $80-100 million, the game's budget is comparable to that of the largest Hollywood movies.[26] The game is rated "M" for "mature" by the Entertainment Software Rating Board ("ESRB"), the recognized ratings body of the videogame industry.

Red Dead Redemption is an "open-world" action-adventure game in which the player assumes the role of John Marston, a reformed criminal forced by the United States government to track down the remnants of his old outlaw gang. As noted above, "open-world" or "sandbox" games allow players to roam freely around a virtual world. The virtual world of *Red Dead Redemption* is the American West in the years leading up to World War I—a world physically straddling the border between the United States and Mexico and metaphorically straddling the cultures of the Old West and modern American society.

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[26] Seth Schiesel, *Way Down Deep in the Wild, Wild West*, N.Y. Times, 05/16/10, *at* http://www.nytimes.com/2010/05/17/arts/television/17dead.html?_r=1.

While gameplay in *Red Dead Redemption* is driven by the basic storyline of Marston's mission, it does not follow any linear path. Instead, the player is allowed to roam through Wild West towns and countrysides, interacting with a vast array of supporting characters. Those interactions may be as casual as an exchange of greetings or far more extensive: for example, Marston is free to accept or reject missions from characters on either side of the law, from herding cattle and breaking mustangs, to capturing local bandits, to racing wagons, and so on. Or, on his own, Marston (really the player, of course) can decide to simply ride into the wild to take in the scenery, to hunt wild game, or to pick herbs and desert flowers; he may stop along the way to help the many folks beset by thieves, rustlers, and vagabonds—or for that matter, he may rob them himself.

Questions of ethics and morality are one of the many aspects of gameplay left to the player to decide. The game does not foreclose the option to play Marston as a nasty drunk who robs stagecoaches, assaults women, and refuses to intervene to stop violent crimes. Alternatively, Marston can help the needy, employ good manners, and otherwise behave honorably. Either way, however, the player's choices have consequences: a meter on the screen tracks Marston's morality, together with a separate "fame" bar that measures his renown. A reputation for immorality will, for example, make shopkeepers—from whom Marston requires clothing, weapons, and other supplies—unlikely to welcome his business. Crimes committed within towns may also result in a bounty placed on Marston's head. The higher the bounty, the more likely he is to be hunted down and killed by bounty hunters—an undesirable outcome for the player.

Regardless of the moral choices a player makes, *Red Dead Redemption* is violent, at times even gory. ESRB states that games with an M rating "may contain intense violence, blood and gore, sexual content and/or strong language."[27] The ratings organization describes violence in *Red Dead Redemption*'s as follows:

> Players use shotguns, pistols, and rifles to kill enemies in realistic gun battles. Players can engage in melee-style hand-to-hand combat and trigger slow-motion effects by shooting enemies at close-range or by targeted shooting (i.e., aiming for body parts). Blood often spurts out of characters when shot; head shots and knife attacks result in much larger sprays. In one sequence, a bloodied and mutilated corpse can be seen hanging from the rafters of a barn. Players have the ability to shoot pedestrians in the game;

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[27] ESRB, *Game Ratings & Descriptor Guide*, *at* http://www.esrb.org/ratings/ratings_guide.jsp.

however, a "Wanted Level"-penalty system discourages these acts by triggering a law enforcement response.[28]

Fundamentally, however, this clinical description of violence in *Red Dead Redemption* has little more to do with what the game is "about" than would a similar description of Oedipus Rex, which of course features patricide, mutilation, and incest. In the words of one critic, *Red Dead Redemption* "hold[s] a mirror up to society and remind[s] us that present day hot button issues like racism, immigration, federal government powers and personal freedoms are not only nothing new, they are deeply ingrained in American society."[29] Moreover, the game "generates much of its heft from clear engagement with concepts like the end of the American frontier and the shift from what could be called a historical America to a modern United States."[30] The world of *Red Dead Redemption*, like our own, is "one in which good does not always prevail and yet altruism rarely goes unrewarded," "a violent, unvarnished, cruel world of sexism and bigotry, yet one that abounds with individual acts of kindness and compassion," and "a complex world of ethical range and subtlety."[31] In short, experiencing

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[28] ESRB, *Red Dead Redemption*, *at* http://www.esrb.org/ratings/synopsis.jsp?Certificate=28989.

[29] Eric Brudvig, *Red Dead Redemption Review*, IGN, 05/17/10, *at* http://xbox360.ign.com/articles/109/1090125p1.html.

[30] Seth Schiesel, *The Best Virtual Worlds Have a Touch of Reality*, N.Y. Times, 08/06/10, *at* http://www.nytimes.com/2010/08/07/arts/television/07games.html.

[31] Schiesel, *supra* note 26.

Red Dead Redemption, like experiencing any work of art, requires engaging with fundamental facets of human existence.

Significantly, *Red Dead Redemption*—like works in other media—overtly references many of its inspirations, inviting players to look beyond the game itself for further exploration of the issues that it raises. From the perspective of plot, "Sam Peckinpah's [movie] The Wild Bunch is the most obvious influence, as you guide your character over the border to Mexico, rob a train, help a group of revolutionaries and mow down a horde of banditos . . ."[32] But as the game's art director observed in an interview, other films were also incorporated—for example, "the Australian Western The Proposition" was the source of the theme of "the brutal means by which a government will seek to extend its reach."[33] And *Red Dead Redemption* includes visual and thematic nods to Don Siegel's *The Shootist* (starring John Wayne), Clint Eastwood's *High Plains Drifter* and *Unforgiven*, Simon Wincer's *Lonesome Dove* (starring Robert Duvall), and other films.[34] Furthermore, "the influences for the story of *Red Dead Redemption* also extend beyond film, for example to the Blood Meridian books of Cormac McCarthy."[35]

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[32] Alastair Plumb, *Red Read Redemption Goes To The Movies*, Infinite Lives, 05/19/10, *at* http://www.empireonline.com/empireblogs/words-from-the-wise/post/p779.

[33] *Id.*

[34] *Id.*

[35] *Id.*

Significantly, the violence in *Red Dead Redemption* utterly pales compared to that of McCarthy's *Blood Meridian*, which also explores the last years of the Old West. Violence in *Blood Meridian* includes graphically rendered scenes of mass murder, scalping, rape, and indeed all manner of bloodshed, brutality and cruelty. Yet the book is widely regarded as McCarthy's masterpiece and one of the greatest American novels of the last century, ranked by the *New York Times* as runner-up in the most important works of American fiction in the last 25 years.[36] Notwithstanding the novel's disturbing nature, however, it may be purchased by minors in nearly any bookstore and has assuredly been read by thousands, perhaps millions, of minors around the world. Just as California could not—and presumably would not want to—pass a law banning the sale of *Blood Meridian* to minors in California, government intervention categorically denying the experience of *Red Dead Redemption* to minors makes no sense.

B. Assassin's Creed II.

Assassin's Creed II was released by Ubisoft Entertainment S.A. in November 2009. As its title suggests, *Assassin's Creed II* is a sequel, one of five games in the popular *Assassin's Creed* series so far, with a sixth expected in November 2010. *Assassin's*

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[36] The New York Times, *What Is the Best Work of American Fiction of the Last 25 Years?*, N.Y. Times, 05/21/08, *at* http://www.nytimes.com/2006/05/21/books/fiction-25-years.html.

Creed II was rated "M" for "mature" by the Entertainment Software Rating Board.

Like *Red Dead Redemption*, *Assassin's Creed II* is an "open-world" action-adventure game with non-linear gameplay. Most of the action takes place in late fifteenth-century Italy, including Venice, Florence, and the Tuscan countryside. The plots and sub-plots of the *Assassin's Creed* games are too intricate to describe here, but the main plot revolves around a bartender named Desmond Miles, who is captured in 2012 by a large multinational corporation called Abstergo Industries. The game implies that 2012 is a time of chaos and destruction; during this strife, Abstergo seeks to locate artifacts called "Pieces of Eden" that will allow it to control individuals' minds and achieve hegemony. Desmond Miles's ancestors were Assassins who knew the location of the Pieces of Eden. Abstergo forces Miles to enter the fictional "Animus" machine, which decodes a subject's DNA to reveal the memories of his ancestors. Throughout the *Assassin's Creed* games, details emerge of a struggle (relating to control of the Pieces of Eden) between two factions—the Assassins and the Knights Templar.

Assassin's Creed II specifically concerns Miles's genetic memories of ancestral nobleman Ezio Auditore ad Firenze, who became an assassin after his father and brothers were murdered. Gameplay allows players to animate Ezio as he explores highly detailed cities and countrysides in fifteenth-century Italy. As in *Red Dead Redemption*, the player chooses among a wide variety of missions—about 200 in total, including eavesdropping, interrogation, pickpocketing, bodyguarding, and, of course, assassination. Ezio also interacts with a wide variety of nonplayer characters ("NPCs")—some are available for hire to serve as distractions or fight alongside the player; some may pay to have another NPC followed; others seek to take advantage of Ezio's core competence as an assassin; and still others are other enemies, including Knights Templar. As in the earlier game *Assassin's Creed*, NPCs are often based on historical figures, including Machiavelli, Caterina Sforza, Lorenzo de' Medici, the Pazzi Family, Pope Alexander VI, and a young Leonardo da Vinci.

The *New York Times* describes *Assassin's Creed II* as "an unparalleled historical adventure along the lines of an interactive Dan Brown or James Clavell novel, melding historically accurate locations, personages and events with pseudoplausible conspiracy theories rooted in antiquity."[37] But while it is partly correct to say that *Assassin's Creed II* plays like a novel, that description also sells the game short. It also plays like a movie and, perhaps more unexpectedly, it plays like a two-CD box set of haunting, evocative, and often touching music. Composer Jesper Kyd is among the most acclaimed videogame-score composers, and *Assassin's Creed II* is arguably his masterpiece. Kyd recorded the score with a 30-piece orchestra and a 13-person choir, creating "a beautiful, sweeping soundtrack that's just as epic as anything you'd hear in a contemporary cinematic epic scored by Hans Zimmer or James

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[37] Seth Schiesel, *On the Scenic Trail of Intrigue: Adventures in 15th Century Italy*, N.Y. Times, 12/07/09, *at* http://www.nytimes.com/2009/12/08/arts/television/08assassin.html.

Newton Howard."[38] Although the "rich instrumentation and lush vocals" have a "modern-day musical aesthetic," they "feel right at home in Renaissance Italy."[39] And Ubisoft clearly knew the "slice of sonic genius they [had] on their hands, as they wasted no time releasing the expansive 35-track, 2-disc soundtrack."[40]

Significantly, however, the *Assassin's Creed* universe extends far beyond the game itself—it has given rise to a variety of works in other media as well. *Assassin's Creed: Renaissance* is a novelization written by Oliver Bowden, essentially chronicling the events of *Assassin's Creed II* without the action sequences. Ubisoft also produced a series of three short films, together known as *Assassin's Creed: Lineage*, that take place after *Assassin's Creed* and provide a prequel to *Assassin's Creed II*. As more related games are issued, works in other media are likely to continue to proliferate.

Whatever the artistic merits of *Assassin's Creed II*, for purposes of this case it is important to note that the game, like *Red Dead Redemption*, is often violent and sometimes gory. ESRB can again be counted upon to provide a clinical recounting:

> When blades connect, blood shoots out in a fountain-like manner as targets groan or scream. . . . [T]he player hears a distinctly

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[38] Brian Linder, *Assassin's Creed 2 Soundtrack Review*, IGN, 12/01/09, *at* http://music.ign.com/articles/105/1050663p1.html.

[39] *Id.*

[40] *Id.*

> "wet" flesh-impact sound. The most graphic depictions of violence occur during cinematic cutscenes . . . A businessman, crawling away from a Templar leader, gets pinned to the ground by a sword through his neck; a young nobleman is ambushed by rivals, begs for mercy, then gets stabbed multiple times in the chest . . . . The spurts and sprays of blood that accompany some of the stabbing attacks can be intense.[41]

But, of course, ESRB does not get to the "why" of the violence in the game, only the "what." As one "devout Christian" reviewer of the game wrote, however, the game actually "drives home the moral gravity of killing a human being":

> Each major assassination is followed up by a small cinematic in which the target dies in my [Ezio's] arms. . . . In fact, it is that conflict that serves as the primary growth experience for Ezio. Rather than becoming more comfortable and hardened as the years go by, each kill brings its own surprises and regrets.[42]

And ultimately, as the same reviewer writes, the game explores fundamental questions:

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[41] ESRB, *Assassin's Creed 2*, *at* http://www.esrb.org/ratings/synopsis.jsp?Certificate=27983.

[42] Richard Clark, *Assassin's Creed II: Shot Through the Heart*, Christ and Pop Culture, 01/28/10, *at* http://www.christandpopculture.com/featured/assassins-creed-2-shot-through-the-heart.

> [As a] . . . Christian . . . I cannot help but experience *Assassin's Creed 2* within the context of my own belief system. [But i]t is in fact the concept of a belief system itself which this game seems to hold up to scrutiny, particularly when the Assassin's Creed is revealed: "Nothing is true. Everything is permissible." This creed is in fact presented in direct opposition to the organized religion of the Catholic Church, the only real religious institution in place within the context of the game. . . . By the end of the game it becomes very clear that the true heroes aren't the ones who claim the truth, but are instead those who live in ambiguity and seek out freedom.[43]

That is, of course, a message that the player—particularly a devout Christian—is free to reject, but as the reviewer concludes, "the writers of this game put their beliefs and convictions on the line . . . resulting in . . . a more interesting and provocative game."[44]

C. Heavy Rain.

Developed by Paris-based developer Quantic Dream, *Heavy Rain* was released in February 2010 and by August had sold over 1.5 million units. Shortly after its release, the rights for a film adaptation were obtained by New Line Cinema. The game is rated "M" for "mature" by the Entertainment Software Rating Board.

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[43] *Id.*

[44] *Id.*

Heavy Rain is halfway between a movie and a game—a genre its developer has called "interactive drama" and others have dubbed a "next-generation adventure game" or a "player-driven movie."[45] The player alternates control of four leading characters in a grim, film-noir-style story involving a serial killer known as "The Origami Killer" because of the Origami bird he leaves with his victims. Those characters are Ethan Mars, a father desperately trying to save his son from the killer; Madison Paige, an insomniac who seems unimportant until her character develops; Scott Shelby, a private detective investigating the murders; and Norman Jayden, a drug-addicted FBI agent assigned to track down the killer.

Gameplay is relatively straightforward, requiring the player to press various game controls to make choices on behalf of characters in response to what is taking place onscreen. But notwithstanding the simplicity of play, the *Guardian* wrote that "*Heavy Rain* gets closer than any previous game to conveying the sense that you are controlling the protagonists in an interactive movie"—"its storyline (twist-laden, naturally) is able to suck you in completely."[46]

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[45] Chris Gaylord, *Heavy Rain Review Roundup*, The Christian Science Monitor, 02/23/10, *at* http://www.csmonitor.com/Innovation/Horizons/2010/0223/Heavy-Rain-review-roundup.

[46] Steve Boxer, *Heavy Rain*, Guardian, 02/18/10, *at* http://www.guardian.co.uk/technology/gamesblog/2010/feb/18/heavy-rain-ps3-game-review.

Indeed, *Heavy Rain* is "a brilliantly engaging example of nonlinear storytelling, one that unfolds all around you as a direct, if often obscured and subtle, result of the choices you make and don't make."[47] The game was "built around a 2,000 page script written by its main creator, David Cage, but as a player you experience only that part of the script that is relevant" given the specific choices you make "over the roughly 10-hour narrative."[48] Hundreds of choices—from the entirely quotidian to difficult moral dilemmas—are presented, each introducing new variables into the narrative. The game weaves these variables back into a limited number of potential outcomes—*Heavy Rain* has 17 distinctly different endings—and which ending the player ultimately reaches depends on his choices throughout the game. None of the endings is exactly uplifting but some are better than others: In *Heavy Rain*, there is "no way to lose, per se," but "depending on your point of view, there may be no way to win, either."[49]

Certain facts are common to all the endings, including the identity and motivations of the Origami Killer. Those motivations are revealed late in the game, when the player takes on the role of a fifth character: the Origami Killer as a child. As the child, the player relives a scene in which his twin brother drowns in a construction yard flooded with stormwater when their drunken father declines to intervene. The child is revealed to be Scott Shelby, the likable private detective whose character the player has assumed for much of the game. Shelby's career as a serial killer has been an effort to test the bounds of fathers' love for their sons—to see what the fathers will do to save their sons that his own father would not. The final scenes of the game focus on whether Ethan, Madison, and Jayden—again, each animated by the player at different times—are able to identify Shelby as the killer and save Ethan's son, whom Shelby has selected as his next victim.

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[47] Seth Schiesel, *A Murderer's Young Prey; A Father's Torment*, N.Y. Times, 02/26/10, *at* http://www.nytimes/com/2010/02/27/arts/television/27heavy.html

[48] *Id.*

[49] *Id.*

Describing the game from a critical distance, however, does it little justice. Like the movies from which it draws inspiration—films by "masters like Hitchcock, Kubrick and David Lynch"[50]—*Heavy Rain*'s primary appeal is its emotional power. "Were this filmed as a Hollywood picture, it would fit perfectly with the work of someone like Martin Scorsese or David Fincher."[51] "In its exploration of the psychology of the sociopath," the *New York Times* writes, "*Heavy Rain* [also] owes more than a bit to novelists like Thomas Harris ('The Silence of the Lambs' and 'Hannibal')."[52] The story of the game was inspired by creator David Cage's "fears for his children," and "the emotional weight of *Heavy Rain* is almost entirely bound up in Ethan's sense of responsibility for his sons."[53] The artistry of the game contributes to that weight: the "sumptuous score" and "[t]he poetry of the cinematography fully realized, combined with a genuine ability to evoke sadness, fear and guilt, make for one of the most emotionally provocative titles ever."[54]

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[50] *Id.*

[51] Chris Roper, *Heavy Rain Review*, IGN, 02/23/10, *at* http://ps3.ign.com/articles/106/1067755p2.html.

[52] Schiesel, *supra* note 47.

As with the other games described here, however, *Heavy Rain*—like the books and movies from which it draws inspiration—is often violent. The ESRB offers its account of that violence:

> Players may encounter . . . a woman squirming and screaming as she catches on fire; a man impaled in the chest with a power drill; a female attacked in her own home by masked male assailants (the scene is prolonged); and a man shot (shown in slow-motion) by police officers. Blood sometimes accompanies the acts of violence—whether triggered or viewed passively.
>
> The most intense instance of violence occurs during a "lizard trial" sequence in which players' character, Ethan, is forced to cut off a segment of his own finger to save his son's life . . . .[55]

Although a similarly detailed description of the violence in many PG-13 movies would garner a good deal more controversial content (consider 2008's revenge thriller *Taken*[56]) there is no denying that *Heavy Rain* is violent at times.

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[53] *Id.*

[54] Will Freeman, *Heavy Rain*, The Observer, 02/21/10, *at* http://www.guardian.co.uk/technology/2010/feb/21/heavy-rain-sony-quantic-dream.

[55] ESRB, *Heavy Rain*, *at* http://www.esrb.org/rates/synopsis.jsp?Certificate=28506.

As citizens, our reaction to that violence depends a good deal on what we expect games to be. *Heavy Rain* illustrates that we are increasingly entitled to expect a gaming experience combining some of the best attributes of both literature and film. Indeed, as The *Guardian* concludes, "Quantic Dream's latest may not only be the best game you've ever played—it could even become one of your favorite films."[57] And the game should receive no less First Amendment protection as the former than as the latter.

D. BioShock.

BioShock was released by Irrational Games in 2007. It is among the most critically acclaimed games of all time, with a vast array of awards to its credit. The Entertainment Software Rating Board rated the game "M" for "mature" due to its violence. In February 2010, a much anticipated sequel, *BioShock* 2, was released and has sold several million copies to date.

BioShock is a "first-person-shooter" role-playing game—a game in which the player does not see the protagonist he animates, but rather views the virtual world through the protagonist's eyes. An "intelligent, gorgeous and occasionally frightening" game,[58]

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[56] IMDB, *Parents Guide for Taken*, *at* http://www.imdb.com/title/tt0936501/parentalguide.

[57] Freeman, *supra* note 54.

[58] Seth Schiesel, *Genetics Gone Haywire and Predatory Children in an Undersea Metropolis*, N.Y. Times, 09/08/07, *at*

BioShock tells the story of the dying undersea city of Rapture. In brief, Rapture was built in the 1940s by a man named Andrew Ryan as "a libertarian haven for the world's best and brightest."[59] Ryan wanted to create a *laissez-faire* state to escape increasingly oppressive political, economic, and religious authority on land. He constructed Rapture under the ocean, and for some time scientific progress in his city far outpaced that of the terrestrial world. Advancements in biotechnology, in particular, led to the creation of the "plasmid" industry, which offered superhuman physical enhancements to its customers. Scientists discovered that they could produce raw material ("ADAM") for plasmid in the stomachs of young girls ("Little Sisters," in the game's terminology), a process that turned the girls into brainwashed "blood-sucking ghouls" that "wander around Rapture harvesting special genetic material from corpses."[60]

The game's primary "dramatic tension" turns on how to interact with these Little Sisters,[61] which are portrayed as fantastic ghost-like characters. The game's main character, Jack (animated by the player), is told by one of the game's important non-player characters that the only way he can survive in Rapture is by killing Little Sisters to extract their ADAM, but he is told by another non-player character that he must save the Little Sisters

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http://www.nytimes.com/2007/09/08/arts/television/08shoc.html.

[59] *Id.*

[60] *Id.*

[61] *Id.*

instead. That choice is left to the player. If he saves a Little Sister, he receives a small amount of additional "power" to survive; if he kills one, he takes all of her powerful elixir.

Significantly, however, over the course of the game the player (as Jack) comes to the realization that he has had *no* choice as to most of what he has done in his life—he has essentially been a slave to one of the game's primary antagonists. The one choice Jack retains, however--to kill or save the Little Sisters—turns out to determine how the game ends.

Although it has been very successful as a game, *BioShock* is also a self-conscious effort by its creators to engage with fundamental philosophical issues. At the heart of the game is Ayn Rand's philosophy of "objectivism," which essentially holds that the proper moral purpose of one's life is the pursuit of one's own rational self-interest. But the game's precise relation to that philosophy is debated—widely debated, in fact, as *BioShock* has generated oceans of critical and academic commentary. The game's primary writer, Ken Levine, calls the game "a cautionary tale about wholesale, unquestioning belief in something," and the dangers of "buy[ing] anything"—including Rand's philosophy—"hook, line and sinker."[62] The game, then, provides more questions than answers, requiring players to form their own opinions.

This fact has not been lost on *BioShock*'s reviewers in the mainstream press. The *Chicago*

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[62] Brian Crecente, *No Gods or Kings: Objectivism in BioShock*, Kotaku, 02/15/08, *at* http://kotaku.com/354717/no-gods-or-kings-objectivism-in-*BioShock*.

Sun-Times reviewer wrote: "I never once thought anyone would be able to create an engaging and entertaining video game around the fiction and philosophy of Ayn Rand, but that is essentially what 2K Games has done. It elicits its share of jump-out-of-your-seat moments with a storyline that is both disturbing and thought-provoking."[63] And the *New York Times* added that the game is "psychologically engaging experience built around a provocative, intellectually mature story."[64]

As noted above, however, *BioShock* received an "M" rating from the ESRB, which uncharacteristically offered no detailed description of the violence but noted that the game contains "intense violence" and "blood and gore."[65] That is true, but then so does Tolkien's *Lord of the Rings* and the movies it inspired. As one fifteen-year-old *BioShock* player interviewed by the the *New York Times* stated, however, the game is not gratuitously violent, but rather "present[s] you with this moral dilemma, and it's really up to you what you do with these little girls. . . [T]hat's what a game should be all about: making choices."[66] That is also what the First Amendment is about: allowing individuals to encounter speech that some might find distasteful and make their own choices.

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[63] Misha Davenport, *Game of the Week*, Chicago Sun Times, 08/24/07 at NC33.

[64] *See* Seth Schiesel, *BioShock Triumphs at TV Video Game Awards*, N.Y. Times, 12/18/07, *at* http://www.nytimes.com/2007/12/18/arts/television/18game.html.

[65] ESRB, *Game Ratings*, *at* http://www.esrb.org/ratings/search.jsp?titleOrPublisher=bioshock&rating=&ratingsCriteria=&platforms=&platformsCriteria=&searchVersion=compact&content=&searchType=title&contentCriteria=&newSearch.x=0&newSearch.y=0.

III. THE ACT WOULD IMPERMISSIBLY CHILL PROTECTED EXPRESSION.

For all the reasons described above, videogames are a culturally important means of expression protected by the First Amendment. Unfortunately, however, the statute at issue in this case would chill that protected expression. The Act is so vague as to make it impossible for the producers and vendors of videogames to determine which games are subject to the Act. As a result, videogame designers will likely self-censor in order to prevent their products from falling under the statute. The Act's tendency to chill speech is exacerbated by a second issue: the Act imposes strict liability for all violations. As a result, the Act threatens to subject importers, distributors, and retailers to multi-million dollar fines for entirely innocent miscalculations about whether a game will be deemed "violent" under the Act. For these reasons, the Act violates the First Amendment.

A. The Act Will Chill Expression Because It Is Vague.

Despite many opportunities to clarify which games it believes are covered by the Act and to explain how it would reach that conclusion, the State of California has made a point to identify only a single example of a game it deems violent. This point was not lost on the district judge, who characterized the State as "reluctan[t] to attempt to apply the Act's definition of 'violent video game'" to real-world examples.[67] The reason for California's reluctance is obvious: determining what games qualify as "violent" under the statute is a difficult, entirely subjective enterprise. The Act restricts the sale of games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that" meets a three-pronged test.[68] The three-pronged test is so vague, however, that it is nearly impossible to determine whether many games meet *any* of the three characteristics—much less all three.

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[66] *See* Schiesel, *supra* note 58.

The first prong asks whether a "reasonable person, considering the game as a whole, would find [*sic*] appeals to a deviant or morbid interest of minors."[69] But the Act does not define "deviant" or "morbid" interest or explain how to determine whether a particular depiction of violence appeals to such an interest. The lack of a definition is no academic matter.[70] As game developer Ted Price explained in his affidavit before the district court, "there is no common or accepted understanding of this term, and game creators and others will not be

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[67] *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1041 (N.D. Cal. 2005).

[68] Cal. Civ. Code § 1746(d)(1).

[69] *Id.* § 1746(d)(1)(A)(i).

[70] *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 655-56 (E.D. Mich. 2006); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 835 (M.D. La. 2006).

able to know at what point an interest becomes 'morbid' or 'deviant'. . . . [Moreover,] each individual is unique in his or her level of interest in any topic."[71] In theory, however, any game that allows a player to commit an act disapproved by some segment of the population could be considered "deviant." And nearly any depiction of death could be construed as morbid.

The second prong asks whether the game is "patently offensive to prevailing standards in the community as to what is suitable for minors."[72] But there likely is no such prevailing standard for what level of violence is appropriate for minors as an entire class—particularly without taking into account specific characteristics of the child.

The Act's third prong asks whether the game depicts violence in a way that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[73] The first part of the standard is familiar from the law of obscenity. But the phrase "for minors" makes the standard vaguer because it is simply impossible to know whether a work lacks value for minors as an entire class. The answer would depend on the age, background, and maturity of the child—factors that the Act completely ignores. Depictions of violence from literary works may have no value for a four-year-old but have great meaning for a teenager.

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[71] Declaration of Ted C. Price (Docket No. 8) at 9-10 ¶¶18-22, *Video Software Dealers Ass'n v. Schwarzenegger*, No. 05-4188 (N.D. Cal. 2005) ("Price Declaration").

[72] Cal. Civ. Code § 1746(d)(1)(A)(ii).

[73] *Id.* § 1746(d)(1)(A)(iii).

The Act's inherent vagueness raises a serious First Amendment problem. As Mr. Price explained in the district court, a game that is labeled "violent" is likely to suffer a serious stigma that will reduce sales and make retailers less likely to carry the game.[74] And because there is "no predictable or settled" way to determine which games will be deemed "violent" under the Act, videogame authors, producers, distributors, and retailers are likely to err on the side of caution.[75] The result will be self-censorship in which "our designers will have to restrict the kinds of storylines and gameplay we include in our games."[76]

The burdens imposed by the Act would affect all levels of the game-development process, from start to finish. At the beginning of that process, game designers brainstorm the basic concepts that will be included in the game. During the "concept" phase, developers must vet ideas carefully because game development costs often exceed $25 million, and a single failed game can doom a development company. Games deemed "violent" would be at increased risk of failure, so developers will likely choose to avoid any concepts that may run afoul of the Act.

This self-censorship would continue at later stages of development. During these stages, artists translate the initial concept into concrete representations on the screen. These representations typically reflect the artists' own personalities and look different than the concept that was initially adopted. While this evolution is a crucial element of the creative process, it generates a constant risk that ideas that seemed "safe" at the concept stage could evolve into something that would trigger the Act. Thus, developers will continually have to reevaulate how subtle changes would affect the game's compliance with the Act.

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[74] Price Declaration, *supra* note 71 at 10 ¶22.

[75] *Id.* at 9 ¶18.

[76] *Id.* at 10 ¶21.

This Court has previously recognized that vague restrictions on speech impose just this sort of burden of self-censorship. For example, in *Reno v. ACLU*,[77] the court noted that vagueness was "a matter of special concern" because the statute at issue was "a content-based regulation of speech." It concluded that the severity of the sanctions for a violation "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." And although the penalties in the *Reno* case were *criminal*, the fines at issue here are nearly as onerous. The Act authorizes a fine of $1,000 for each violation,[78] which—for a company importing thousands of copies of a single game—could mean a fine of millions of dollars.

B. The Act Will Chill Speech Because It Lacks a Scienter Requirement.

The difficulty in determining exactly what the Act covers is exacerbated by a second problem—the lack of a scienter requirement. The Act mandates strict liability for the sale of a violent videogame to a minor, imposing liability even for innocent misunderstandings of the vague statutory terms. Similarly, although the Act requires warning labels on violent videogames that are "imported" or "distributed" for retail sale, it fails to specify what level of intent an importer or distributor must have to be found liable.

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[77] 521 U.S. 844, 871 (1997).

[78] Cal. Civ. Code § 1746.3.

This Court has previously held that because of the chilling problem, the First Amendment prohibits the state from imposing criminal penalties on speech if those penalties are applied without proof that the speaker knew his conduct was prohibited.[79] This prohibition is not limited to criminal penalties like the one in *Smith*.[80] This Court has imposed scienter requirements even on civil laws that impose draconian sanctions on speech—for example libel statutes.[81] The Court explained, "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."[82] So too here. The fear of multi-million-dollar damage awards will chill the speech of videogame producers, distributors, and retailers.

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[79] *See Smith v. Cal.*, 361 U.S. 147, 152 (1959).

[80] *See Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992).

[81] *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (holding that "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel").

[82] *Id.* at 277.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, et al.,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* LOUISIANA, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, TEXAS AND VIRGINIA SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition. The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994), is the State required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?

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INTEREST OF STATE *AMICI*

The *amici* states are vitally interested in protecting the welfare of children and in helping parents raise them. The Ninth Circuit's decision in this case unreasonably restricts their authority to do that. Contrary to the Ninth Circuit's decision, states may—consistent with the First Amendment and this Court's longstanding precedents—prevent minors from buying or renting without parental approval a defined class of video games which invite players to commit digital homicide, torture, and rape. The *amici* states therefore have an interest this matter.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1975, a cutting-edge video game console allowed players to bounce an electronic ball back and forth on a television screen by rotating small knobs. This was *Pong*.[1] Things had changed by 2003. That year, a popular game called *Postal*[2] invited players to:

- Burn people alive with gasoline or napalm;
- Decapitate people with shovels and have dogs fetch their severed heads;
- Beat police to death while they beg for mercy;

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[1] *See* http://www.time.com/time/covers/1101050523/console_timeline/ (last visited July 8, 2010) (*Time* magazine timeline of video game development featuring Atari's 1975 release of the home version of *Pong*, which "introduce[d] at-home video games to the masses")

- Kill bald, unshaven men wearing pink dresses (in an "expansion pack" called *Fag Hunter*);
- Slaughter nude female zombies;
- Urinate on people to make them vomit; and,
- Shoot players with a shotgun that has been silenced by ramming it into a cat's anus.[2]

Postal^2 is made by a company called *Running With Scissors*, which promotes the game with the tag line: "[R]emember … it's only as violent as you are!"[3]

The makers of *Postal*^{2} likely never intended its hyperbolic violence to be taken seriously. Ten-year-olds, however, may fail to grasp the satiric content in an exploding cat. With that in mind, California enacted a modest restriction in 2005 designed to prevent minors from buying games like *Postal²*. The law reaches only games that afford players a "range of options ... [which] includes killing, maiming, dismembering, or sexually assaulting an image of a human being," and, in addition, that meet an "obscene-as-to-minors" test. *See* Pet. 2; CAL. CIV. CODE §§ 1746-1746.5.[4] California does not prevent adults from buying such games, however, nor does it bar a parent or guardian from buying them for minors. Pet. App. 96a.

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[2] *See generally* http://www.postalnetwork.org (last visited July 8, 2010) (summarizing the game); *see also* http://www.ggmania.com/full.php3?show=5521 (last visited July 8, 2010) (*Gameguru* review, reporting that "one of the surprises in this game was the urination element").

[3] *See* http://www.amazon.com/Postal-2-Pc/dp/B00008RGR5/ref=sr_1_1?ie=UTF8&s=videogames&qid=1278606957&sr=8-1 (last visited July 8, 2010) (identifying manufacturer's product description); *see also* http://www.postalnetwork.org/postal2/overview.shtml (last visited July 8, 2010) (official game overview announcing that "[t]he game is as violent as you are!"). *Postal*^{2} has won numerous awards, including first place for "Most Violent Video Game Ever" (AskMen.com 2009), fifth place for "Goriest Headshots" (*Gamepro* 2009), and first place for "Top Ten Games You Can't Show Mom" (*Gametiger* 2004). *See* http://www. runningwithscissors.com/awards-and-honors (last visited July 8, 2010).

A panel of the United States Ninth Circuit Court of Appeals held California's law infringes minors' freedom of speech. Pet. 3-4. The court applied strict scrutiny. *See* Pet. App. 27a-34a. It rejected the more lenient standard from *Ginsberg v. New York*, 390 U.S. 629 (1968), which affords government greater leeway to restrict distribution of indecent materials to minors. *See* Pet. App. 15a-23a.

Contrary to the Ninth Circuit's decision, the First Amendment does not bar California's law. Unlike other measures the Court has struck down, California leaves adult speech untouched. It also precisely delineates the materials subject to restriction. California has not simply barred minors from buying "violent" games. Instead, it restricts a disturbing subgenre of games that encourages players to commit graphic acts of homicide, rape, and sadism. This Court's precedents allow states to restrict commercial dissemination to minors of erotic materials. *See, e.g.*, *Ginsberg*, 390 U.S. 629; *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978). Just as states may keep minors from buying *Penthouse* magazine, states may also keep them from buying *Postal*^{2}. At bottom, then, the Ninth Circuit artificially limited *Ginsberg* and its progeny, and thus curtailed states' authority to place certain hyper-violent games out of juveniles' direct grasp.[5] *See infra* Part I.

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[4] The obscene-as-to-minors test is drawn from *Ginsberg v. New York*, 390 U.S. 629, 646 (1968), and more generally from the Court's obscenity jurisprudence. *See infra* Part I.

California's law falls squarely within the limits on juvenile freedoms which this Court has upheld. In fundamental realms—such as voting, marriage, contracts, privacy, travel, juries, sentencing, and speech—states may (and sometimes must) treat minors in ways that would be inconceivable for adults. California's law is situated within this sensible and laudable tradition. If a state may restrict a minor's right to vote or to marry, then it may also restrict her ability to purchase graphically violent video games. If a state may not impose the death penalty on minors—because they are "more vulnerable ... to negative influences and outside pressures," *Roper v. Simmons*, 543 U.S. 551, 569 (2005)—then a state may also keep them from buying games which invite them to commit digital atrocities. *See infra* Part II.

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[5] Other courts have made the same mistake. *See, e.g.*, *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (CA8 2008); *Interactive Digital Software Ass'n v. St. Louis*, 329 F.3d 954 (CA8 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (CA7 2001); *Entm't Merchants Ass'n v. Henry*, No. CIV-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065(D. Minn. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

At bottom, California's law permissibly seeks to reinforce the authority of parents. Limits on juvenile freedoms find their strongest justification when they simply help parents guide their own children as they see fit. California's law does this. It wants parents, and not the marketplace, to raise children. States may assist parents in many ways—for instance, by enacting curfews, by requiring parental consent to medical procedures, or by barring children from suing parents. In the same way, states may keep children from buying video games that encourage them to play at being sadists. *See infra* Part III.

States that do so betray no hostility to juvenile rights. Rather, they recognize that "[c]hildren have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The First Amendment does not bar states from enacting a commonsense regulation such as California's, which bans no speech, which affects no adults, which carefully delineates its reach, and which reinforces parents' authority to police the products of popular culture their children consume.

ARGUMENT

I. MINORS DO NOT HAVE A FIRST AMENDMENT RIGHT TO BUY GRAPHICALLY VIOLENT MATERIAL AGAINST THEIR PARENTS' WISHES.

A state commits a cardinal sin against the First Amendment by "reduc[ing] the adult population … to … only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). California's law, however, does nothing of the sort. It simply restricts minors' unmediated commercial access to certain graphically violent video games. But it prevents no adult from buying or renting such games. It does not even stop minors from playing them. Rather, the law helps ensure that parents—and not the marketplace—ultimately decide whether their children play a game, such as *Postal*^{2}, in which players are encouraged to urinate on their victims before burning them alive.

The First Amendment permits California's commonsense measure. "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (citing *Ginsberg*, 390 U.S. 629). Moreover, California's restriction is confined to "relatively narrow and well-defined circumstances," as the First Amendment requires, *see Erznoznik*, 422 U.S., at 213 (citing *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Rabeck v. New York*, 391 U.S. 462 (1968)), because it leaves adult speech untouched and because it targets a delineated class of materials.

A. California's law leaves adult speech untouched.

First, California's law reaches only minors. It curtails their direct commercial access to a defined class of materials, while not in any way restricting or burdening the production of such materials or their sale to adults. *Cf.*, *e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (observing that "targeted blocking [of indecent communications] enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners"). The law thus avoids burdening *adult* speech, a defect which has often led the Court to invalidate as poorly tailored laws designed to protect minors.

It is thus nothing like the Michigan law in *Butler*, which imposed a blanket ban on public dissemination of literature with "a potentially deleterious influence upon youth." 352 U.S., at 383. Nor is it like the law, struck down in *Sable Communications, Inc. v. F.C.C.*, 492 U.S. 115, 126-31 (1989), that sought to protect minors from indecent telephone messages by banning them outright. *See id.*, at 131 (explaining that the ban "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear"); *see also Bolger v. Young's Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983) (invalidating broad restriction on contraceptive advertisements because it "purg[ed] all mailboxes of unsolicited material that is entirely suitable for adults"). Nor, finally, is it like speech restrictions that, while seeking to protect minors from indecent content, incidentally burden adult speech. *See, e.g.*, *Ashcroft v. A.C.L.U.*, 542 U.S. 656, 660 (2004) (finding law burdened adult speech by requiring credit card or other means of age verification); *Playboy*, 529 U.S., at 826 (finding law burdened adult speech by forcing cable operators to time-channel content); *Reno v. A.C.L.U.*, 521 U.S. 844, 882 (1997) (finding law chilled adult speech by criminalizing transmission of indecent messages to minors).

California's law avoids the tailoring problems the Court condemned in those cases. It has neither the intent nor the effect of infantilizing the video game options of adults. Instead, by preventing juveniles from purchasing certain hyper-violent games, it simply empowers parents to decide what is "fit for [their] children." *Butler*, 352 U.S., at 383; *see infra* Part III.

B. California's law is limited to games that invite players' participation in graphic sadism.

Second, California's law is valid because it defines the restricted class of materials with the precision the First Amendment demands. It does not, for instance, bluntly restrict "violent" games. *Cf., e.g.*, *Erznoznik*, 422 U.S., at 213-14 (explaining that an ordinance broadly targeting "nudity," as opposed to "sexually explicit nudity," would be overbroad). Rather, it removes from minors' immediate reach only games that cast players as participants in disturbing acts of sadistic violence — *i.e.*, games in which a player is invited to "kill[], maim[], dismember[], or sexually assault[] an image of a human being," CAL. CIV. CODE § 1746(d)(1) (2006), and which fail an "obscene-as-to-minors" test drawn from the Court's precedents. *Id.*, at § 1746(d)(1)(A)(i)-(iii). *See, e.g.*, *Ginsberg*, 390 U.S., at 646; *Miller v. California*, 413 U.S. 15, 24 (1973).[6]

California's restriction thus falls comfortably within the leeway afforded government by precedents such as *Ginsberg*, *Interstate Circuit*, and *Pacifica*. Those cases teach that,

> because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.

Interstate Circuit, 390 U.S., at 690 (citing *Ginsberg*, 390 U.S. 629). Such restrictions further a state's interests in supporting parental authority and in minors' own well-being. *See, e.g.*, *Ginsberg*, 390 U.S., at 639-40; *Pacifica*, 438 U.S., at 749; *see also infra* Parts II & III.

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[6] California's law would require games containing the defined violent content to meet all of the following descriptions: (1) "A reasonable person, considering the game as a whole, would find it appeals to a deviant or morbid interest in minors", (2) "It is patently offensive to prevailing standards in the community as to what is suitable for minors", and (3) "It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." *See* Pet. 2; Pet. App. 96a.

The Court has sustained restrictions like California's on concluding it was "not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Ginsberg*, 390 U.S., at 641. That analysis does not require any "scientific" demonstration of potential harm flowing to minors from the restricted materials. *See, e.g., id.*, at 642-43 (explaining that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation'") (quoting *Noble State Bank v. Haskell*, 219 U.S. 104 (1911)); *cf. F.C.C. v. Fox Tele. Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (explaining that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them").

California's law finds particularly strong support in *Pacifica*. There, the Court sustained F.C.C. discipline of a radio station for airing a profane (but not legally obscene) monologue during an afternoon broadcast. 438 U.S., at 739-40, 748-51. That government action was allowed to safeguard minors and their parents' authority, despite the fact that it made the speech less accessible to adults. *See id.*, at 750 & n.28 (observing that F.C.C. action "does not by any means reduce adults to hearing only what is fit for children" because "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words") (citing *Butler*, 352 U.S., at 383). In contrast to the sensitive issue of burdening *adult* speech, however, the Court thought it uncontroversial that the government could bar *minors'* commercial access to such materials:

> Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children.

438 U.S., at 749-50 (citing *Ginsberg*, 390 U.S., at 640, 639).

California has done precisely what *Pacifica* deemed permissible under the First Amendment. It has defined a class of materials deemed harmful to minors and said that commercial sellers are "prohibited from making [such] ... materials available to children." *Pacifica*, 438 U.S., at 749-50. The First Amendment permits this modest regulation and the Ninth Circuit erred by ruling otherwise.

C. Neither precedent nor logic support limiting *Ginsberg-Pacifica* to erotic materials.

In this case, the lower courts resisted application of the *Ginsberg-Pacifica* line based on the artificial rationale that those cases apply to sexually themed material only. *See* Pet. App. 15a-23a, 53a-58a, 86a-89a. But that limitation is neither inherent in those cases nor consistent with their underlying logic.

To begin with, in those cases the Court spoke in terms broader than the merely erotic. For instance, *Ginsberg* approvingly quoted a New York case that described a state's interest in "preventing distribution to children of *objectionable material*" and of "books recognized to be suitable for adults." 390 U.S., at 636 (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 671 (N.Y. 1966)) (emphasis added). Indeed, in a case decided the same day as *Ginsberg*, the Court described *Ginsberg* as allowing states to "regulate the dissemination to juveniles of ... *material objectionable as to them*[.]" *Interstate Circuit*, 390 U.S., at 690 (emphasis added). *Pacifica* likewise spoke, not merely of sexual language, but of language that was "excretory," "vulgar," "indecent," "offensive," "shocking," "unseemly," and "not conforming to generally accepted standards of morality." *See, e.g.*, 438 U.S., at 739, 740 & n.14, 747-50. In the same vein, Justice Powell's concurrence explained that "speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest." *Id.*, at 758 (Powell, J., concurring in part and concurring in the judgment).

Second, the laws in *Ginsberg* and *Interstate Circuit* themselves encompassed certain violent content. For instance, the New York law in *Ginsberg* restricted depictions, not only of sexual matters, but also of "sadomasochistic abuse," defined as "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume." *See* 390 U.S., at 646 (app'x) (quoting N.Y. PENAL LAW § 484-h(1)(e) (1965)). Focusing even more pointedly on violence, the Dallas ordinance in *Interstate Circuit* restricted certain materials "[d]escribing or portraying brutality, criminal violence or depravity." 390 U.S., at 691-92 (app'x) (quoting DALLAS CIV. & CRIM. ORD. § 46A-1(f)(1) (1960)). To be sure, neither decision specifically addressed these provisions. But neither did the Court suggest that those laws' violence-related components would be invalid to the extent they embraced more than purely erotic materials.

Finally, the underlying logic of these cases rejects confining them to erotic materials. *Ginsberg-Pacifica* drew strongly on the states' interest in reinforcing parental authority. *See, e.g.*, *Ginsberg*, 390 U.S., at 639 (explaining that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"). Consequently, the Court reasoned that parents "are entitled to the support of laws designed to aid discharge of that responsibility." *Id.*; *see also infra* Part III. It would be arbitrary, however, to confine this state interest to sexual themes. The graphically interactive violence kept from minors' direct grasp by California's law is "as potentially degrading and harmful to children as representations of many erotic acts." *Pacifica*, 438 U.S., at 758 (Powell, J., concurring in part and concurring in the judgment). Parents, in other words, have just as keen an interest in guarding their children from *Postal*[2] as from *Penthouse*, and laws like California's may help them do so.

II. CALIFORNIA'S LAW FALLS WITHIN TRADITIONAL STATE LIMITS ON MINORS' FREEDOMS.

The law has never been blind to the fact that children are not adults. In fundamental realms—such as voting, marriage, contracts, privacy, travel, juries, sentencing, and speech—states may (and sometimes must) treat minors in ways that would be inconceivable for adults. California's law is situated squarely within this sensible and laudable tradition. It betrays no hostility to minors' constitutional rights, but rather recognizes that "[c]hildren have a very special place in life which law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); *see also Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality op.) (observing that "[t]he Court long has recognized that the status of minors under the law is unique in many respects").

Few rights are more fundamental than the rights to vote, to marry, to serve on a jury, or to contract. Yet states have traditionally limited minors' ability to participate in these basic forms of citizenship. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 581-587 (2005) (app'x B, C & D) (cataloguing state laws establishing minimum ages for voting, jury service, and marriage without parental or judicial consent); Restatement (Second) of Contracts § 14 (1981) (discussing limitations on minors' right to contract).[7]

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[7] *See also, e.g.*, Colo. Rev. Stat. § 13-22-101 (2009); Fla. Stat. ch. 743.07 (2009); Idaho Code § 29-101 (2010); Iowa

Even minors' control over their own bodies may often be restricted. Minors cannot unilaterally consent to most medical procedures.[8] In the same vein, parental consent laws may curtail minors' ability to have an abortion, subject to judicial bypass. *See Bellotti*, 443 U.S., at 643. And a minor may undergo heightened drug-screening protocols because his "school-related privacy interest, when compared to the privacy interests of an adult, has different dimensions." *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 840 (2002); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (observing that the school context "requires some easing of the restrictions to which searches by public authorities are ordinarily subject"), *and see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656-57 (1995) (explaining that, "[p]articularly with regard to medical examinations and procedures, ... 'students within the school environment have a lesser expectation of privacy than members of the population generally'") (quoting *T.L.O.*, 469 U.S., at 348 (Powell, J., concurring)).

Other examples abound. Minors do not have a right to jury trials in delinquency proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545-51

CODE § 599.1 (2009); KAN. STAT. ANN. § 38-101 (2009) (generally addressing limits on minors' capacity to contract).

[8] *See, e.g.*, ALA. CODE § 22-8-4 (2009); CAL. FAM. CODE § 6922 (2004); DEL. CODE ANN. tit. 13, § 707 (2009); ME. REV. STAT. ANN. tit. 22, § 1503 (1998); N.Y. PUB. HEALTH LAW § 2504 (2005) (generally addressing parental consent to medical procedures).

(1971) (plurality op.). Curfew laws across the country permissibly restrict minors' right to travel. *See, e.g.*, *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 538 (CA DC 1999) (en banc plurality op.); *Qutb v. Strauss*, 11 F.3d 488, 492 (CA5 1993).[9] Statutory rape laws regulate minors' consensual sexual relations. *See, e.g.*, *State v. Granier*, 765 So.2d 998, 1001 (La. 2000) (explaining that "[t]he policy underlying such a statute is a presumption that, because of their innocence and immaturity, juveniles are prevented from appreciating the full magnitude and consequences of their actions").[10] Even the Court's sexual autonomy jurisprudence, rooted in adult privacy, is nonetheless limited by this special vulnerability of minors. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (observing that "[t]he present case does not involve minors").

Juvenile impressionability has shaped the Court's Eighth Amendment jurisprudence. Recognizing that "'[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults,'" the Court has exempted minors from the death penalty and from life-without-parole sentences for non-homicide crimes. *See Roper*, 543 U.S., at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)); *see also Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010). As the Court reiterated last term in *Graham*, juveniles "'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'" 130 S. Ct., at 2026 (quoting *Roper*, 543 U.S., at 569-70).

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[9] *See also generally* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 553-58 (1997) (discussing curfew ordinances).

[10] *See also, e.g.*, ALA. CODE §§ 13A-6-70, 13A-6-61 (2009); CAL. PENAL CODE § 261.5 (2008); FLA. STAT. ch. 800.04 (2009); HAW. REV. STAT. § 707-730 (2009); MD. CODE ANN., CRIM. LAW §§ 3-302–3-308 (2009) (generally addressing statutory rape and minors' age-of-consent).

Juvenile speech is not immune from these well-established limitations. For instance, while minors retain First Amendment rights in public schools, officials may sometimes *ban* their speech. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (holding that officials may suppress student speech if it will "materially and substantially disrupt the work and discipline of the school"). The Court has recognized that "[i]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Vernonia*, 515 U.S., at 656 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)). Such censoring of adult speech would obviously fail. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971); *see also Morse v. Frederick*, 551 U.S. 393, 405-06 (2007) (commenting that the Court's case law has "acknowledged that schools may regulate some speech 'even though the government could not censor similar speech outside the school'") (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). And yet, drawing on *Ginsberg*, the Court

> has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.

Fraser, 478 U.S., at 684 (discussing *Ginsberg*, 390 U.S. 629, and *Bd. of Educ. v. Pico*, 457 U.S. 853, 871-872 (1982)). Nor has the Court artificially confined this principle to erotic material, but has validated states' concern to protect children "from exposure to sexually explicit, indecent, or lewd speech" as well as "vulgar and offensive spoken language." *Fraser*, 478 U.S., at 684 (discussing *Pacifica*, 438 U.S. 726); *see also supra* Part I.

California's law is thus no outlier: it falls within a tradition of permissible limitations on juvenile rights. "[Y]outh-blindness," this Court's case law teaches, "is not a goal in the allocation of constitutional rights" because "failing to take children's particular attributes into account in many contexts ... would be irresponsible." *Ramos v. Town of Vernon*, 353 F.3d 171, 179-80 (CA2 2003) (citing, *inter alia*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-31, at 1589 (2d ed. 1988)). This is one of those contexts. If a state may restrict a minor's right to vote or to marry, then it may also restrict her right to purchase graphically violent video games. If a state may not impose the death penalty on minors—because they are "more vulnerable ... to negative influences and outside pressures," *Roper*, 543 U.S., at 569—then a state may also keep them from buying games which invite them to commit digital atrocities.

III. CALIFORNIA'S LAW FALLS WITHIN A TRADITION OF STATE REINFORCEMENT OF PARENTAL AUTHORITY.

Limits on juvenile freedoms find their strongest justification when they assist those persons—namely, parents—who have a far higher claim to authority over children than the state. *See, e.g.*, *Bellotti*, 443 U.S., at 637 (plurality op.) (explaining that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors"). California's law does precisely this. It wants parents, and not the marketplace, to police children's participation in the graphic violence enacted and encouraged by certain video games. Its modest regulation, then, does not suppress speech or impose a paternalistic restraint on children, but instead aims to "support the right of parents to deal with the morals of their children as they see fit." *Ginsberg*, 390 U.S., at 639 & n.7 (quoting Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 n.68 (1963)).

Respect for parental authority has shaped the Court's jurisprudence. The truth that "[t]he child is not the mere creature of the state," *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925), is a fixed star in constitutional interpretation. "[T]he interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *see also Bellotti*, 443 U.S., at 639 & n.18 (plurality op.) (suggesting the Court's decisions recognize "a constitutional parental right against undue, adverse interference by the State") (and citing, *inter alia*, *Pierce*, *supra*; *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Ginsberg*, *supra*).

These basic precepts have influenced how the Court measures juvenile rights. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (explaining that "[o]ur jurisprudence historically has reflected Western civilization['s] concepts of the family as a unit with broad parental authority over minor children"). For instance, the Court has understood that state authority in the school context derives, in important part, from parental authority. *See, e.g.*, *Vernonia*, 515 U.S., at 654 (observing that "a parent 'may ... delegate part of his parental authority ... to the tutor or schoolmaster of his child'") (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769)); *see also Morse*, 551 U.S., at 413-16 (Thomas, J., concurring) (discussing role of *in loco parentis* doctrine). That helps explain why school officials may subject minors to more intrusive searches or censor their speech. *See, e.g.*, *Vernonia*, 515 U.S., at 655 (observing that "we have acknowledged that for many purposes school authorities ac[t] *in loco parentis*"); *Fraser*, 478 U.S., at 683 (emphasizing that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse").

The same principle has also shaped the Court's understanding of juvenile rights outside schools. For instance, it explains why a court may be required to weigh the advisability of parental consultation in deciding whether to authorize a minor's abortion. *See Bellotti*, 443 U.S., at 648 (plurality op.) (explaining that a court "may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby"); *see also Lambert v. Wicklund*, 520 U.S. 292, 295-96 (1997) (per curiam) (discussing *Bellotti*). *Bellotti* underscored that "[l]egal restrictions on minors, *especially those supportive of the parental role*, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Id.*, at 638-39 (plurality op.) (emphasis added); *see also Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990) (op. of Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) (observing that "[i]t is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature"). For the same reasons, the Court has recognized the state's "undoubtedly substantial" interest in "aiding parents' efforts to discuss birth control with their children." *Bolger*, 463 U.S., at 73 (citing *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *Bellotti*, 443 U.S., at 637).

Critically, the Court's *Ginsberg-Pacifica* line of cases has upheld restrictions on juvenile speech by drawing on this interest in reinforcing parental authority. *See supra* Part I (explaining centrality of *Ginsberg-Pacifica*); *see also Bellotti*, 443 U.S., at 639 & n.18 (plurality op.) (placing *Ginsberg* in the historical line of parental authority cases); *Fraser*, 478 U.S., at 684 (identifying in *Ginsberg* and *Pacifica* the *in loco parentis* doctrine). *Ginsberg* itself emphasized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." 390 U.S., at 639. It therefore reasoned:

> [t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.

Id.; *see also Pacifica*, 438 U.S., at 749 (reiterating that the state's interest in supporting parental authority "justified the regulation of otherwise protected expression"). As Justice Powell explained in his *Pacifica* concurrence, the state may prevent dissemination of vulgar speech to children and thereby "leav[e] to parents the decision as to what speech of this kind their children shall hear and repeat[.]" *Id.*, at 758 (Powell, J., concurring).

State and local governments act on this interest in reinforcing parental authority in many ways. Laws in numerous jurisdictions, similar to the New York law in *Ginsberg*, support parents' role in policing children's exposure to sexually themed materials.[11] Local curfew ordinances more broadly reinforce parental supervision of juveniles. *See supra* Part II (discussing curfew laws).[12] As the Colorado Supreme Court explained, drawing directly from this Court's reasoning in *Bellotti*:

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[11] *See generally* 93 A.L.R.3D 297 (1979) (discussing prevalence of statutes or ordinances prohibiting sale of obscene materials to minors); *see also, e.g.*, *Commonwealth v. Rollins*, 799 N.E.2d 1287, 1289-90 (Mass. App. Ct. 2003)

> Courts have recognized that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. [...] [C]ontrolling a minor's freedom of movement after 10:00 p.m. reinforces parental authority and encourages parents to take an active role in supervising their children.

People in interest of J.M., 768 P.2d 219, 223 (Colo. 1989) (relying on factors in *Bellotti*, 443 U.S., at 622-23).[13]

(addressing application of MASS. GEN. LAWS ch. 272, § 31 (2000)); *Athenaco, Ltd. v. Cox*, 335 F. Supp. 2d 773, 778 & n.2 (E.D. Mich. 2004) (addressing constitutionality of MICH. COMP. LAWS § 722.675 (2002)); *State v. Anderson*, 540 So.2d 974 (La. App. 2 Cir. 1989) (addressing application of LA. REV. STAT. ANN. § 14:91.11 (1989)).

[12] Such laws are more commonly enforced than one might suspect. One scholar reports that, in 2004, there were 137,400 arrests for curfew violations nationwide. *See* Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System—A Former Prosecutor's Perspectives on Reform*, 48 FAM. CT. REV. 322, 332 (2010).

[13] Other state supreme courts have followed the same rationale. *See, e.g.*, *Sale ex rel. Sale v. Goldman*, 539 S.E.2d 446, 449 & n.5 (W. Va. 2000) (upholding city curfew ordinance whose stated purpose was to "reinforce and promote the role of the parent in raising and guiding children"); *City of Panora*

Falling in the same category are state laws requiring parental consent for medical treatment. *See supra* Part II (discussing medical consent laws); *see also, e.g., In re Estate of K.E.J.*, 887 N.E.2d 704, 716 (Ill. App. 1 Dist. 2008) (observing the "well established legal fact that in the majority of circumstances, a parent can give binding consent to medical treatment for a child"). Similarly, when states limit a minor child's ability to sue a parent for negligence, they do so to protect both parental authority and family harmony. *See, e.g., Owens v. Auto Mut. Indem. Co.*, 177 So. 133 (Ala. 1937); *Dubay v. Irish*, 542 A.2d 711 (Conn. 1988); *Mroczynski v. McGrath*, 216 N.E.2d 137 (Ill. 1966); *Walker v. Milton*, 268 So.2d 654 (La. 1972). As a Texas court recently explained, this parental-immunity defense "prevent[s] the disruption or distortion of parental decision-making within the 'wide sphere of reasonable discretion which is necessary ... to provide nurture, care, and discipline for their children[.]'" *Sepaugh v. LaGrone*, 300 S.W.3d 328, 333 (Tex. App.—Austin 2009, pet. filed Mar. 26, 2010).

In sum, an abiding respect for parental authority has shaped the Court's understanding

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v. Simmons, 445 N.W.2d 363, 370 (Iowa 1989) (upholding city curfew ordinance based in part on rationale that it "acts to make parents the primary agent of enforcement" and "could be said 'to promote family life by encouraging children to be at home'") (quoting Note, *Curfew Ordinances and the Control of Nocturnal Juvenile Crime*, 107 U. PENN. L. REV. 66, 67 (1958)); *City of Milwaukee v. K.F.*, 426 N.W.2d 329, 337-39 (WIS. 1988) (rejecting argument that municipal curfew interfered with parental authority).

that juvenile rights cannot always be absolute. Numerous state and local laws are premised on this understanding. California's law falls squarely within this longstanding, praiseworthy, and constitutional exercise of state authority. Children are creatures of their parents, not the state, but states may help parents fulfill their duties toward children. States do so by enacting curfews, or by requiring parental consent to medical procedures, or by preventing children from suing parents. States may also take the more modest step of keeping children from buying, without parental consent, video games that encourage them to pretend they are sadists.

* * *

Over three decades ago, this Court explained that "[b]ookstores and motion picture theaters … may be prohibited from making indecent material available to children." *Pacifica*, 438 U.S., at 749 (citing *Ginsberg*, 390 U.S., at 640, 639). California's law does nothing more than that. It does so, furthermore, not to impose a paternalistic morality on children, but rather to help parents raise children according to their own good sense. Parents' concern over which cultural products their children consume does not arbitrarily stop with sex. It extends to violence, and in particular to the disturbingly interactive form of digital sadism targeted by California's law. States may help parents shield their children from these materials without violating the First Amendment.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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In the
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF MARION B. BRECHNER FIRST AMENDMENT PROJECT AND PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF RESPONDENTS SEEKING AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*

The Marion B. Brechner First Amendment Project ("Project"), formerly known as the Marion Brechner Citizen Access Project, is a nonprofit, non-partisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

The Pennsylvania Center for the First Amendment ("PaCFA") was established by the Pennsylvania State University in 1992 to promote awareness and understanding of the principles of free expression to the scholarly community, the media and the general public. Directed by attorney Robert D. Richards, the PaCFA's members publish books and scholarly articles on First Amendment topics. The PaCFA regularly tracks issues related to free expression, including the regulation of violent video games, and research generated from those projects is presented at national conferences and in law journals.[1]

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[1] Pursuant to S. Ct. R. 37.6, the *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit in *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009), was correct in holding that California Civil Code Sections 1746 through 1746.5 (the "Act") are unconstitutional. In particular, the appellate court was right in deciding that the Act imposes: 1) an unconstitutional, content-based restriction on the First Amendment speech rights of both game-playing minors and the adults who create and produce the games, with respect to the sale and rental of video games that are labeled as violent; and 2) an unconstitutional, compelled-speech obligation on the First Amendment speech rights of video game retailers, with respect to the Act's labeling provision.

Amici thus urge the Court to: 1) affirm the Ninth Circuit's opinion, in both its reasoning and its result; 2) not carve out a new category of unprotected expression for violent-themed speech in the medium of video games by unnecessarily expanding the variable obscenity, harmful-to-minors doctrine created in *Ginsberg v. New York*, 390 U.S. 629 (1969) that applies to a very different form of content; and 3) continue to require that government entities, including California, must prove a direct causal link between violent video games and physical/psychological harm allegedly sustained by minors before they can prohibit or limit the sale of those games to minors without violating the First Amendment.

The Court now hears the instant case in the face of a wall of precedent developed by lower federal courts across the country – a wall built steadily and unanimously during the past decade – that is stacked tall and sturdy against the constitutionality of similar laws restricting and limiting minors' access to violent video games. Starting in 2001 and moving through the present, such laws have been enjoined by several federal appellate courts in addition to the Ninth Circuit. See *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (enjoining an Indianapolis, Ind., statute affecting minors' access to violent video games in arcades); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) (issuing a permanent injunction, on First Amendment grounds, stopping St. Louis County, Mo. from enforcing a regulation limiting minors' access to violent video games); and *Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008) (affirming a permanent injunction against a Minnesota violent video game statute). No federal appellate court has ever upheld such a law. In addition, laws limiting minors' access to violent video games repeatedly have been enjoined by federal district courts. See *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004) (enjoining a Washington state law limiting minors' access to certain violent video games); *Enm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1052 (E.D. Ill. 2005), *aff'd on other grounds*, 469 F.3d 641 (7th Cir. 2006); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) (enjoining a Louisiana law affecting minors' access to violent video games); and *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 U.S. Dist. LEXIS 69139 (W.D. Okla. Sept. 17, 2007) (issuing a permanent injunction against Oklahoma's law).

By granting the petition for a writ of certiorari in *Schwarzenegger*, the Court now stands primed to wade deeply into the culture war over media violence. This is a surreal, surrogate and substitute war, *Amici* contend, for addressing the problems of real-world violence, as California and other government entities play the media blame game by attacking the speech of corporate entities in the name of ostensibly protecting, in noble fashion, minors from content many adults fear and abhor. It also is a war over censorship to which the First Amendment freedom of speech stands counterposed. *Amici* urge the Court not to sacrifice or to give short shrift to First Amendment freedoms in the face of what might be considered well-intended, yet feel-good, legislation. *Amici* further assert that the Court should have faith in several matters – faith in the wisdom of parents and guardians to know what video games are and are not appropriate for their children to rent, purchase and play; faith in a voluntary, rigorous Entertainment Software Rating Board ("ESRB") rating system designed to help those parents and that assigns independent age ratings and content descriptors for video games; and faith in technological advances in game consoles that easily allow parents to block games carrying ESRB ratings to which parents object. Indeed, this Court recently reasoned that, "premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010). In the instant case, California disfavors a certain subject – violent video games – and, given the "mistrust of governmental power" recognized in *Citizens United*, the Court and, for that matter, society in general should instead trust parents and guardians to monitor and to control the content their children purchase, rent and play.

Part I of *Amici's* argument below urges the Court to affirm the Ninth Circuit's opinion in *Schwarzenegger*, in both its reasoning and its result. In particular, it argues that strict scrutiny is the correct standard by which to evaluate California's content-based Act, that California has failed its burden of satisfying both prongs of that rigorous test and that, furthermore, the Act suffers from underinclusiveness in serving California's purported interests in protecting minors from alleged physical and psychological harm.

Part II then encourages the Court not to extend principles relating to the regulation of sexual expression, which is permissible under both *Miller v. California*, 413 U.S. 15 (1973), and *Ginsberg*, into the realm of violent-themed expression that is largely unregulated unless it constitutes an incitement to violence, fighting words or a true threat of violence. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (the government can prohibit advocacy of force or illegal action only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) ("[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"); and *Virginia v. Black*, 538 U.S. 343, 359 (2003) (defining unprotected true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). As Judge Richard Posner observed nearly a decade ago in writing for a unanimous three-judge panel of the United States Court of Appeals for the Seventh Circuit when enjoining Indianapolis' video game ordinance, "Violence has always been and remains a central interest of mankind and a recurrent, even obsessive theme of culture both high and low." *Am. Amusement Mach. Ass'n, supra* at 577.

Part III then respectfully requests this Court to maintain a rigorous standard of proof of causation of harm before First Amendment protection for speech that otherwise receives full Constitutional protection may be abridged. In brief, California must prove that the harms it cites are real, that they are, in fact, directly caused by the speech California seeks to regulate, and that the regulation in question must directly and materially alleviate them, if those harms are, in fact, real.

In summary, there is little doubt that there are some people – including, perhaps, some California legislators – who do not play violent video games, who do not fully understand them as do minors and, thus, who find them repulsive and reprehensible. But as this Court has recognized, "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Without proof of direct causation of harm to minors from playing violent video games, and without choosing to embrace and to promote less restrictive means of serving its alleged interests that are readily available to it, Petitioners are left with little to support their case, other than to ask this Court to break new legal ground. *Amici* strongly encourage the Court not to go down that uncharted path and to, instead, affirm the Ninth Circuit's ruling in *Schwarzenegger* and the long-standing principles regarding the presumptively unconstitutional nature of content-based laws.

ARGUMENT

I. The Ninth Circuit Correctly Ruled That the Act Violates the First Amendment

This part of the argument has three sections. Section A addresses the Act's unconstitutional ratings requirement, while Section B analyzes its unconstitutional labeling mandate. Section C then describes the underinclusiveness problem that fatally plagues the Act.

A. The Act's Restriction on the Sale of Violent Video Games Violates the First Amendment

This case affects two sets of First Amendment rights – the rights of retailers and distributors to freely sell the speech products that are violent video games, and the rights of minors to purchase those games free from government interference. Put more bluntly, the Act impacts both the right to speak and the correlative right to receive speech. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read"). Indeed, as this Court has recognized, "minors are entitled to a significant measure of First Amendment protection." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

This Court also has made it clear that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials" to minors. *Id.* at 213. And as Judge Richard Posner wrote in the process of striking down an Indianapolis law restricting minors' access to violent video games in arcades, "We are in the world of kids' popular culture. But it is not lightly to be suppressed." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

As a content-based regulation, the Act must pass the strict scrutiny standard of judicial review and this is something that it fails to do, as the Ninth Circuit correctly ruled. See Joel Timmer, *Violence as Obscenity: Offensiveness and the First Amendment*, 15 Comm. L. & Pol'y 25, 28 (2010) ("Courts have declared violent media content to be entitled to full First Amendment protection. Laws restricting such content generally are subjected to strict scrutiny, the standard typically applied to content-based restrictions on fully protected speech. Under strict scrutiny, the government must show that a restriction is necessary to achieve a compelling government interest and that the restriction is narrowly drawn to achieve that end").

In the instant case, Petitioners are unable to demonstrate causation of harm, be it physical or psychological, to minors stemming from playing violent video games, thus refuting their position that there is a compelling interest of the highest order sufficient to support the law. This failure to demonstrate harm using social science evidence is not surprising; as two professors recently observed, "the social sciences are much less successful than the physical sciences in terms of scientific goals such as prediction and explanation. This tendency certainly includes evidence from media effects research, a fact that mitigates against its applicability to policy issues generally, or more specifically, to constitutional free speech issues." Matthew D. Bunker & David K. Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 Comm. L. & Pol'y 1, 18 (2004).

But assuming *arguendo* such a compelling interest were to exist, the Act still fails to pass constitutional muster because it is not the least restrictive means of serving that interest. For example, the ESRB voluntary ratings and content descriptors, when coupled with technological developments in gaming consoles that allow parents to use the ESRB's system to block games with such ratings, provide a government-free solution to whatever problems California believes exist. Just as the voluntary ratings for movies used by the Motion Picture Association of America provide an informative and effective way of helping parents to determine what movie content is suitable for their children, so too do the much newer and methodologically rigorous ESRB ratings.

Finally, to contextualize this case, *Amici* emphasize that at a time when the country is fighting an open-ended war on terrorism involving real-life death and violence and, concomitantly, consuming those real-life images as they are published in newspapers, aired on television sets, and posted on the Internet, one might conclude that Petitioners would have other issues on which to focus besides the effects of viewing computer-generated, entertainment-based images of violence in a video game. Petitioners have failed to demonstrate how fictional images of fantasy violence are somehow harmful to minors, let alone any more harmful than images of real-life violence about which they apparently fail to worry. As described later in Section C, this goes directly to the Act's underinclusiveness.

B. The Act's Compelled-Speech Labeling Obligation Violates the Respondents' First Amendment Right Not to Speak

California Civil Code Section 1746.2 requires that "violent video games," as defined by the Act, carry a four-square-inch label that reads "18," signifying the minimum age a consumer must be to purchase that product. By mandating that this precise content appear on the front side of the game's packaging against the desire of Respondents, California has compelled speech in violation of the First Amendment. This Court long has held that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

Petitioners are prescribing content to which game producers object, despite "leading First Amendment precedents [that] have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006). It is well settled within this Court's jurisprudence that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Furthermore, this Court has observed that "[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Indeed, the Court has recognized that "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed. of the Blind of North Carolina*, 487 U.S. 781, 795 (1988). In summary, the Act violates Respondents' First Amendment right not to speak by forcing Respondents to agree with or to affirm a particular subjective message with which they disagree and with which that do not want to be associated. See Abner S. Greene, *The Pledge of Allegiance Problem*, 64 Fordham L. Rev. 451, 451 (1995) (this Court has interpreted the First Amendment to include an unenumerated "right not to speak, which prohibits the government from compelling expression in which the speaker does not wish to engage").

The Court has identified "two categories of cases" within its compelled-speech jurisprudence, and the instant dispute falls squarely within the "true" compelled-speech grouping "in which an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005). The instant action thus is not, in other words, either a compelled-subsidy case or one involving the funding of government speech. *Id.* at 558-562.

At first blush, it may appear that California can rely on this Court's rulings in the commercial speech arena that permit compelled disclosure of "purely factual and uncontroversial information" in advertising provided the requirements "are reasonably related to the State's interest in preventing deception of customers." See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Yet, the "most prominent examples" of the type of information contemplated in this Court's rulings are "warning and nutritional information labels." See *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006) (citation omitted). In other words, the information that may be compelled in the context of commercial speech, consistent with the First Amendment, is *factual* information, such as calorie counts or vitamin content in food products or statements regarding toxins in cleaning products. See, e.g., *Nat'l Elec. Manufacturers Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) *cert. denied*, 536 U.S. 905 (2002) (upholding requirements for listing mercury content because "mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests").

California's labeling requirement moves far beyond compelled factual information permitted under commercial speech doctrine. The determination of whether a particular game is a "violent video game" under the Act is a highly subjective finding – not a factual one subject to empirical verification such as a calorie count. As the discussion in Part II of the Argument later illustrates, California's definition of "violent video game" is fatally flawed because it conflates time-honored definitions of unprotected obscene speech with protected expression of violent images and content. The very idea that California is trying to expand this Court's variable obscenity jurisprudence to encompass violent themes moves the determination squarely outside the realm of fact into the murky waters of subjectivity.

The United States Court of Appeals for the Seventh Circuit recently considered a similar issue, and its reasoning is instructive here. Illinois required that "sexually explicit" video games be labeled with a number "18" sticker. The Seventh Circuit rejected the state's argument that the labeling provision simply required "purely factual disclosures." *Blagojevich*, 469 F.3d at 652. In striking down the mandate, the appellate court observed that "the State's definition of this term is far more opinion-based than the question of whether a particular chemical is within any given product." *Id.* Significantly, the Seventh Circuit highlighted just how subjective making the required determination would be. It suggested that "[e]ven if one assumes that the State's definition of "sexually explicit" is precise, it is the State's definition – the video game manufacturer or retailer may have an entirely different definition of this term." *Id.*

The same argument holds true with California's labeling requirement. The amorphous definition of "violent video game" provides little guidance to manufacturers and retailers who, unless trained in the art of applying the federal sentencing guidelines borrowed by California, are forced to guess whether a particular game should carry the "18" label. Consequently, *Amici* contend that California's labeling provisions in no way may be construed as a purely factual disclosure. To the contrary, the provisions should be considered outside the context of commercial speech, and instead be viewed solely as a true compelled speech mandate subject to heightened scrutiny. As such, the labeling requirement is an impermissible infringement on freedom of speech.

C. The Act is an Underinclusive Remedy for Any Alleged Harms

In the first appellate court decision invalidating restrictions on minors' access to violent video games nearly a decade ago, *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001), U.S. Court of Appeals Judge Richard Posner aptly dismissed the proffered evidentiary research purporting to prove that violent video games are somehow more problematic than other forms of media because of their interactivity. Judge Posner, writing on behalf of a unanimous three-judge panel for the Seventh Circuit, found that the studies offered by the City of Indianapolis "are not evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments." *Id.* at 579. In that single sentence, Judge Posner also telegraphed the more far-reaching constitutional concern that singling out one form of violent media for legal sanction, while simultaneously giving a free pass to others, gives rise and credence to a claim of substantial underinclusiveness – and thus yet another basis upon which violent video game laws should be deemed invalid. Judge Posner's logic and reasoning in *Kendrick,* which this Court declined to disturb, remains equally as valid today as it was then.

Indeed, at least seven federal district courts have addressed the problem of the underinclusiveness of violent video game statutes, and the substance of each of their findings is remarkably consistent and directly on point. See *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (E.D. Ill. 2005); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065 (D. Minn. 2006); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006) and *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 U.S. Dist. LEXIS 69139 (W.D. Okla. Sept. 17, 2007); *Video Software Dealers Ass'n v. Schwarzenegger*, No. C-05-04188 RMW, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal. Aug. 6, 2007). Like the Seventh Circuit and Judge Posner, the judges in these cases found that the social science evidence failed to support the laws in question.

These courts correctly recognized that the violence a minor witnesses when playing a video game cannot logically or constitutionally be singled out as any more harmful – either physically or psychologically – than similar exposure to violent content in movies, on television, in books or, for that matter, in society itself. Without doubt, minors today are regularly bombarded with violent images from a panoply of readily available media sources, ranging from movies downloaded directly to their iPods to stark *a la carte* offerings on YouTube to images of real-life violence on television news. Taking medium-specific steps to squelch a particular form of content simply seems futile in a high-tech, digital age when violent content is available on a multitude of media platforms. See Clay Calvert, *The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship*, 60 Fed. Comm. L.J. 157, 182 (2008) ("tamping down such expression on one medium, when it surely will crop up on another, simply is fruitless, like engaging in a never-ending arcade game of Whac-a-Mole"). Jurists reviewing the laws regulating violent video games have properly posed the question: Why should this one form of media – video games – be treated differently from all the others?

Judge Robert S. Lasnik, when striking down Washington Revised Code Section 9.91.180 (2003) in *Maleng*, addressed this point by noting that "the Act is too narrow in that it will have no effect on the many other channels through which violent representations are presented to children." 325 F. Supp. 2d at 1189. Similarly, Judge Matthew F. Kennelly, in *Blagojevich*, wrote, "the underinclusiveness of this statute – given that violent images appear more accessible to unaccompanied minors in other media – indicates that regulating violent video games is not really intended to serve the proffered purpose." 404 F. Supp. 2d at 1075. In *Granholm*, Judge George Caram Steeh struck down 2005 Michigan Public Act Section 108 (2005), finding that "[w]hile the State claims to try to protect the physical and psychological well-being of minors as well as prevent violent and asocial behavior, the Act fails to regulate other comparable forms of violent media from minors." 426 F. Supp. 2d at 654. In *Hatch*, Judge James M. Rosenbaum likewise found Minnesota Statute Section 325I.06 (2006) to be constitutionally infirm because "there is no showing whatsoever that video games, *in the absence of other violent media,* cause even the slightest injury to children." 443 F. Supp. 2d at 1070 (emphasis in the original). In *Foti,* Louisiana's violent video game law met a similar fate, with Judge James J. Brady observing that "[u]nder the Statute, for example, a minor could be legally barred from buying or renting an 'M'-rated video game containing violent content, but the same minor could legally buy or rent the movie or book on which the video game was based." 451 F. Supp. 2d at 833. In *Henry,* Judge Robin J. Cauthron mirrored that point, writing that "[a] minor who is prevented by the Act from buying or renting a video game containing "inappropriate violence" may still legally buy or rent the book or movie on which the game was based." 2007 U.S. Dist. LEXIS 69139, at *18.

The district court's decision in the instant case also recognized the faulty logic in allowing underinclusive violent video game laws. Judge Ronald M. Whyte found no proof that video games are "any more harmful than violent television, movies, internet sites or other speech-related exposures." 2007 U.S. Dist. LEXIS 57472, at *32.

If the purported rationale for prohibiting minors' access to violent video games is to protect them from harm that allegedly arises due to exposure to violence, then these laws must fail because – as myriad federal courts have ruled – they are an underinclusive vehicle for serving those ends. This Court has found that underinclusiveness serves as a basis for invalidating laws that privilege one type of speech over another and that "[w]hile surprising at first glance, the notion that the regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles." *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (emphasis in the original) (FN omitted). Additionally, the Court has observed that when there are "multitude of external stimuli that color their children's perception of sensitive subjects," a statute that provides "only the most limited incremental support for the interest asserted" may be held unconstitutional. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983). In the instant case, children are exposed to a multitude of violent-themed stimuli across many forms of media, and California's law provides only the most limited incremental support for the interests asserted.

More recently, this Court pointed out the fatal underinclusivness in the realm of federal campaign finance laws that "banned corporate speech in only certain media within 30 or 60 days before an election." *Citizens United v. Federal Elections Comm'n*, 130 S. Ct. 876, 911 (2010) ("the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time").

Moreover, Justice Antonin Scalia has suggested "that a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring) (citation omitted). Yet, this is precisely what California attempts to do with its violent video game law.

California advances two compelling interests that California Civil Code Sections 1746 through 1746.5 supposedly serve: "(1) 'preventing violent, aggressive, and anti-social behavior'; and (2) "preventing psychological or neurological harm to minors who play violent video games.'" *Schwarzenegger*, 556 F.3d at 961. The state even clarified its position that "'[t]he physical and psychological well being of children is the concern of the Act,' as distinguished from the interest of protecting third parties from violent behavior.'" *Id.* If exposure to violence is the ill that must be cured, then allowing uncurbed violence in every other media format unquestionably leaves "appreciable damage" unprohibited.

To date, social scientists have been unable to parse out any purported damage to a minor caused by playing violent video games from that allegedly arising from the plethora of exposures to other images of violence or, quiet simply, social factors. As Judge Lasnik wrote in *Maleng*, "virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior (other factors include family problems, problems with peers at school and in the neighborhood, biological factors, *etc.*)." 325 F. Supp. 2d at 1188. Social scientists, thus far, have failed to isolate the violent video game variable from other forms of violent entertainment or other powerful and impressionable social factors. Absent such isolation and proof of direct causation, the social science evidence to date in support of laws targeting violent video games founders.

While it might seem expedient for a state to single out a form of media that differs from the others in that the user controls a portion of the action, doing so runs afoul of established First Amendment principles, all the while not accomplishing the state's goals of alleviating the purported harms associated with exposure to violence. Although California may assert that it is allowed to move in step-by-step, slippery-slope-toward-censorship fashion against media images of violence, by first targeting video games and then moving on to other forms of media, "this one-step-at-a-time analysis is wholly inappropriate" where First Amendment interests are at stake. *City of Renton v. Playtimes Theatres, Inc.*, 475 U.S. 41, 58 (1986) (Brennan, J., dissenting).

Finally, the underinclusive nature of California's Act raises Equal Protection concerns by treating similarly situated speakers in dissimilar fashion. In particular and within the entertainment industry, speakers who convey violent-themed messages through CDs, television sets, movie screens, magazine pages and other forms of media are exempted from the reach of the Act while, in contrast, only those speakers who convey their violent-themed messages through the medium of video games are subject to regulation. This Court recently held that the First Amendment prohibits the disparate treatment of speakers who wish to convey the same content. *Citizens United*, 130 S. Ct. at 898 (2010) ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others"). The Act thus is flawed.

In summary, *Amici* urge this Court to hold the California Act fatally underinclusive.

II. Sexually Explicit and Violent-Themed Speech Should Continue to be Treated Separately and Distinctly by This Court

In April in *United States v. Stevens*, 130 S. Ct. 1577 (2010), this Court refused to carve out another unprotected category of expression for depictions of animal cruelty from its free-speech, First Amendment jurisprudence. *Amici* now urge the Court to continue to reject any further expansion to the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

In particular, *Amici* encourage this Court to reject California's attempt to conflate and confuse unprotected sexual expression that is either obscene or child pornographic with protected violent media content. See *Roth v. United States*, 354 U.S. 476, 485 (1957) ("obscenity is not within the area of constitutionally protected speech or press"), *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008) ("we have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and "we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-246 (2002) ("as a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children"). Specifically, California's Act amounts to a backdoor effort to expand this Court's variable obscenity jurisprudence initially fashioned more than four decades ago in *Ginsberg v. New York*, 390 U.S. 629 (1968), that prevents non-obscene yet sexually explicit content that is harmful to minors from reaching their hands, while still affording consenting adults access to it. See Kevin W. Saunders, *The Need For A Two (Or More) Tiered First Amendment To Provide For The Protection Of Children*, 79 Chi.-Kent L. Rev. 257, 261 (2004) ("*Ginsberg* allowed society to protect children from material that some see as harmful to them, while still allowing adult access"). The variable obscenity jurisprudence allows courts to have two definitions of obscenity – one for adults, as defined under *Miller v. California*, 413 U.S. 15 (1973), and one for minors, with states fashioning their own statutes and often borrowing from the three-pronged *Miller* test within them to define the content that is unsuitable for minors. See, e.g., Fla. Stat. § 847.001 (2010) (defining harmful to minors, in relevant part, as content that "(a) Predominantly appeals to a prurient, shameful, or morbid interest; (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors"); Nev. Rev. Stat. Ann. § 201.257 (2009) (defining harmful to minors, in relevant part, as content that "predominantly appeals to the prurient, shameful or morbid interest of minors, is patently offensive to prevailing standards in the adult community with respect to what is suitable material for minors, and is without serious literary, artistic, political or scientific value").

But *Ginsberg* was a case about sexual expression – "some so-called 'girlie' magazines," as this Court wrote (*Ginsberg*, 390 U.S. at 631) – not violent expression. The entire doctrine of variable obscenity is made possible only because, as the Court observed in *Ginsberg*, "obscenity is not protected expression." *Id.* at 641. In stark contrast, this Court has never held that violent-themed speech falls outside of the ambit of First Amendment protection.

The bottom line is that the necessary condition that makes the variable obscenity doctrine possible – namely, a category of expression that lacks Constitutional protection – is absent when it comes to violent-themed speech. Variable obscenity is an off-shoot, in other words, of this Court's long-standing obscenity jurisprudence. California's Act attempts to create what amounts to a variable violence doctrine, but there simply is no violent-expression jurisprudence from which such an off-shoot can arise.

In an effort to stretch this Court's sexual expression jurisprudence to apply to violent expression, California Civil Code Section 1746 (2009) borrows from *Miller's* obscenity test by defining a violent video game, in relevant part, as one in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that:

> (A) Comes within all of the following descriptions: (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors. (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors. (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. *Id.*

This represents a brazenly bold bastardization and bootstrapping of the *Miller* test for obscenity, which provides that, in determining whether the content in question is obscene, the trier of fact must consider if: 1) the material, taken as a whole and viewed from the perspective of an average person, would appeal to a prurient interest, meaning a morbid or shameful interest; 2) the material is patently offensive; and 3) the material lacks serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) ("prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex").

Grafting the phrases "of minors" and "for minors" onto the *Miller* test and simultaneously swapping out sexual images and replacing them with violent-themed ones as the underlying regulated content may constitute clever crafting, but it is an unconstitutional encroachment on the First Amendment. This is more than just Petitioners playing verbal gymnastics with *Miller*; it is Petitioners playing fast and loose with long-standing First Amendment principles. *Amici* thus urge this Court both to continue to make clear distinctions between sexual and violent expression and to reject Petitioners' efforts to conflate the two.

III. Proof of Causation of Harm Must Continue to be Required Before the Regulation of Violent Video Games Can Even be Considered

Amici urge the Court to accept the Ninth Circuit's standard and its ruling on the issue of causation of harm. In the instant case, the appellate court not only engaged in its own examination and analysis of several studies offered by California, but it suggested that proof of harm causation – not merely correlation – was required:

> Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution against inferring causation. Although we do not require the State to demonstrate a "scientific

> certainty," the State must come forward with more than it has.

Schwarzenegger, 556 F.3d at 963-964.

Just one year earlier, the United States Court of Appeals for the Eighth Circuit in *Entertainment Software Association v. Swanson*, 519 F.3d 768 (8th Cir. 2008), went even further on the evidentiary burden in striking down a Minnesota law targeting violent video games when it held "that the evidence falls short of establishing the statistical certainty of causation demanded." *Id.* at 772.

All of this concern for proof of harm comes with very good reason when it is contextualized historically. To this extent, it is important to emphasize that the types of concerns, fears and suspicions that apparently animate Petitioners' efforts at censorship are far from new. As two leading communication scholars write:

> In 1929, an estimated 40 million minors, including more than 17 million children under the age of fourteen, went to the movies weekly. Critics raised alarming questions about their effects. Were the picture shows destroying parents' control over their children? Were they teaching immorality? Films with unwholesome themes – horror, crime, immoral relationships, and the illegal use of alcohol (during Prohibition) – were especially troubling.

Melvin L. DeFleur & Everette E. Dennis, *Understanding Mass Communication: A Liberal Arts Perspective* 432 (6th ed. 1998).

Each new medium, it seems, causes concerns about its impact on minors. Perhaps this is natural, as one generation fears a new technology with which it is not familiar. But in just a few years, many lawmakers and judges across the country will have grown up playing video games, some of which were not violent and some of which probably were. Or perhaps the fear of new media merely reflects the fact that, as one leading First Amendment scholar and university president puts it, "[c]ensorship is a social instinct." Rodney A. Smolla, *Free Speech in an Open Society* 4 (1992).

Ultimately, the burden must continue to fall on the government to prove direct causation of harm allegedly stemming from a particular form of expression that otherwise receives full First Amendment protection. Even in the area of commercial speech, which is only subject to intermediate scrutiny rather than the heightened strict scrutiny standard by which laws targeting violent-themed speech must be measured, this Court has held that the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfeld v. Fane*, 507 U.S. 761, 770, 771 (1993). Justice Samuel Alito embraced this rigorous level of scrutiny in commercial speech cases while serving on the United States Court of Appeals for the Third Circuit in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).[2]

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[2] In declaring unconstitutional a Pennsylvania statute restricting advertisements for alcohol in college and university newspapers, then Judge Alito wrote for a unanimous three-judge panel that the Commonwealth of Pennsylvania relied only on speculation and conjecture and had not offered any evidence to show the law would

Furthermore, in the process of applying the lower standard of intermediate scrutiny to evaluate the constitutionality of government laws affecting the speech of cable system operators, this Court has held that the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Even when it comes to regulating the speech of adult bookstores and sexually oriented businesses through zoning laws, government entities must put forth some evidence of harm. In particular:

> a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest [citation omitted]. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance.

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002).

Surely if speech-restricting regulations analyzed under the intermediate scrutiny standard and imposed upon the expression of large cable companies, commercial advertisers, and adult businesses must be

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be effective. *Pitt News v. Pappert*, 379 F.3d 96, 107-108 (3d Cir. 2004).

justified by actual evidence showing real harms, then Petitioners and other governmental entities that seek to regulate speech that receives full First Amendment protection must demonstrate a higher standard of evidentiary proof. *Amici* thus urge this Court to affirm the Ninth Circuit's rigorous analysis of the question of causation of harm.

CONCLUSION

Rather than battling real-world violence and crime by hiring more police officers or by better enforcing already-on-the-books laws that target actual illegal conduct, Petitioners' have chosen, instead, to fight a surrogate battle over fictional, entertainment-based violence by adopting a statute that targets speech – not conduct – and that, in the process, jeopardizes First Amendment freedoms. Given the fatal underinclusiveness of this effort described in Part I of the Argument above, one must wonder whether California will next target images of real-life violence from the wars in Afghanistan and Iraq or whether it will attack its own Hollywood-centric film studios that churn out violent content like the *Terminator* movies starring Petitioner Arnold Schwarzenegger.

In addition, it is important to remember that the gaming generation is growing up. As its members begin to take the tools of power in this country – as they become lawmakers, law clerks, judges and policy makers – they may have a greater comfort level with the media they grew up with than do older generations who may fear new technologies. Until that time, however, the Court must hold the line on allowing such fears to trump First Amendment rights.

Amici thus respectfully request that the Court affirms the decision below of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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ARNOLD SCHWARZENEGGER, in his official capacity as
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EDMUND G. BROWN, JR., in his official capacity as
Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and
ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF MICROSOFT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF MICROSOFT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Microsoft's mission is to enable individuals and businesses throughout the world to realize their full potential by creating technology that transforms the way people work, play, and communicate. Microsoft has long advanced that mission in the context of video games by positioning itself at the forefront of technology—including as an early innovator in computer gaming, and more recently by developing the popular Xbox and Xbox 360 video game consoles.

In addition to creating the technology that makes gaming possible, Microsoft develops and publishes video games for both its *Windows* operating system and the Xbox consoles. Video games released through Microsoft Game Studios include some of the most successful games in history, such as the *Halo* and *Age of Empires* series. Microsoft's games are available for purchase through retailers around the world, as well as through Microsoft's online store at store.microsoft.com.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus*, Gibson, Dunn & Crutcher LLP, represented respondents in the lower courts but does not represent them before this Court; none of the attorneys who represent *amicus* before this Court were involved in the proceedings below, and none of the attorneys who represented respondents below authored any portion of this brief.

The California Civil Code imposes labeling requirements on "[e]ach violent video game that is imported into or distributed in California for retail sale" and prohibits retailers from selling any game labeled as "violent" to persons under the age of 18. Cal. Civ. Code §§ 1746.1(a), 1746.2. Although the statute contains a lengthy definition of "violent video game," prolixity is no substitute for clarity, and the statutory definition offers none of the latter. Indeed, the terms of the definition are so unclear that those potentially subject to the statute, including Microsoft, can do no more than guess which video games might be covered.

Microsoft is concerned that uncertainty regarding the reach of the California statute forces video game developers, publishers, and distributors into either of two unacceptable positions. They may engage in self-censorship to mitigate the risk of facing substantial penalties—$1,000 *per violation* (*i.e.*, for "[e]ach . . . game" imported or distributed)—for concluding incorrectly that a particular game need not be labeled as "violent." Or they may prophylactically label any questionable games as "violent" and thereby shut those games out of retail channels unwilling to assume the $1,000-per-violation risk associated with selling them. Confronting potential speakers with this Morton's Fork undermines the creative process and is antithetical to the First Amendment.

STATUTORY PROVISIONS INVOLVED

Section 1746(d)(1)(A) of the California Civil Code provides, in relevant part:

> "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that . . . [c]omes within all of the following descriptions:
>
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
>
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
>
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

Section 1746.1(a) of the California Civil Code provides:

> A person may not sell or rent a video game that has been labeled as a violent video game to a minor.

Section 1746.2 of the California Civil Code provides, in relevant part:

> Each violent video game that is imported into or distributed in California for retail sale shall be labeled with a solid white "18" outlined in black. . . .

Section 1746.3 of the California Civil Code provides, in relevant part:

> Any person who violates any provision of this title shall be liable in an amount of up to one thousand dollars ($1,000), or a lesser amount as determined by the court. . . .

SUMMARY OF ARGUMENT

This Court has emphasized that "First Amendment freedoms need breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). California's labeling requirement for "violent" video games suffocates creativity and expression in the comparatively new medium of video games by forcing video game developers, publishers, and distributors to self-censor rather than risk penalties for games that could conceivably fall within the statutory requirement.

Confronted with the vague terms in the California statute, video game makers are left to guess about the statute's scope and how it might conceivably be enforced. Yet rather than risk punishment for incorrect guesses, some companies would err on the side of caution and either alter the content of their games to avoid any possibility of penalties, or label as "violent" even games that they do not believe qualify as such under the statute—in either case reducing the availability of protected expression not only for minors but also for society as a whole.

This self-censorship would come at a great cost. Video games provide players with the opportunity to create—and indeed to control the creative process—through the interactions of their characters with others in the game, including both computer-controlled characters and characters controlled by other players. Restricting access to video games would thus deprive game developers and those who play their games of a critical instrument for expressing and exercising their creativity.

The First Amendment does not permit such limitations on constitutionally protected expression. Instead, it insists that statutes "'give the benefit of any doubt to protecting rather than stifling speech.'" *Citizens United* v. *FEC*, 130 S. Ct. 876, 891 (2010) (quoting *FEC* v. *Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.)). Because the California statute falls well short of this requirement, the Court should invalidate it—if not because, as respondents correctly contend, its attempted restriction on "violent" content is an invalid content-based restriction on speech, then because that restriction is impermissibly vague.

ARGUMENT

I. VAGUE RESTRICTIONS ON VIDEO GAMES ARE CONSTITUTIONALLY IMPERMISSIBLE AND UNDERMINE THE CREATIVE PROCESS.

The California statute—like other attempts to restrict access to so-called "violent" video games—is problematic because people "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). As this Court has recognized, such uncertainty is particularly unacceptable in regulating expressive activity because it would "create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions" by the courts. *Citizens United* v. *FEC*, 130 S. Ct. 876, 891 (2010).

1. Before this Court, as before the Ninth Circuit, "[t]he State does not contest that video games are a form of expression protected by the First Amendment." Pet. App. 16a. Nor could it do so: The First Amendment is "versatile enough to 'shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,'" and there is "no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative

present in video games are not entitled to a similar protection." *Interactive Digital Software Ass'n* v. *St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) ("*IDSA*") (quoting *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995)) (alteration in original).

Video games "contain stories, imagery, 'age-old themes of literature,' and messages, 'even an "ideology," just as books and movies do.'" *IDSA*, 329 F.3d at 957 (quoting *Am. Amusement Mach. Ass'n* v. *Kendrick*, 244 F.3d 572, 577–78 (7th Cir. 2001) (Posner, J.) ("*AAMA*")); *see also Entm't Software Ass'n* v. *Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006) ("*ESA*") (video games "contain original artwork, graphics, music, storylines, and characters similar to movies and television shows"). Indeed, the parallels between video games and movies are so pronounced that each routinely provides material for the other; movies like *Prince of Persia: The Sands of Time* and *Lara Croft: Tomb Raider* originated as video games, for instance, whereas *GoldenEye 007* and *The Godfather* are video games derived from movies.[2] Like movies and television shows, video games therefore receive full constitutional protection under the First Amendment even though they are at least partly designed to entertain. *See Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501–02 (1952); *see also, e.g.*, *Winters* v. *New York*, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of that basic right.").

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[2] Given this overlap, it is unsurprising that film actors routinely provide voices for video games. *Mass Effect 2*, for instance, features the voices of Martin Sheen (*Apocalypse Now*), Carrie-Anne Moss (*The Matrix* trilogy), Adam Baldwin (*Full Metal Jacket*), Shohreh Aghdashloo (*House of Sand and Fog*), and Seth Green (the *Austin Powers* series). *Grand Theft Auto: San Andreas* has a similarly impressive cast, including Samuel L. Jackson (*Pulp Fiction*), James Woods (*Once Upon a Time in America*), Peter Fonda (*Easy Rider*), Frank Vincent (*Raging Bull*), and Chris Penn (*Reservoir Dogs*).

Video games that contain "violence" nonetheless remain constitutionally protected, for a simple and obvious reason: "Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low." *AAMA*, 244 F.3d at 577 (citing, *e.g.*, the *Odyssey*, *The Divine Comedy*, *War and Peace*, *Frankenstein*, and *Dracula*). That is particularly true for American culture.

American film and literature have long glorified the violent days of the Wild West, as in Cormac McCarthy's *Blood Meridian*, *The Quick and the Dead*, and *The Good, the Bad, and the Ugly*. Violent westerns are not just tolerated by society; they are embraced. John Wayne won the Academy Award for Best Actor in *True Grit*, in which he portrayed a U.S. Marshal who (among other things) shoots and kills a horse thief who had himself just fatally stabbed another horse thief. *Butch Cassidy and the Sundance Kid*, which ends with the title characters charging into their certain deaths in a volley of gunfire, was nominated for Best Picture, as were the comparably violent *High Noon* and *The Alamo*.

Depictions of war in American film and literature likewise contain violence as an essential element of their artistic and thematic value. In James Fenimore Cooper's *The Last of the Mohicans*, for instance, the title character is stabbed to death (along with the daughter of a British army colonel); his killer, a

Huron chief, is then shot by a recurring character in Cooper's novels, who also appears in the similarly violent *The Deerslayer*. More recently, violence has been an important component of such critically acclaimed films as *Apocalypse Now*, in which a machete attack on Marlon Brando's character is juxtaposed with the ritual slaughter of a water buffalo, and *The Deer Hunter*, a Best Picture winner that, in addition to depicting violence in the Vietnam War, involves several scenes of Russian Roulette, which ultimately results in the shooting death of Christopher Walken's character. *Platoon*, *Schindler's List*, and *Saving Private Ryan*—all of which were nominated for the Academy Award for Best Picture, and the first two of which won it—also involve graphic depictions of violence.

Violence is not limited to the western and war genres. *The Godfather* and *The Godfather Part II* won Best Picture Oscars (and seven other Academy Awards) for their depictions of the Corleone crime family. And *The Silence of the Lambs* swept the top Oscar categories for its depiction of an FBI agent who captures a serial killer with the help of a convicted cannibal.

Video games, no less than books and movies, can use violence as a critical part of their expressive content. In *AAMA*, Judge Posner used *The House of the Dead*, a video game that could be played on Microsoft's *Windows* operating system, to illustrate how even "violent" games draw on and reflect recurrent cultural themes:

> The player is armed with a gun—most fortunately, because he is being assailed by a seemingly unending succession of hideous axe-wielding zombies, the living dead con-

> jured back to life by voodoo. The zombies have already knocked down and wounded several people, who are pleading pitiably for help; and one of the player's duties is to protect those unfortunates from renewed assaults by the zombies. His main task, however, is self-defense. Zombies are supernatural beings, therefore difficult to kill. Repeated shots are necessary to stop them as they rush headlong toward the player. He must not only be alert to the appearance of zombies from any quarter; he must be assiduous about reloading his gun periodically, lest he be overwhelmed by the rush of the zombies when his gun is empty.

244 F.3d at 577. Similar zombie-themed games have remained popular in the decade since *AAMA* was decided, including the *Dead Rising* series on Xbox 360.

As Judge Posner observed, "[s]elf-defense, protection of others, dread of the 'undead,' [and] fighting against overwhelming odds" are "all age-old themes of literature, and ones particularly appealing to the young." 244 F.3d at 577–78. Although *The House of the Dead* is perhaps not "distinguished literature," "popular culture . . . is not lightly to be suppressed." *Id.* at 578; *see also IDSA*, 329 F.3d at 958 ("Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the [First Amendment], we are obliged to recognize that 'they are as much entitled to the protection of free speech as the best of literature.'" (quoting *Winters*, 333 U.S. at 510)).

Eagle Forum—but, notably, not California—claims that video games lose their constitutional protection because they are purportedly *"role-playing* activities that do not constitute free speech." Eagle Forum Br. 2 (emphasis in original). As the lower courts have concluded, however, "there is no justification for disqualifying video games as speech simply because they are constructed to be interactive." *IDSA*, 329 F.3d at 957; *see also, e.g.*, *AAMA*, 244 F.3d at 577 (same). Interactivity is the future of *all* media, as companies have long appreciated in developing technologies such as interactive television. *See, e.g.*, Lorne Manly, *Your TV Would Like a Word with You*, N.Y. Times, Nov. 19, 2006, § 2, at 1. And even those who work in older media have recognized the value of interactive works: "[S]ome books, such as the pre-teen oriented 'Choose Your Own Nightmare' series (in which the reader makes choices that determine the plot of the story . . . by following the instructions at the bottom of the page) can be every bit as interactive as video games." *IDSA*, 329 F.3d at 957–58.[3]

Contrary to Eagle Forum's assumption, "[a]ll literature . . . is interactive; the better it is, the more interactive." *AAMA*, 244 F.3d at 577. "[L]iterature is most successful when it 'draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.'" *IDSA*, 329 F.3d at 957 (quoting *AAMA*, 244 F.3d at 577); *see also, e.g.*, C.S. Lewis, *An Experiment in Criticism* 137 (Canto 2000) (1961) ("We want to see with other eyes, to imagine with other imaginations, to feel with other hearts, as well as with our own."). In this respect, the interactive nature of video games "can be said to enhance the expressive elements even more than other media by drawing the player closer to the characters and becoming more involved in the plot of the game than by simply watching a movie or television show." *ESA*, 426 F. Supp. 2d at 651. That video games are *more* expressive than movies or books is hardly a justification for according them *less* constitutional protection.

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[3] The same is true of the "Choose Your Own Adventure" books, one of the most popular children's series of the 1980s and 1990s. *See, e.g.*, Edward Packard, *The Cave of Time* 3 (1979) ("If you decide to start back home, turn to page 4. [¶] If you decide to wait, turn to page 5."); *see also* Julie Bosman, *Choose Your Own Adventure Series Turns a Page*, N.Y. Times Media Decoder Blog, July 26, 2010, http://mediadecoder.blogs.nytimes.com/2010/07/26/choose-your-own-adventure-series-turns-a-page (discussing "modern interactive books based on the series," which preserve "[t]he basic concept of the books—a suspenseful plot with dozens of possible endings, depending on which choices the reader makes"). There is considerable overlap between video games and these interactive books; *The Cave of Time*, for instance, was developed into a computer game for the Apple II and Commodore 64 systems in the mid-1980s.

Indeed, modern gaming technology creates the possibility for an unprecedented collaboration between the designer and the player. Whereas older video games typically required the player to complete a particular sequence of steps in a particular order, modern games may be nonlinear: Game designers have the technological ability to permit players to choose which tasks to complete in which order, perhaps even whether to complete a particular task at all, and to encode in the game multiple endings or side-plots to reflect the outcome of these choices. *See, e.g.*, Ernest Adams, *The Designer's Notebook: How Many Endings Does a Game Need?*, Gamasutra, Dec. 22, 2004, http://www.gamasutra.com/view/feature/2179/the_designers_notebook_how_many_.php ("If your game includes an interactive story, you may want multiple endings to reflect important actions that your player has made in the course of the game, actions that she expects to have meaningful consequences."). In this sense, video games represent the expressive product of *both* the designer *and* the player, and limitations on video games are thus far more pernicious in their effect than comparable restrictions on movies or television shows.

2. This Court has long recognized that "the vagueness of [content-based] regulation[s]," such as the California statute at issue here, "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno* v. *ACLU*, 521 U.S. 844, 871–72 (1997). These concerns apply equally to statutes that are purportedly designed to protect minors: "'It is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise . . . .'" *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 689 (1968) (quoting *People* v. *Kahan*, 206 N.E.2d 333, 335 (N.Y. 1965) (Fuld, J., concurring)) (first omission in original).

a. When a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," the "uncertain meanin[g]" of the statute forces potential speakers to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)); *see also, e.g.*, *Greyned* v. *City of Rockford*, 408 U.S. 104, 109 & nn.6–8 (1972) (collecting cases). The result is self-censorship: Rather than risk violating a vague prohibition, speakers "limit their [speech] to that which is unquestionably safe," at the expense—for the speaker, and for society as a whole—of protected speech that falls closer to the line. *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 609 (1967).

The problems caused by vague laws governing speech are particularly pronounced in the context of new media. New media are vulnerable to suppression through vague laws because the newness of the medium invariably means those proscriptions have yet to be cabined by reliable enforcement patterns or judicial construction. *Cf. Se. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

To avoid such limitations on constitutionally protected speech, the Court has "molded both substantive rights and procedural remedies . . . to conform to [its] overriding duty to insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by vagueness." *Walker* v. *City of Birmingham*, 388 U.S. 307, 345 (1967). "Because of the sensitive nature of constitutionally protected expression," for instance, this Court has not required "those subject to overbroad regulations [to] risk prosecution to test their rights" because "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). Similarly, "[b]ecause First Amendment freedoms need breathing space to survive," this Court has repeatedly held that "government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963); *see also, e.g., Citizens United*, 130 S. Ct. at 891–92.

b. The concerns that motivated this Court to invalidate potentially chilling, vague statutes in other contexts apply with particular force to California's attempt to regulate "violent" video games.

The statute imposes a $1,000 penalty for each violation, Cal. Civ. Code § 1746.3, and "[e]ach violent video game that is imported into or distributed in California for retail sale" without the required labeling is a separate violation, *id.* § 1746.2. Because a video game publisher might sell multiple *millions* of copies of popular titles—of which a considerable number would be sold in California, the most populous state—it would face enormous potential liability for erroneously concluding that a video game is not "violent" under the California statute. And even if the publisher *correctly* declines to label a game as violent, the costs of litigation over the labeling requirement themselves could be substantial—particularly because the requirement possibly may be enforced by private parties, *see id.* § 1780(a), in addition to "*any* city attorney, county counsel, or district attorney," *id.* § 1746.4 (emphasis added). *See, e.g., Dombrowski*, 380 U.S. at 487 ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.").

To avoid this potential liability, the publisher could self-censor in either of two ways: It could encourage its developers to alter the game's content, or it could label the game as "violent" despite its genuine belief to the contrary. *Cf. Entm't Software Ass'n* v. *Granholm*, 404 F. Supp. 2d 978, 983 (E.D. Mich. 2005) (noting, in the context of a similarly vague statute, that "without wholesale, indiscriminate refusals to sell video games to minors by store operators it appears impossible to protect sellers from prosecution"). The adverse effect on the creative process is obvious in the former example, but it is equally pronounced in the latter.

If a publisher labels a video game as "violent," that would trigger the California statute's prohibition on sales of the game to minors. *See* Cal. Civ. Code § 1746.1(a) ("A person may not sell or rent a video game that has been labeled as a violent video game to a minor."). This prohibition, like the labeling requirement, is enforceable by a $1,000-per-violation penalty. *Id.* § 1746.3. Faced with this potential liability, few retailers would choose to carry games that have been labeled as "violent" when they could avoid any potential liability (and any need for additional staff training) simply by selling other games. Indeed, even in the absence of a statutory mandate, major retailers have declined to carry compact discs marked with an analogous "parental advisory" label for explicit lyrics. *See, e.g.*, Neil Strauss, *Policing Pop: Recording Industry's Strictest Censor Is Itself*, N.Y. Times, Aug. 1, 2000, at A1 (noting that such national retailers comprise "10 to 20 percent [of the market] for popular artists"). And because the largest retailers are national in scope and may prefer to order their inventory on a company-wide basis, there is a substantial risk that games labeled as "violent" might be shut out of *all* a national retailer's stores, not just its California ones.

To maximize the retail availability of its products, a video game publisher thus has a strong incentive to avoid labeling its games as "violent," even if that means forcing its developers to change video game content. *See, e.g.*, *Policing Pop*, *supra*, at A1 (noting that "[a]rtists are regularly asked to sing lyrics again, edit out particular words and even excise entire songs from albums" to ensure their albums can be sold in stores that "refuse to carry albums with parental advisory stickers"). Because the definition of "violent" games under the California statute is so imprecise, distributors would be forced to "give the benefit of any doubt to . . . stifling speech"—a result the First Amendment plainly forbids. *Citizens United*, 130 S. Ct. at 891 ("First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.'" (quoting *FEC* v. *Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.))).

II. THE VAGUE TERMS OF THE CALIFORNIA STATUTE FORCE VIDEO GAME DEVELOPERS, PUBLISHERS, AND DISTRIBUTORS TO GUESS ABOUT ITS SCOPE.

Almost every portion of the California statute contains terms "so vague that [persons] of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally*, 269 U.S. at 391.

A. THE CALIFORNIA STATUTE'S REPEATED REFERENCES TO "MINORS" ARE VAGUE.

The word "minors" itself renders the California statute impermissibly vague. The statute refers to "a deviant or morbid interest *of minors*," "prevailing standards . . . as to what is suitable *for minors*," and games that "lack serious literary, artistic, political, or scientific value *for minors*." Cal. Civ. Code § 1746(d)(1)(A) (emphases added). Under California law, a "minor" is simply someone "under 18 years of age." *Id.* § 1746(a). There are doubtless video games that are suitable for 17-year-olds that are unsuitable for toddlers, but the statute does not state *which* of these "minors" is relevant.

The Third Circuit's decision in *ACLU* v. *Ashcroft* is illustrative. 322 F.3d 240 (3d Cir. 2003), *aff'd*, 542 U.S. 656 (2004). The statute at issue there covered "'material that is harmful to minors,'" defined in part (like the California statute here) as speech that "'lacks serious literary, artistic, political, or scientific value *for minors*.'" *Id.* at 253 (quoting 47 U.S.C. § 231(e)(6)(C) (2000)) (emphasis in original). But because "[t]he term 'minor' . . . applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen," potential speakers "cannot tell which of these 'minors' should be considered." *Id.* at 254.

As the Third Circuit recognized, "[t]he type of material that might be considered harmful to a younger minor is vastly different—and encompasses a much greater universe of speech—than material that is harmful to a minor just shy of seventeen years old." 322 F.3d at 268. Some materials, for instance, "may have 'serious value' for, and not be 'patently offensive' as to, sixteen-year-olds," even though "[t]he same material . . . might well be considered 'patently offensive' to, and without 'serious value' for, children aged, say, ten to thirteen." *Ibid.*

The Third Circuit therefore "consider[ed] the use of the term 'minor' . . . to be impermissibly vague." 322 F.3d at 268 n.37. "Because the statute's definition of a minor is all-inclusive, and provides no age 'floor,'" potential speakers would be "forced to guess at the bottom end of the range of ages to which the statute applies." *Id.* at 269 n.37; *see also id.* at 254 (potential speakers "must guess at which minor should be considered in determining whether [their speech] has 'serious . . . value for [those] minors'" (quoting 47 U.S.C. § 231(e)(6)(C) (2000)) (omission and second alteration in original)). Such uncertainty would "dete[r] [potential speakers] from engaging in a wide range of constitutionally protected speech," and "[t]he chilling effect caused by this vagueness offends the Constitution." *Id.* at 269 n.37.

Similarly here, the California statute provides no clues for video game developers, publishers, and distributors regarding which age range of "minors" they should consider in deciding whether to label their games. To avoid potential liability, they might be forced to assume the statute means *any* "minor," and therefore that it would consider "violent" even those games that satisfy the statutory definition only with respect to toddlers. This reading of the statute would render it substantially overbroad: Even assuming the First Amendment permits the government to restrict minors' access to "violent" content, that content remains protected speech, and the First Amendment prohibits the government from suppressing speech that would not be "violent" as to teenagers simply because it is inappropriate for toddlers. *See ACLU*, 322 F.3d at 255. Thus, to the extent the word "minors" is not vague, it simply reveals a related constitutional problem with the California statute. *See Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8 (1983) (noting that the Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines").

B. EACH OF THE THREE PRONGS OF THE CALIFORNIA STATUTE IS VAGUE.

Even assuming that the California statute's references to "minors" have a discernable meaning, the three prongs in which that word appears do not. No video game developer, publisher, or distributor could determine by anything other than guesswork whether a game "appeals to a deviant or morbid interest of minors," as judged by a hypothetical "reasonable person"; whether a game is "patently offensive to prevailing standards . . . as to what is suitable for minors"; or whether a game "lack[s] serious literary, artistic, political, or scientific value for minors." Cal. Civ. Code § 1746(d)(1)(A).

In attempting to define "violent video game" using these three prongs, California drew heavily from the test for obscenity announced in *Miller* v. *California*, 413 U.S. 15 (1973). In *Miller*, this Court explained that the "basic guidelines" in determining whether speech qualifies as obscene are:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (internal quotation marks and citations omitted).

Even in the best of circumstances, *Miller*'s three prongs provide only the most modest of guidance to potential speakers. The Court settled on the *Miller* test after "[h]aving struggled for some time to establish a definition of obscenity," *Reno*, 521 U.S. at 872, and that test has been subject to persistent criticism by members of the Court ever since, *see Miller*, 413 U.S. at 37 (Douglas, J., dissenting) ("The Court has worked hard to define obscenity and concededly has failed."); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 92 (1973) (Brennan, J., dissenting) ("[O]ne cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."); *Marks* v. *United States*, 430 U.S. 188, 198 (1977) (Stevens, J., dissenting) (characterizing "the present constitutional standards" as "intolerably vague"); *Pope* v. *Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) (noting "the need for reexamination of *Miller*"). Indeed, the *Miller* test is perhaps the most criticized legal standard of the past century. *See* James Lindgren, *Defining Pornography*, 141 U. Pa. L. Rev. 1153, 1159 (1993) ("The *Miller* test has been called vague, underbroad, and overbroad by various commentators.").[4]

But whatever the merits *vel non* of *Miller*'s test for obscenity, California's attempt to modify that test to address the value of particular speech for minors deprives *Miller* of even the limited clarity it would otherwise offer.

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[4] *See also, e.g.*, Donald A. Downs, *The New Politics of Pornography* 20-21 (1989) (noting "[c]onfusion over the meaning of key parts of the *Miller* test—'prurience,' 'serious value,' 'patently offensive,' 'community standards'"); Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After* Roth *v.* United States, 9 Tex. Rev. Ent. & Sports L. 1, 20 (2007) (discussing the "troubling definitional problems with the *Miller* test"); H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 St. Thomas L. Rev. 517, 531 (2003) ("No reasonable person could argue with a straight face that *Miller* defines obscenity with 'narrow specificity.'" (citing 413 U.S. at 27)); P. Heath Brockwell, Comment, *Grappling with* Miller *v.* California*—The Search for an Alternative Approach to Regulating Obscenity*, 24 Cumb. L. Rev. 131, 136 (1993) ("the failure of the *Miller* test lies partly in the vagueness of its standards"); Emily Campbell, *Obscenity, Music and the First Amendment: Was the Crew 2 Lively?*, 15 Nova L. Rev. 159, 237-38 (1991) ("There is no justifiable basis [under *Miller*] upon which to distinguish the 'bad stuff'—obscenity—from the 'tolerable stuff'—pornography.").

1. The California statute applies to video games that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors." Cal. Civ. Code § 1746(d)(1)(A)(i). The terms "deviant" and "morbid" are not defined by the statute, however, and it is completely opaque to potential speakers what those terms might mean.

The judgment about what is "deviant"—that is to say, especially abnormal—for a minor is subject to considerable debate. "Classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial." *AAMA*, 244 F.3d at 575. It is hardly clear whether some of these works might appeal to minors' "deviant" interests. Do minors have a "deviant" interest in the portions of the *Odyssey* containing "graphic descriptions of Odysseus's grinding out the eye of Polyphemus with a heated, sharpened stake"? *Id.* at 577. What about "graphic descriptions of the tortures of the damned" in *The Divine Comedy*? *Ibid.*

The statutory term "morbid" is no better. *See Video Software Dealers Ass'n* v. *Webster*, 968 F.2d 684, 690 (8th Cir. 1992) ("The phrase 'tendency to cater or appeal to morbid interests in violence for persons under the age of seventeen' is elusive."). California apparently borrowed this term from *Ginsberg* v. *New York*, which upheld a statute covering material that "predominately appeal[ed] to the prurient, shameful or morbid interest of minors." 390 U.S. 629, 646 (1968). But in *Ginsberg*, the state all but conceded it could not defend "morbid" on the statute's own terms; instead, the state argued that the statute had been construed by the New York courts as applying only to the *pruriently* morbid. *See* Appellee Br. 96, *Ginsberg*, 390 U.S. 629 (No. 67-47) ("What the enactors have forbidden by their draftsmanship is the arousal of prurient morbidity or shamefulness[,] not other kinds of morbid interest . . . ."). The California statute contains no such limitation, however, because it is not limited to sexual content.[5]

Even if it were possible to determine whether a video game appealed to a "deviant" or "morbid" interest of *any particular minor*, however, the statute calls for this determination to be made with respect to *minors as a class*. A video game that appeals to particular interests of one minor might not appeal to the same interests in every other minor in California, and that is true even if it were possible—and it is not—to hold age and maturity levels constant. Yet the statute does not provide any guidance regarding which minors, or what percentage of minors, must be used to determine whether a game appeals to a deviant or morbid interest of "minors." (Of course, whatever percentage is relevant, no video game developer, publisher, or distributor can reasonably be expected to determine whether its games appeal to particular interests of a given percentage of minors in California.)

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[5] Consistent with the state's brief, this Court's decision upholding the *Ginsberg* statute rested entirely on the fact that "the New York Court of Appeals [had] construed th[e] definition to be 'virtually identical to the Supreme Court's most recent statement of the elements of obscenity'"—a proposition for which the Court cited *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966). *Ginsberg*, 390 U.S. at 643 (quoting *Bookcase, Inc.* v. *Broderick*, 218 N.E.2d 668, 672 (N.Y. 1966)). That this Court expressly disapproved the *Memoirs* test in *Miller* casts even further doubt on *Ginsberg*'s vagueness holding. *See Miller*, 413 at 24-25; *see also Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 n.10 (1975) ("We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation.").

The California statute is all the more problematic because it requires distributors to speculate about what a hypothetical "reasonable person" would believe to raise deviant or morbid interests in the unknowable class of minors. By taking inherently value-laden terms like "deviant" and "morbid," and layering on top of them an additional value judgment about what is "reasonable," the California statute sets an impossible standard for potential speakers to evaluate. *Cf.* Benjamin Franklin, *The Autobiography of Benjamin Franklin* 32 (Charles W. Eliot ed., SoHo 2010) (1791) ("So convenient a thing it is to be a reasonable creature, since it enables one to find or make a reason for everything one has a mind to do."). While a potential speaker could perhaps—at great expense and subject to considerable margins of error—determine the "average" views in a community through surveys, there is no comparable method to determine what is "reasonable."[6]

2. The California statute covers material that is "patently offensive to prevailing standards in the community as to what is suitable for minors." Cal. Civ. Code § 1746(d)(1)(A)(ii). But the decision about what is "suitable for minors" is necessarily made on a family-by-family basis—and indeed, in some cases, on a family-member-by-family-member basis.

Suitability judgments are subjective and personal, and there is no reason to expect that a video game developer, publisher, or distributor would be able to determine how any particular family has drawn the balance, let alone whether the aggregation of these private judgments has somehow resulted in a "prevailing standar[d] in the community." That is precisely why the industry has instead developed a voluntary ratings system designed to provide guidance *to parents* as they determine what is suitable for *their own* children. *See* Entm't Software Rating Board, *Game Ratings & Descriptor Guide*, http://www.esrb.org/ratings/ratings_guide.jsp ("The Entertainment Software Rating Board . . . ratings are designed to provide concise and impartial information about the content in computer and video games so consumers, especially parents, can make an informed purchase decision.").

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[6] Indeed, not even the *Miller* test (for all its faults) would go so far. *Miller* uses a "reasonable person" standard only to evaluate the value of a work—to avoid prohibiting unpopular but nonetheless potentially valuable works—but it looks to an "average" member of the community for the remaining prongs. *See, e.g.*, *Pope*, 481 U.S. at 500.

The critical flaw in the California statute is that it takes the community-standards test this Court developed for obscenity and attempts to adapt that test to video games by adding an insoluble "suitable for minors" inquiry. In obscenity cases, this Court presumes that members of a community will be able to determine whether a particular item falls short of "contemporary community standards" where they live. *Miller*, 413 U.S. at 24. That is, the test assumes community members can "draw on [their] own knowledge of the views of the average person in the community or vicinage" to "mak[e] the required determination." *Hamling* v. *United States*, 418 U.S. 87, 104 (1974).

Whatever the merits of the assumptions behind the community-standards test, there is at least *some* information a potential speaker could consider in attempting to discern the relevant standard. The speaker could consider, for instance, whether comparable materials were commonly purchased in the community. *See United States* v. *Womack*, 509 F.2d

368, 379 (D.C. Cir. 1974) (noting that a publication may be "so widely sold and . . . so generally available in the community as to warrant a finding of community acceptance"); *see also, e.g.*, *In re Harris*, 366 P.2d 305, 305 (Cal. 1961) (in bank) (holding that the trial court erred by excluding "comparable writings and publications purchased in the community").

To decide whether a particular video game is deemed "suitable for minors" in a particular community, however, a publisher or distributor could not look to sales data for other games. Sales of similar games to adults would be meaningless, of course, and even sales of similar games to minors would be of very limited probative value: The only games that a minor could purchase would be ones already determined by their creators to be "suitable" for minors. But even then, a video game developer could not be certain that the previous developers' judgments were in accord with an average member of the community. And the determinations of previous developers would be of no assistance to the developer of truly original content in his effort to determine whether an average member of the community would deem the new game "suitable" for minors. With so little information that potential speakers could even theoretically consult in trying to determine the statute's reach, they must instead resort to guesswork—precisely what the First Amendment forbids.

3. Finally, the California statute covers video games "lack[ing] serious literary, artistic, political, or scientific value for minors." Cal. Civ. Code § 1746(d)(1)(A)(iii). This, too, provides no meaningful guidance to video game developers, publishers, and distributors.

As an initial matter, the concept of "serious . . . value" is inherently subjective and therefore vague. The First Amendment "accommodat[es] . . . the widest varieties of tastes and ideas" because "[w]hat is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another." *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 157–58 (1946) ("What seems to one to be trash may have for others fleeting or even enduring values."). "[R]atiocination has little to do with esthetics," and therefore "it is quite impossible to come to an objective assessment of (at least) literary or artistic value, there being many accomplished people who have found literature in Dada, and art in the replication of a soup can." *Pope*, 481 U.S. at 504–05 (Scalia, J., concurring). Thus, while *Miller* and its progeny have (for the time being) defined *obscenity* by reference to "serious literary, artistic, political, or scientific value," 413 U.S. at 24, the Court should not extend such an indeterminate approach to other types of speech.

The vagueness of the "serious . . . value" standard is compounded in this case because it turns on the value of particular works "for minors." The statute thus presumes that video games are age-specific—that is, some games with "serious . . . value" for a 17-year-old might not have such value for a younger child. But even assuming the statute referred to a particular age range of minors, *but see supra* Part II.A, there is no reason to believe it is even *possible* to determine when a particular game first has "serious . . . value" for a minor, *see, e.g.*, *ACLU*, 322 F.3d at 255 ("Even if the statutory meaning of 'minor' were limited to minors between the ages of thirteen and seventeen, [potential speakers] would still face too much uncertitude as to the nature of material that [the statute] proscribes.").

The statute likewise assumes there are some video games that have "serious . . . value" for 19-year-old adults but that do not also have "serious . . . value" for 17-year-old minors. This is hardly a self-evident proposition, but in any event video game publishers are left to speculate about which games have value only for adults and not for older minors—and therefore can avoid the risk of making an incorrect guess only by altering the content of games that *by definition* have "serious . . . value" for adults. The First Amendment prohibits vague statutes to avoid precisely this sort of chilling effect. *See, e.g., Keyishian*, 385 U.S. at 609.

C. THE UNIQUE FEATURES OF VIDEO GAMES COMPOUND THE CALIFORNIA STATUTE'S INHERENT VAGUENESS.

The California statute's vague terms would be problematic in any statute, but they are especially so in the context of video games—a context that renders unclear even terms that might in other contexts be pellucid. The seemingly clear statutory phrase "image of a human being" (Cal. Civ. Code § 1746(d)(1)) both illustrates the difficulty of adapting real-world concepts to video games and confirms that the California statute is impermissibly vague.

In the context of video games, in which the images displayed on screen are the product of the game designer's imagination unbounded by physical limitations, it is often meaningless to speak of "human being[s]." Characters may be depicted as having only some "human" characteristics, or they may be "human" at some times and not others; a game might present characters that are entirely robotic but that have highly realistic "human" appearances. *See also supra* at 8–9 (discussing violence against zombies). The statute provides no guidance for video game developers, publishers, and distributors about whether violence against such fantastical or robotic characters might violate the statute—or indeed whether a depiction of a part-animal, part-alien, or robotic creature can ever be deemed an "image of a human being" under the statute.

For instance, in *Jade Empire*, a video game available on Microsoft's Xbox 360 console, both the player's character and the enemy forces possess magical abilities and transform into non-humanoid creatures. These are, of course, not traits of "human being[s]." But at least when the character appears in human form, that would arguably qualify as an "image of a human being" under the statute. Video game developers, publishers, and distributors are thus left to guess about the proper interpretation of this ambiguous phrase—at the risk of stiff civil penalties if they guess wrong. The First Amendment forbids states from forcing potential speakers to undertake this sort of guesswork.

* * *

Vagueness, even in a statute that imposes only labeling requirements and sales restrictions to minors, stifles creativity. The California statute does so in the extreme, as it repeatedly requires potential speakers to apply statutory terms that make little sense, or admit of no clear definition, in the context to which they are applied.

The result of this imprecise drafting can only be widespread chilling of protected expression. Faced with massive potential liability for failing to label games that a court might later deem to be "violent," video game designers, publishers, and distributors are forced either to alter game content or to label as "violent" any game that even approaches the statutory line, which in turn reduces retail availability of the game. Such self-censorship deprives society of the creative output of video game designers and removes from would-be players of those games—adults and minors alike—a uniquely powerful outlet for their own creativity.

This Court has repeatedly recognized that society is poorer when expression is not given the "breathing space" it requires "to survive," and therefore that the government may regulate expression "only with narrow specificity." *Button*, 371 U.S. at 433. California failed to heed this command.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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v.

ENTERTAINMENT MERCHANTS ASSOCIATION, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.; INDEPENDENT FILM AND TELEVISION ALLIANCE; LUCASFILM LTD.; NATIONAL ASSOCIATION OF THEATRE OWNERS, INC.; DIRECTORS GUILD OF AMERICA, INC.; PRODUCERS GUILD OF AMERICA; SCREEN ACTORS GUILD; WRITERS GUILD OF AMERICA, WEST, INC.; AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICI CURIAE

The Motion Picture Association of America, Inc. (MPAA), is a not-for-profit trade association that serves as the primary voice for the American motion picture industry. Its members include Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLLP; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc. MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home-entertainment markets. The MPAA was founded in 1922, in response to intensifying efforts by state and local governments to censor American motion pictures. Several decades later, the MPAA played a central role in the establishment of the industry's voluntary movie rating system, which was designed to deter efforts at government censorship by providing the public with clear and concise information about the content of motion pictures. The MPAA continues to work to ensure First Amendment protection for movie content, while also assisting the public in making informed decisions about the motion pictures it wishes to see.

The Independent Film and Television Alliance (IFTA) is the nonprofit trade association for the independent film and television industry worldwide. IFTA's membership includes 150 independent film and television production, finance, and distribution companies. IFTA members finance, produce, and distribute about 500 feature films and countless hours of television programming annually.

Lucasfilm Ltd. is a fully integrated film and entertainment company. Founded in 1971 by George Lucas, Lucasfilm is responsible for some of the best-known motion pictures of our time, including the *Star Wars* and *Indiana Jones* series and *American Graffiti*.

The National Association of Theatre Owners, Inc. (NATO), is the largest motion picture exhibition trade organization in the world, representing owners and operators of more than 30,000 movie screens in all fifty states. NATO's members include the ten largest movie theater operators in the United States and hundreds of smaller, independently owned theater companies. NATO partnered with the MPAA to create the voluntary movie rating system in 1968, and its members continue to serve as the primary source of education and enforcement of that system.

The Directors Guild of America, Inc., was founded in 1936 to protect the economic and creative rights of directors. Over the years, its membership has expanded to include over 14,000 people, encompassing not only directors but also unit production managers, assistant directors, associate directors, stage managers, and production associates. The members of the Directors Guild make vital contributions to the production of feature films, television programs, documentaries, news and sports programs, commercials, and content made for new media. The Directors Guild seeks to protect the legal, economic, and artistic rights of directorial teams, and serves as an advocate for their creative freedom.

The Producers Guild of America is the nonprofit trade group that represents, protects, and promotes the interests of all members of the producing team in film, television, and new media. The Producers Guild has over 4,500 members who work together to protect and improve their careers and the industry.

Screen Actors Guild (SAG) is the Nation's largest labor union representing working actors. Established in 1933, SAG represents more than 125,000 actors who work in motion pictures and television, industrials, commercials, video games, music videos, and all other new media formats. In its 77-year history, SAG has grown to encompass 20 branches across the country in addition to its offices in Hollywood and New York. SAG's brand is recognized the world over and embodies its commitment to enhancing actors' working conditions, compensation, and benefits. Headquartered in Los Angeles, SAG is a powerful, unified voice for artists' rights and is a proud affiliate of the AFL-CIO.

The Writers Guild of America, West, Inc., is a labor organization representing approximately 11,000 professional writers in the motion picture, television, and new media industries. The Writers Guild's mission is to protect the economic and creative rights of the writers it represents.

The American Federation of Television and Radio Artists (AFTRA) represents the people who entertain and inform America. In 32 locals across the country, AFTRA represents actors, singers, journalists, dancers, announcers, comedians, disc jockeys, and other performers in television, radio, cable, sound recordings, music videos, commercials, audio books, non-broadcast industrials, interactive games, and all formats of digital media. Founded in 1937, AFTRA today provides its more than 70,000 members nationally with a forum for bargaining strong wages, benefits, and working conditions, and the tools and upward mobility to pursue their careers with security and dignity. From new art forms to new technology, AFTRA members embrace change in their work and craft to enhance 21st-century American culture and society.

Together, amici represent a broad cross-section of the motion picture and television industries, which make a significant contribution to popular culture and the American economy. The motion picture and television industries consist of some 95,000 businesses involved in all aspects of production, distribution, and promotion. In 2008, the motion picture and television industries collectively supported some 2.4 million jobs in the United States, providing over $140 billion in wages. And they generated over $15 billion in tax revenue for the federal and state governments. See MPAA, *The Motion Picture*

& Television Industry Contribution to the U.S. Economy (Apr. 2010) <tinyurl.com/mpaaeconomy>.[1]

STATEMENT

The history of the motion picture industry serves as a vivid illustration of the threat to First Amendment rights from the impulse to control and censor new forms of media—a threat reflected in the statute at issue before the Court. From the advent of motion pictures, a variety of state and local governments sought to restrict their content for the asserted purpose of protecting moviegoers from being exposed to harmful material. In response to that patchwork of regulation, the motion picture industry initially imposed its own form of censorship, which proved to be unworkable. Ultimately, the concerns that originally animated efforts at censorship were successfully addressed by a voluntary regime that provides the public with accurate information about the content of motion pictures. That widely praised regime—which has been in operation for more than four decades—allows parents and other moviegoers to make informed decisions about which motion pictures contain appropriate content, and does so in a way that does not compromise First Amendment rights. While the rating system itself is now a familiar and established part of American life, we begin with a brief account of the history leading to its adoption and of the operation of the system.

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the amici, their members, or their counsel made such a monetary contribution. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

A. Early Efforts At Censorship

By the early 1920s—even before the first "talking" motion pictures were shown—there were a host of state and local censorship boards across the country that reviewed the content of motion pictures before permitting them to be shown within their respective jurisdictions. Predictably, the resulting patchwork of regulation created a minefield for filmmakers and exhibitors; each censorship board applied different standards. For example, at the time, a woman could smoke onscreen in Ohio, but not in Kansas; a pregnant woman could appear onscreen in New York, but not in Pennsylvania. Even when censorship boards in different jurisdictions were applying substantively similar regulations or criteria, each board would often demand different changes, leading to further confusion. See Classification and Rating Administration, *The Movie Rating System: Its History, How It Works and Its Enduring Value* 3 (*Movie Rating System*) (last visited Sept. 17, 2010) <tinyurl.com/ratingsystem>; Leonard J. Leff & Jerold L. Simmons, *The Dame in the Kimono: Hollywood Censorship and the Production Code* 3-4, 32 (2d ed. 2001) (Leff & Simmons); Comment, *Censorship of Motion Pictures*, 49 Yale L.J. 87, 92 (1939) (*Censorship of Motion Pictures*).

As a result, it was virtually impossible for filmmakers and exhibitors to predict in advance whether particular motion pictures would successfully run the gauntlet of censorship boards. In light of the variation and indefiniteness in the applicable standards, filmmakers were forced to tailor their motion pictures to what they guessed would be the most restrictive standards, particularly given the considerable costs of making changes once production was completed. See Jane M. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 Colum. L. Rev. 185, 187 (1973) (Friedman); *Censorship of Motion Pictures* 91-92. Filmmakers and exhibitors had little recourse in the face of efforts to censor the content of motion pictures, because this Court at the time took the position that motion pictures were not entitled to First Amendment protection. *See Mutual Film Corp.* v. *Industrial Comm'n of Ohio*, 236 U.S. 230, 243-245 (1915).[2]

B. The Production Code And Continued Efforts At Censorship

Soon after its establishment in 1922, the MPAA embarked upon a campaign to preempt government censorship by promoting a uniform system of voluntary industry self-regulation. In 1927, the MPAA endorsed an advisory list of "Don'ts and Be Carefuls" for filmmakers. That list identified the following subjects to avoid:

> [P]rofanity, nudity, drug trafficking, sex perversion, white slavery, miscegenation, sex hygiene and venereal diseases, scenes of actual childbirth, children's sex organs, ridicule of the clergy, and offenses against a race, creed, or nation.

Leff & Simmons 8. Although the list of topics to be avoided altogether was primarily focused on specific types of sexual content, the MPAA also promulgated a somewhat broader list of topics to be handled with "special care," which included various types of criminal, immoral, and sexual conduct. *See The Movies in Our*

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[2] This Court later overruled the *Mutual Film* decision, holding that motion pictures were a form of speech protected by the First Amendment. *Joseph Burstyn, Inc* v. *Wilson*, 343 U.S. 495, 500-502 (1952).

Midst: Documents in the Cultural History of Film in America 213-214 (Gerald Mast ed. 1982).

In 1930, the MPAA incorporated those advisory lists into a system of private censorship that became known as the Production Code (or the Hays Code). The Production Code espoused the philosophy that motion pictures ought not to "lower the moral standards" of their viewers, and it contained a list of prohibited topics and words. Gerald R. Butters, *Banned in Kansas: Motion Picture Censorship, 1915-1966*, at 188 (2007) (Butters). As the MPAA explained almost sixty years ago in an amicus brief to this Court, the Production Code was intended to serve as a "workable alternative to official restraint." MPAA Br. at 2, *Superior Films, Inc.* v. *Department of Education*, 346 U.S. 587 (1954) (No. 217). As it was implemented, the Production Code not only set out standards for the content of motion pictures, but also established a system whereby the Production Code Administration (an arm of the MPAA) would review both scripts and finished motion pictures and either approve or disapprove them, depending on its judgment as to whether a given motion picture was "moral" or "immoral." As a practical matter, no motion picture could secure widespread release without the Administration's seal of approval. See Leff & Simmons 20, 54-55; *Movie Rating System* 5, 37-38; H.J. Forman, *Our Movie Made Children* (1933).

The Production Code Administration vetoed scripts that contained even slightly objectionable content. And it continually battled with filmmakers over the use of mild profanity, depictions of marital discord, and insinuations of homosexuality. In one protracted episode, the Administration issued warnings to the producer of *Gone with the Wind* for the use of profanity in Rhett Butler's famous last line, "Frankly, my dear, I don't give a damn." The producer argued that the line should be retained and prevailed only after an appeal to the MPAA's board. See Leff & Simmons 82, 91, 100-107.

Over time, filmmakers increasingly bridled at the Production Code Administration's decisions, and there was increasing public demand for motion pictures that were denied the Administration's seal of approval. The industry therefore began searching for a more workable alternative to the Production Code that would serve the goal of informing the public about potentially objectionable content without directly imposing creative restrictions on the content itself. See Leff & Simmons 100-107; Recent Developments, *Supreme Court Upholds Validity of Municipal Ordinance Requiring Submission of All Motion Pictures for Censorship Prior to Exhibition*, 61 Colum. L. Rev. 921, 922 (1961).

C. The Rating System

In 1968, the MPAA, working in conjunction with NATO, devised the idea of a voluntary rating system. The primary objective of the system is to inform parents about movie content so that they can make effective decisions concerning their children's exposure to mature or controversial material. See *Movie Rating System* 6.

The operation of the rating system is straightforward. Filmmakers agree to submit their motion pictures to the Classification and Ratings Administration (CARA), an independent organization financed by rating fees. Movie ratings are determined by a full-time board of eight to thirteen members; when they join the board, the raters are parents of children between the ages of five and seventeen, and they have no prior affiliation with the motion picture industry. The raters are tasked with determining the suitability of motion pictures for different audiences; they are asked to consider both the content and themes of a motion picture and to give particular consideration to sexual content and nudity, violence, drug use, and adult language. The raters take into account the totality of the circumstances, and the standards they apply are intended to be flexible and adaptable over time. See *Movie Rating System* 8, 12.

Filmmakers agree to use the resulting ratings on all marketing and promotional materials. In addition, NATO's members have agreed to enforce the ratings by refusing to admit children to "R"-rated motion pictures unless they are accompanied by a parent or guardian (and refusing to admit children to "NC-17"-rated motion pictures at all). Retailers that sell or rent movies have also agreed to participate in enforcement. See Classification and Rating Administration, *Classification and Rating Rules* (last visited Sept. 17, 2010) <tinyurl.com/cararules>.

Since its initial adoption, the rating system has evolved in response to changing social norms and parental concerns. For example, in 2007, CARA added adult smoking to the list of considerations taken into account in the rating process. In addition, the rating system itself has been modified to increase the specificity and detail of the information provided. Not only has the rating system added new rating classifications (most notably, "PG-13" as an intermediate category between "PG" and "R"), but each motion picture now also receives a "rating descriptor," which specifically identifies the particular elements that form the basis for the rating. For example, *Saving Private Ryan* was rated "R" for "intense prolonged realistically graphic sequences of war violence" and for "language." That modification enables CARA to provide parents not only with an overall assessment of the suitability of a motion picture for different audiences, but also with an explanation for its assessment. See *Movie Rating System* 11, 17.

The movie rating system has received widespread praise and recognition for its effectiveness. According to survey data, some 75% to 80% of parents believe that the rating system accomplishes its intended purpose: namely, to allow parents to make informed determinations regarding the level of mature or controversial material that they wish to allow their children to see, while permitting filmmakers to retain discretion over the content of their motion pictures. See *Movie Rating System* 7.

The movie rating system has also served as an important model for the development and enforcement of the voluntary rating system used by the video game industry. In fact, the effectiveness of the movie rating enforcement system, as implemented by movie theater operators, was recognized at a Federal Trade Commission hearing, in the course of which video game retailers were encouraged to develop a similar program. See Federal Trade Commission, *Marketing Violent Entertainment to Children: A Workshop on Industry Self-Regulation* 211-212 (Oct. 29, 2003) <tinyurl.com/ftcworkshop>. Video game retailers responded favorably and later took steps to improve their enforcement efforts. See Press Release, Federal Trade Commission, *Undercover Shop Finds Decrease in Sales of M-Rated Video Games to Children* (Mar. 30, 2006) <tinyurl.com/ftcpressrelease>.

In fact, some states and localities have gone so far as to attempt to codify all or part of the system into law. See Friedman 230 (discussing "statutes which incorporate the X or R ratings as the substantive standard for that which is to be regulated"). The MPAA has explained, however, that the rating system is "not intended to function as * * * a method of categorizing films as protected or unprotected speech." MPAA, *The Authori-*

ty of the Federal Trade Commission to Regulate the Advertising and Marketing of Motion Pictures Depicting Violence 21 (Oct. 24, 2000). Accordingly, courts have uniformly rejected government efforts to implement legally enforceable restrictions that track the movie rating system, on the ground that "[the] standards by which the movie industry rates its films do not correspond to the * * * criteria for determining whether an item merits constitutional protection or not." *Swope* v. *Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983) (citation omitted); accord *Engdahl* v. *City of Kenosha*, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970); *MPAA* v. *Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970).

The motion picture industry thus relies on a system of voluntary compliance with, and self-enforcement of, the rating system, which protects the American public by providing information so as to enable it to make informed decisions about the motion pictures it wishes to see. That system serves as a model not only for the rating system for video games, but also for other rating systems across the entertainment industry. See Kyontze Hughes, First Amendment Center, *Rating & Labeling Entertainment* (May 2006) <tinyurl.com/otherratings>.

SUMMARY OF ARGUMENT

Amici agree with respondents that California's prohibition on the sale of violent video games to minors is invalid under the First Amendment. Amici file this brief to bring to the Court's attention the history of unsuccessful efforts to regulate the content of motion pictures, culminating in the voluntary adoption of the widely praised movie ratings system, and to warn of the potential chilling effect on the motion picture industry of a ruling in petitioners' favor.

A. To begin with, the Court should reject petitioners' contention that depictions of violence, either generally or "with respect to sale to minors," are categorically excluded from First Amendment protection. The Court has consistently rebuffed efforts to carve out new categories of unprotected speech and has made clear that only speech that has historically been unprotected can be treated as outside the scope of the First Amendment. There is no historical tradition of regulating depictions of violence comparable to the tradition of regulating obscenity or other categories of unprotected speech, either more generally or with specific reference to the motion picture industry. Petitioners' proposed categorical exclusion would not be limited to the particular medium of video games, and it would require courts to engage in the difficult enterprise of determining which depictions of violence could be regulated and which could not. There is no valid basis for that constitutional innovation.

B. Under the applicable framework for First Amendment analysis, petitioners cannot show that California's statute is narrowly tailored to serve a compelling governmental interest. While parents have a legitimate interest in directing the upbringing of their children, petitioners have failed to show that the government's assistance is necessary to serve that interest. And the fundamental lesson of the motion picture industry is that a system of self-regulation can sufficiently enable parents to make informed judgments concerning movie content. The movie rating system has widely been praised for its effectiveness, and society's long experience with the movie rating system demonstrates that a properly designed voluntary rating system can serve the relevant parental interest without the need for content-based government regulation.

C. Finally, if this Court were to hold that California's statute is valid, it would have a dramatic chilling effect on the motion picture industry. If the Court's reasoning is not confined to the particular medium of video games, state and local governments could attempt to impose similar restrictions on depictions of violence in other media, including motion pictures. Such restrictions would have an obvious chilling effect, particularly given the inherent amorphousness of restrictions of that type and the potential for a patchwork of nationwide regulation. And that chilling effect would reach motion pictures even if the Court were to attempt to limit the scope of its decision to depictions of violence in video games, in light of the increasingly symbiotic relationship between video games and motion pictures and the increasingly blurred lines between different forms of media more generally. In sum, under settled First Amendment principles, California's statute is invalid, and the judgment of the court of appeals should be affirmed.

ARGUMENT

CALIFORNIA'S PROHIBITION ON THE SALE OF VIOLENT VIDEO GAMES TO MINORS IS UNCONSTITUTIONAL

A. Depictions Of Violence Are Not Categorically Excluded From First Amendment Protection

Most ambitiously, petitioners contend (Br. 12) that the Court should treat "offensively violent material" as the equivalent of obscenity—and that the Court should therefore uphold California's prohibition on the sale of violent video games to minors without regard to the strict-scrutiny framework ordinarily applicable to content-based restrictions on speech. Amici agree with respondents that the Court should reject that sweeping contention.

1. This Court has consistently resisted efforts to carve out new categories of speech that are categorically excluded from First Amendment protection. Only last Term, in *United States* v. *Stevens*, 130 S. Ct. 1577 (2010), the Court squarely rejected the contention that "depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment." *Id.* at 1584. The Court acknowledged that it had previously held certain categories of speech, including obscenity, to be "fully outside the protection of the First Amendment." *Id.* at 1586. At the same time, however, the Court made clear that those exclusions were limited to categories of speech that had historically been understood to be unprotected. *See id.* at 1584 (noting that, "[f]rom 1791 to the present, * * * the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations") (second alteration in original; internal quotation marks and citation omitted). Although the Court left open the possibility that "there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law," it ultimately held that depictions of animal cruelty did not qualify as such a category. *Id.* at 1586.

2. Depictions of violence, like depictions of animal cruelty, do not constitute a category of unprotected speech, either generally or "with respect to * * * sale to minors." Pet. Br. 38.[3] Perhaps most importantly,

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[3] In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court clarified that material that does not constitute obscenity with regard to adults could still constitute obscenity with regard to minors. See *id.* at 636. Petitioners seemingly contend (Br. 12) that the same approach could be applied to depictions of violence, with the result that

there is no historical tradition of regulating depictions of violence comparable to the tradition of regulating obscenity or the other categories of speech that have been held to be unprotected. In support of the proposition that "many states have regulated violent material," petitioners cite only two nineteenth-century statutes prohibiting the depiction of criminal activity more generally. Br. 34. Even in the modern day, however, only nine States have enacted laws similar to California's prohibiting the sale of violent video games to minors, see Pet. Br. 34 n.3—and lower courts have consistently invalidated or enjoined those laws under established First Amendment principles. See, *e.g.*, *Entertainment Software Association* v. *Swanson*, 519 F.3d 768, 772 (8th Cir. 2008); *Interactive Digital Software Association* v. *St. Louis County*, 329 F.3d 954, 961 (8th Cir. 2003); *American Amusement Machines Association* v. *Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001).

Notably, there is little evidence of a historical tradition of regulating depictions of violence in the specific context of the motion picture industry. The earliest significant efforts at censorship, in the 1920s, focused primarily on sexual content—at a time when women's traditional roles were challenged by new clothing styles, open discussion of female sexuality, and changing social and political norms. See, *e.g.*, Butters 148, 153 (noting that, "[o]f all the subject matter most critiqued and con-

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only restrictions on the distribution or viewership of depictions of violence *to minors* would be upheld. That limitation, however, does not alter the fact that petitioners are seeking a categorical exclusion from First Amendment protection for a particular type of content—*i.e.*, certain "depictions of violence" that, in petitioners' view, constitute content whose regulation is not subject to strict scrutiny. See pp. 21-25, *infra*.

demned by the [Kansas censorship board], the depiction of impressionable young women being led to immorality, or sexually liberated young women having a good time, frustrated them the most"); p. 6, *supra*. While state and local censorship boards also sought to eliminate depictions of criminal activity, their focus was on the illegal nature of the actions shown, rather than on violence *per se*. See, *e.g.*, Butters 153. Unsurprisingly, then, the MPAA's 1927 list of "Don'ts and Be Carefuls" for filmmakers—which formed the basis of the Production Code that would remain in effect for several decades—advocated the complete prohibition of sexual content and profanity, but suggested only that "special care" be exercised with regard to depictions of violence. See pp. 7-8, *supra*.

Over the next several decades, although state and local censorship boards did order filmmakers to delete some scenes depicting violence and criminal activity, they primarily targeted scenes then viewed as risqué—such as a scene in which "Joan Crawford drop[ped] her skirt for a hot Charleston in *Our Dancing Daughters*," or another in which "[a filmmaker] set afire a theater in *Paris* so that chorines could flee the dressing rooms undressed." Leff & Simmons 8. In its effort to centralize and make uniform the restrictions imposed by the patchwork system of local censorship, the Production Code Administration followed suit and primarily emphasized the removal of sexual content from motion pictures. See *id.* at 59-65. Other themes—including "toilet humor," criminal activity, and profanity—were also targeted by the Production Code Administration, but neither as consistently nor as prominently as sexual content. See *id.* at 77, 105, 155; Butters 153.

As support for the Production Code declined in the 1950s, the difference between the Code's primary and secondary targets crystallized: in 1956, the MPAA eliminated most of the outright prohibitions contained in the Code, leaving only the prohibitions against nudity, sexual perversion, and venereal disease. See Leff & Simmons 224-225. When the MPAA implemented the voluntary rating system, replacing the Production Code, it focused on sexual content. The adoption of the movie rating system, in fact, came immediately after this Court's decision in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), which upheld the prohibition of the sale to minors of *obscene* materials. See *Movie Rating System* 6. In the history of efforts to regulate the motion picture industry, therefore, there is scant support for the proposition that depictions of violence have traditionally been understood to be unprotected.

3. Petitioners' proposed categorical approach suffers from two additional flaws that counsel against its adoption—both of which have a direct bearing on the motion picture industry.

a. If this Court were to hold that depictions of violence are categorically excluded from First Amendment protection, such a principle could not logically be limited to the particular medium of video games. Indeed, in arguing for such a categorical approach, petitioners do not propose any such limitation. See, *e.g.*, Pet. Br. 12 (contending that the rule of *Ginsberg* "is equally applicable to regulations on minors' access to offensively violent material" on the ground that "[s]uch material, like obscenity, is harmful to minors and has little or no redeeming social value for them"); *ibid.* (further contending that "history, tradition, and our continuing understanding of the inherent vulnerability and susceptibility of minors to negative influences confirm that California should be allowed to restrict minors' access to offensively violent material as it has done here").

Under petitioners' approach, therefore, the government would presumably be empowered to proscribe the distribution or viewership of depictions of violence in motion pictures, television, and books, as long as the content qualified as sufficiently "violent" to trigger the categorical exclusion. This Court has taken such broader ramifications into account in invalidating other restrictions on speech, and it should do so here as well. See, *e.g.*, *Citizens United* v. *FEC*, 130 S. Ct. 876, 904 (2010) (noting that, under the government's rationale, it "could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books"). Lower courts, moreover, have recognized that difficulty in the specific context of invalidating statutes like the one at issue here. See *Entertainment Software Association*, 519 F.3d at 772 (stating that, "[a]lthough some might say that it is risible to compare the violence depicted in [video games] * * * to that described in classical literature, such violence has been deemed by our court worthy of First Amendment protection"); *American Amusement Machines Association*, 244 F.3d at 575-576 (noting that "[c]lassic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial"); *Entertainment Software Association* v. *Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (stating that "there is serious reason to believe that a statute sweeps too broadly when it prohibits a game that is essentially an interactive, digital version of the *Odyssey*").

b. If this Court were to hold that depictions of violence are categorically excluded from First Amendment protection, moreover, lower courts would be forced to draw difficult distinctions between protected and unprotected content. The statute at issue in this case defines the prohibited violent video games by loose analogy to the definition of "obscenity" in *Miller* v. *California*, 413 U.S. 15 (1973). See Cal. Civ. Code § 1746(d)(1)(A) (2010) (considering whether "[a] reasonable person * * * would find that [the game] appeals to a deviant or morbid interest of minors"; whether "[i]t is patently offensive to prevailing standards in the community as to what is suitable for minors"; and whether "[i]t causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors"). Assuming, *arguendo*, that the line between protected and unprotected content lies roughly where California has drawn it (and further assuming that a statute drawing that line would not be unconstitutionally vague, but see pp. 27-28, *infra*), a court would have to apply some analogue to the notoriously slippery *Miller* factors—which would present the same difficulties as, or even greater difficulties than, the application of the actual *Miller* factors in the context of obscenity. Cf., *e.g.*, *United States* v. *Kilbride*, 584 F.3d 1240, 1250-1255 (9th Cir. 2009) (discussing the lingering uncertainty as to whether national or local "community standards" should be applied to Internet obscenity).

More broadly, such an approach would inevitably require a court to weigh the potential harm of permitting minors to be exposed to depictions of violence against the artistic value of motion pictures and other works of which such depictions may be either an essential or incidental element. Indeed, petitioners seem to concede as much. See, *e.g.*, Br. 6 (referring to "offensively violent, harmful material with no redeeming value for children"). That mode of analysis, however, would require courts to pass judgment on the artistic value of motion pictures and other works with violent content. In *Stevens*, the Court expressly cited that concern in refusing to expand the list of categorical exclusions from First Amendment protection to include depictions of animal cruelty. See

130 S. Ct. at 1585 (stating that "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits").

In short, there is no reason to deviate from the conventional First Amendment framework in analyzing restrictions on speech with violent content. Petitioners' effort to add depictions of violence to the short list of categories of speech that are excluded from First Amendment protection should therefore be rejected.

B. California's Statute Does Not Survive Strict Scrutiny Because It Is Not Narrowly Tailored To Serve A Compelling Governmental Interest

As a content-based restriction on speech, California's prohibition on the sale of violent video games to minors can be upheld only if petitioners can show that the statute is narrowly tailored to serve a compelling governmental interest. See, *e.g.*, *United States* v. *Playboy Entm't Group*, 529 U.S. 803, 813 (2000); *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997); *Sable Commc'ns of Cal., Inc.* v. FCC, 492 U.S. 115, 126 (1989). Petitioners make only a halfhearted effort to satisfy that stringent standard, and amici agree with respondents that petitioners have failed to do so.

1. Although petitioners are somewhat circumspect about articulating the relevant governmental interest, they ultimately take the position (Br. 56) that the California statute serves the compelling governmental interest of "helping parents direct the upbringing of children and protecting them from harm caused by playing offensively violent video games." To be sure, amici agree that parents have a legitimate interest in directing the up-

bringing of their children. See, *e.g.*, *Winkelman* v. *Parma City School District*, 550 U.S. 516, 529 (2007).[4]

In order to argue, however, that there is a derivative *governmental* interest in assisting parents in directing the upbringing of their children (much less a compelling interest), petitioners must at a minimum show that the government's assistance is necessary: *i.e.*, that, absent government intervention, parents cannot adequately exercise their authority. See *Ginsberg*, 390 U.S. at 639. That principle flows not only from the requirement that there be a compelling governmental interest in the first place, but also from the requirement that any government regulation be narrowly tailored to serve that interest. Thus, this Court has made clear that, where the parental interest in directing the upbringing of their children can be served by providing parents with more information concerning potentially objectionable content, "a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 824. And where government regulation is in fact required, any such regulation should "support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815.

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[4] To the extent that petitioners suggest (Br. 56) that the government has a discrete interest in "protecting [children] from harm caused by playing violent video games," amici agree with respondents that petitioners have made an insufficient showing of a correlation between the playing of violent video games and actual violence or other antisocial behavior. Insofar as petitioners contend otherwise (Br. 43-45), they rely on broad assertions concerning the effects of depictions of violence in the media more generally. That contention, however, would seemingly support a prohibition on the distribution or viewership of depictions of violence in any form. See pp. 18-19, *supra*.

2. The fundamental lesson of the movie rating system is that a system of self-regulation can be sufficient, without additional government regulation, to enable parents to make informed judgments concerning the suitability of exposing their children to violent or other potentially objectionable content. As discussed above, the movie rating system is one means of enabling parents to do so, by providing them with substantial and readily accessible information concerning the content of motion pictures that their children may wish to see. See pp. 9-11, *supra*. That information comes not only in the form of a rating, which serves as a shorthand recommendation regarding the suitability of a motion picture for audiences of particular age groups, but also in the form of a "rating descriptor," which provides detailed information concerning the particular elements that serve as the basis for the rating. See pp. 10-11, *supra*. The rating system is designed to be flexible and responsive to the changing and sometimes differing concerns of American parents. See *ibid.* And the rating system is supported by a voluntary enforcement regime, through which theater owners refuse to admit children to "R"-rated motion pictures unless they are accompanied by a parent or guardian (and refuse to admit children to "NC-17"-rated motion pictures at all). See p. 10, *supra*.

The movie rating system has been widely recognized as an effective means of enabling parents to make informed judgments concerning the suitability of movie content, taking into account their child's level of maturity and individual sensitivities. As discussed above, an overwhelming majority of parents believe that the rating system accomplishes that very purpose. See p. 11, *supra*. In fact, it is no overstatement to say that the rating system has become part of the fabric of American life, with the result that the average person on the street could readily identify the significance of a "PG" or "R" rating.

3. It is well established that, where strict scrutiny is applicable, the government bears the burden of demonstrating that less restrictive alternatives to the challenged regulation would be insufficient to serve the asserted governmental interest. See, *e.g.*, *Ashcroft* v. *ACLU*, 542 U.S. 656, 665 (2004); *R.A.V.* v. *St. Paul*, 505 U.S. 377, 382-383 (1992). In this case, therefore, petitioners bear the burden of demonstrating, first, that the voluntary rating system adopted by video-game manufacturers is insufficient to enable parents to exercise their right to make informed judgments concerning the suitability of exposing their children to violent content, and, second, that there is no less restrictive means of serving that interest short of the blunt tool of an outright prohibition of sales to minors.

Petitioners hardly even try to make the requisite showings. Petitioners contend only that some video-game manufacturers do not participate in the rating system and that, as of ten years ago, retail enforcement of the rating system was imperfect. See Br. 56-59. Even assuming that showing were sufficient to establish that the current video-game rating system is inadequate, petitioners fail to show that any inadequacy could not be remedied through other means: for example, by providing support for an educational campaign for parents and retailers about the rating system, which would help to address the asserted deficiencies by creating incentives for manufacturers to participate and retailers to enforce the ratings more stringently. See Pet. App. 33a. Petitioners also fail to show that the asserted deficiencies could not be (and have not in fact been) remedied through technological means, such as the now-ubiquitous parental controls on game consoles that can be used to prevent minors from playing video games with violent or other potentially objectionable content. Cf. *Reno* v. *ACLU*, 521 U.S. 844, 877 (1997) (noting, in invalidating provisions of the federal Communications Decency Act, that filtering software enabling parents to prevent children from accessing inappropriate Internet content "will soon be widely available") (citation omitted).

The experience of the motion picture industry demonstrates that a properly designed voluntary rating system can serve the parental interest in making informed judgments about age-appropriate content without the need for government-imposed restrictions on content. There is no reason to permit government regulation in this case simply because it involves a new form of media, rather than a more established form such as motion pictures or books. As the history of the motion picture industry illustrates, see pp. 5-12, *supra*, the advent of new forms of media is often closely followed by efforts to control and censor those media, out of concern that they will have harmful effects. The efforts of a limited number of States to prohibit the sale of violent video games merely constitute the latest chapter of that saga. And absent a substantial showing that government intervention is required, there is no valid basis for arrogating to the state the authority to make judgments concerning the suitability of certain content for minors. Because petitioners' showing falls far short of that required to satisfy the stringent standard applicable to content-based restrictions on First Amendment rights, the court of appeals correctly held that California's prohibition on the sale of violent video games to minors is invalid.

C. If California's Statute Were Upheld, It Would Have A Chilling Effect On The Motion Picture Industry

Finally, if this Court were to hold that California's statute is valid either because depictions of violence are categorically excluded from First Amendment protection or because the statute survives strict scrutiny, it would have a dramatic chilling effect on the motion picture industry and other industries in which depictions of violence are a component of artistic expression.

1. As explained above, if the Court were to uphold California's statute (particularly on the ground that depictions of violence are categorically excluded from First Amendment protection), its reasoning could not logically be limited to the particular medium of video games. See pp. 18-19, *supra*. Absent such a limitation, moreover, state and local governments would be free to impose similar restrictions on the depictions of violence in other media—for example, by imposing sanctions on theater owners that permit minors to see motion pictures with violent content.

Scenes depicting violence, however, have played a substantial role in some of the most important motion pictures both of this generation and of prior ones. For example, *The Hurt Locker*, an independently financed and produced film depicting the work of an Army bomb-disposal unit in post-invasion Iraq, won the 2009 Academy Award for Best Picture. *The Hurt Locker* opens with a gripping scene in which an Army officer is eventually killed after unsuccessfully attempting to dispose of a remote-controlled bomb, and the movie is built around other scenes in which the bomb-disposal unit attempts to dispose of bombs with varying degrees of success. See Internet Movie Database, *The Hurt Locker* (last visited Sept. 17, 2010) <tinyurl.com/imdbhurtlocker>. *The Hurt Locker* received an "R" rating for "war violence" and "language," meaning that children were not permitted to attend unless they were accompanied by a parent or guardian. But if California's statute were upheld, it is entirely possible that state or local governments could seek to prohibit children from seeing motion pictures such as *The Hurt Locker*—even though parents could readily have concluded that *The Hurt Locker* was an appropriate motion picture for older children in light of its unquestionable educational and artistic value. Indeed, it is entirely possible that state or local governments could seek to prohibit children from seeing motion pictures that are specifically targeted to younger audiences, such as the *Star Wars* or *Lord of the Rings* series, but that still contain some degree of violent content.

The chilling effect on the motion picture industry from such restrictions would be obvious. And it would be particularly acute to the extent that the restrictions require regulators or courts to consider whether a particular depiction of violence offends prevailing community standards, or whether it causes the motion picture as a whole to lack serious artistic value—as does California's statute prohibiting the sale of violent video games to minors. See Cal. Civ. Code § 1746(d)(1)(A) (2010). As this Court has recognized with specific reference to the motion picture industry, such amorphous regulatory requirements would have particularly pernicious chilling effects; indeed, they would likely be unconstitutionally vague. See *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 684 (1968) (noting that, "[i]f [a filmmaker] is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public" and instead "might choose nothing but the innocuous").[5]

A constitutional regime that permitted restrictions on depictions of violence, moreover, would leave the motion picture industry subject to the same patchwork of regulation that bedeviled the industry upon its inception. See pp. 6-7, *supra*. To avoid the uncertainty associated with differing or even conflicting regulations, filmmakers would be forced to produce motion pictures that complied with the most restrictive regulations. See *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 74 (1961) (Warren, C.J., dissenting) (noting that the chilling effect of censorship on the motion picture industry is particularly acute "due to the large financial burden that must be assumed by [motion pictures'] producers"). And motion picture exhibitors and theater owners might be deterred from showing motion pictures that contain content close to the regulatory line out of concern about potential criminal or civil sanctions. The inevitable result would be a dramatic curtailment of content with considerable artistic value—content that, when viewed by adults, would indisputably be entitled to First Amendment protection.

2. Finally, that chilling effect would ensue even if the Court were to attempt to limit the scope of its decision to depictions of violence in video games, in light of the increasingly symbiotic relationship between video games and motion pictures and the increasingly blurred line between different forms of media more generally. See, *e.g.*, Vince Horiuchi, *Gaming the Movies*, Salt Lake Trib., May 27, 2010; John Horn, *Getting Game*, L.A. Times, Feb. 26, 2009, at E1; *Video Games Inspired by*

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[5] Amici agree with respondents that the California statute at issue in this case is itself unconstitutionally vague. See Resp. Br. 57-61.

Hollywood: Film Spin-Off Is Not a Guarantee for Success for Video Games, Screen Digest, May 2008, at 135. In recent years, numerous motion pictures have been made into successful video games, including *The Matrix*, *The Fast and the Furious*, and the *Lord of the Rings* trilogy, as have even older motion pictures such as *Dirty Harry*. Many of those games contain excerpts of movie content or even special content, using the same sets and actors as the movie but filmed explicitly for the video game. Conversely, filmmakers have been making a growing number of motion pictures based on video games: for example, after many years of popularity, the video game *Tomb Raider*, which features an antiquities collector who procures artifacts by using her skills in combat, was made into the film *Lara Croft: Tomb Raider*, starring Angelina Jolie. See Internet Movie Database, *Lara Croft: Tomb Raider* (last visited Sept. 17, 2010) <tinyurl.com/imdbtombraider>.[6] Whether the motion picture or the video game comes first, the increasing overlap in visual elements, themes, and storylines renders it more difficult to draw clear lines between the two media. At a minimum, therefore, any restrictions on the content of video games would inevitably have some effect on the content of corresponding motion pictures.

There is no reason for the Court to enter this jurisprudential minefield. The experience of the motion picture industry teaches that concerns about exposing minors to violent content can be addressed through a system of self-regulation that does not require restrictions on content. And the application of familiar First Amendment principles dictates that California's efforts to address those concerns in the context of the video game industry through the blunt tool of an outright prohibition are invalid, because the prohibition is not narrowly tailored to serve a compelling governmental interest. The Court should therefore invalidate California's statute and affirm the court of appeals.[7]

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[6] *Lara Croft: Tomb Raider* received a "PG-13" rating for "action violence" and "some sensuality." Other video games that have recently been made into motion pictures include *Doom*, *Driver*, *Fear Effect*, *Mortal Kombat*, *Prince of Persia*, *Splinter Cell*, *Spy Hunter*, and *World of Warcraft*. All of those motion pictures received "PG-13" or "R" ratings.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[7] While all of the amici fully support the position of respondents in this case, the views of some of the amici diverge with regard to the relationship between the First Amendment and individuals' rights of publicity. This case, however, does not present the Court with the opportunity to resolve that issue.

AMICUS
CURIAE
BRIEF

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IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN, JR., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF BROADCASTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The National Association of Broadcasters ("NAB") is a non-profit, incorporated association of radio and television stations and broadcast networks that serves and represents the American broadcast industry.[1] NAB frequently files briefs as an *amicus curiae* in cases that present issues of interest to its members, including issues arising under the First Amendment.[2]

NAB has an interest in the questions presented in this case because their resolution may affect the scope of the government's authority to regulate violence in television programming. For decades, the federal government has examined violent content on television but failed to develop a workable and constitutional definition of "violence" for purposes of any potential regulation. The government has also failed, despite repeated attempts, to establish a causal connection between violence on television and antisocial behavior or youth aggression.

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[1] Pursuant to Rule 37.6, *amicus* NAB affirms that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* NAB, its members, or its counsel made such a monetary contribution. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

[2] NAB participated as *amicus curiae* in *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), among others.

The history of government efforts to address violence on television sheds light on the issues in this case. California Civil Code sections 1746-1746.5 impose restrictions and a labeling requirement on the sale or rental of "violent video games" to minors. California's assertion that "violent" content in video games is harmful to children founders on the same shoals that the federal government has repeatedly faced in the television context—both with respect to defining the violent content to be regulated and establishing a causal link between violent content and real world harm.

It also is instructive for purposes of this case to underscore that the federal government's inability to find a basis for regulating television violence has not left parents without options to oversee the programming viewed by their children. An effective system of parent empowerment and industry self-regulation has given parents the ability to control their children's access to video content without any need for the government to define and regulate "violent" content or control its dissemination. Parental blocking solutions such as the V-chip for television, used in conjunction with a standardized, industry-monitored rating system, are an effective way to alleviate the government's concerns without imposing speech restrictions.

The video game industry, like the television industry, has adopted a voluntary and widely used rating system for video games, supported by technology that allows parents to limit a child's access to games based on the ratings. The California regulatory scheme simply ignores this less restrictive approach to achieving its putative goal of child protection. In so doing, it runs roughshod over the First Amendment rights of content producers, retailers, and consumers.

In sum, NAB has an interest in ensuring that laws like the California statute are not upheld, because they do not advance a compelling government interest, they chill protected speech by using vague terms to constrain the distribution of content, and they do not utilize the least restrictive means to achieve the state's objective.

SUMMARY OF THE ARGUMENT

1. The federal government's attempts to regulate violence on television support the conclusion that the California law violates the First Amendment. By imposing a labeling requirement and restrictions on the sale of video games, the California law intrudes on the First Amendment rights of video game producers, distributors, and retailers. To justify this intrusion, the State must demonstrate that the alleged harm is real, and that the law will directly alleviate it. In addition, the law must provide sufficient guidance so that regulated parties know what conduct is prohibited. The California law fails both requirements.

Despite many attempts, the federal government has never formulated a definition of "violence" that is not unconstitutionally vague. The first attempt simply counted the number of punches thrown and shots fired during a television program. This "violence index" was inadequate because, among other reasons, it did not differentiate violent incidents in a detective show from those in a cartoon. Congress also attempted to define "violence" during the 1970s by directing the FCC to identify the steps it could take to protect children from "excessive violence." But the FCC informed Congress that it could not do so without raising "serious constitutional questions." Because decisions regarding which programs were excessively violent would be "highly subjective," the FCC concluded that governmental efforts to regulate in this area "could lead to extreme results unacceptable to the American people." Most recently, in 2007, the FCC again declined to define "violence" despite a congressional request that it do so. The FCC concluded that "developing a definition would be challenging" because "violent programming cannot be sufficiently defined to give affected parties the requisite notice to be able to predictably comply with any such regulation."

The California law does not identify and define the objective characteristics of unacceptably "violent" content. Instead, it regulates content based on vague terms, such as "appealing to the deviant and morbid interest of minors." The statute, which borrows much of its language from judicial and regulatory definitions of "obscene" materials, is unconstitutionally vague because it forces retailers to judge whether a particular video game is too violent to sell or rent to minors and it subjects them to a civil fine if a court later decides that their judgment was incorrect.

Similarly, government studies have been unable to establish a causal relationship between television violence and youth behavior. In 1954, the federal government considered whether crime programs on television were encouraging juvenile delinquency.

Despite endorsing the view that a causal relationship existed, the congressional subcommittee studying the issue acknowledged that there was no research supporting this conclusion. A committee convened by the Surgeon General considered the issue in 1972, but its report was inconclusive. The Surgeon General reconsidered the issue in 2001, and concluded that television violence might at most cause a short-term increase in aggressive behavior, but that there is no evidence that it causes real-life violence. In 2007, the FCC took the position that media violence can increase aggressive behavior in children. It did so based on the Surgeon General's 2001 report, but failed to recognize that the report made clear that any such effects are short-lived and that television violence does not cause real-life violence.

These decades of study have failed to establish a causal link between violence on television and real world harm. Likewise, there is no evidence establishing that violent video games cause actual violence. Without clear evidence of such a causal connection, the California law's infringement on First Amendment rights is impermissible.

2. The California law is not narrowly tailored to achieve the government's purported interest because rating systems and blocking technologies can limit children's access to particular content without restricting free speech rights.

The television industry, like the video game industry, has established a voluntary system for rating its programming. The rating system uses age-based ratings (similar to the motion picture ratings), and also provides specific information about the content of television programs. This system, adopted at Congress's urging, has been endorsed by the FCC and many prominent advocacy groups.

In conjunction with the development of the ratings systems, the FCC adopted technical requirements for the V-chip. This technology permits parents to restrict their children's viewing options by blocking programming according to the age-based categories (such as TV-14) or content labels (such as V for violence). Every television 13 inches or larger manufactured in the last decade contains a V-chip.

The rating systems and blocking technologies provide an effective solution to limiting youth exposure to violent media content. A 2007 study showed that most parents were aware of the television ratings system, and that a majority of them had used the system. Similarly, most parents are aware of the V-chip, and the number of parents using the V-chip is increasing. Because technology can effectively limit children's access to violent media without unduly restricting speech, content-based regulations, such as California's prohibition on violent video game sales to minors, are not narrowly tailored. The more constitutionally appropriate role for government is to continue promoting technological tools that assist parents in monitoring their children's use of media.

ARGUMENT

I. The History Of Government Efforts To Regulate Violence On Television Supports The Conclusion That California's Law Violates The First Amendment.

To justify a labeling requirement and restrictions on the sale of video games, California must do more than simply recite the truism that the state has a compelling interest in the well being of minors. Because labeling requirements and sale restrictions have an impact on First Amendment rights, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). The Constitution also demands that such laws provide "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

In the broadcast context, the federal government has struggled for decades to develop a viable definition of "violence" on television. In the most recent effort, the Federal Communications Commission ("FCC") conducted a multi-year inquiry into "violent" programming on television and its effect on children. The FCC concluded that defining violence in a way that would provide clear notice to those being regulated would be "challenging," and referred the issue back to Congress without proposing a definition. FCC, *Report: In the Matter of*

Violent Television Programming and Its Impact on Children at 18 (April 25, 2007) ("2007 FCC Report").

The federal government also has tried for decades without success to establish the existence of a causal link between depictions of violence on television and actual harm to children. Although Congress and the FCC have repeatedly studied the issue, they have failed to establish that violent television content produces youth aggression.

Viewed against this backdrop of government efforts to regulate violence on television, California's ban on sales of violent video games to minors cannot pass constitutional muster. The statute fails to provide a constitutionally adequate definition of the content it is seeking to regulate; fails to demonstrate that it is addressing a real and provable harm; and lacks a real-world mechanism for enforcing the vague and undefined standards it imposes on video game producers, distributors, and retailers.

A. Decades of Examining Violence On Television Have Failed To Produce A Satisfactory Definition Of "Violence."

The First Amendment requires that laws restricting speech provide regulated parties with "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The federal government's decades-long effort to study violence on television has demonstrated its inability to define "violence" in a way that meets this standard.[3]

The federal government made an early attempt to define violence during the 1970s. In 1972, the Scientific Advisory Committee on Television and Social Behavior, appointed by the Surgeon General, issued a report on the effects of entertainment violence on children's behavior. *See* Television and Growing Up: The Impact of Televised Violence, Report to the Surgeon General (1972). The report defined violence as the "overt expression of physical force against others or self, or the compelling of action against one's will on pain of being hurt or killed." *Id.* at 3.

In response to the report by the Surgeon General's committee, the Senate Subcommittee on Communications requested the creation of a "violence index" to measure the amount of violence on television. *See* Nancy Signorielli, *Violence in the Media* 8-10 (2005). This index counted the number of times a character punched someone or shot a gun, but drew no distinctions based on the type of violence or its context. *See* David Trend, *The Myth of Media Violence* 4 (2007). This measure of violence failed to give policymakers specific guidance as to which "violent" acts warranted regulatory intervention because it gave equal weight to violent incidents in cartoons and in detective, science fiction, and comedy programs such as *Columbo, Star Trek,* and *Get Smart. Id.*

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[3] The Ninth Circuit did not find it necessary to reach Respondents' vagueness challenge to the California law, but the difficulties regulators have encountered in seeking to define "violent" media content help to illuminate the other First Amendment issues in this case.

Two years later, in 1974, the House Appropriations Committee directed the FCC "to submit a report to the Committee by December 31, 1974, outlining the specific, positive actions taken or planned by the [FCC] to protect children from programming of excessive violence and obscenity." *See* H.R. Rep. No. 1139, 93d Cong., 2d Sess. 15 (1974). In response to this directive, the FCC determined that the "judgments concerning the suitability of particular types of programs for children are highly subjective" and would "rais[e] serious constitutional questions." FCC, *Report on the Broadcast of Violent, Indecent, and Obscene Material*, 51 F.C.C. 2d 418, 419 (1975).

The FCC recognized that "no reform short of a wholesale proscription" of all violent material would "provide absolute assurance that children or particularly sensitive adults will be insulated from objectionable material." *Id.* at 423. But under this absolutist approach, "many traditional children's films should be banned because they include some element of violence—for example, episodes in *Peter Pan* when Captain Hook is eaten by a crocodile or in *Snow White* where the young heroine is poisoned by the witch." *Id.* at 419 n.5. As a result, the FCC concluded that any "attempt at drafting" rules defining the scope of entertainment violence "could lead to extreme results which would be unacceptable to the American public." *Id.* at 419.[4]

During the 1980s, despite some calls for regulation, very few specific recommendations for government restrictions on television programming came out of the House or Senate committees. *See* Cynthia A. Cooper, *Violence on Television: Congressional Inquiry, Public Criticism and Industry Response* 102-03 (1996). These attempts at regulating television violence languished because, among other reasons, Congress recognized that the First Amendment placed substantial constraints on its authority to legislate the content of television. *Id.*

More recent examinations of violence on television have made clear that an absolutist approach to defining violence is overly simplistic. During the mid-1990s, a consortium of research universities conducted the National Television Violence Study, analyzing more than 10,000 hours of broadcast material. Trend, *supra*, at 4. This study was the first to find that the *context* in which violence appears is important to understanding its impact. It concluded that the reason for the violence, the characters involved, the consequences of the violence, and the relevant audience are all factors that should be included in any definition or measurement of television "violence." *Id.* at 4-5.

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[4] Although it did not take formal regulatory action, the FCC was found to have pressured television broadcasters to air only "family-friendly" programming during the 8:00-9:00 p.m hour of primetime. *See* Signorielli, *supra*, at 11; Cooper, *supra*, at 81. In 1976, a federal district court struck down the FCC's "Family Viewing Hour" policy on the ground that it violated the First Amendment. *Writers Guild of Am., W., Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976). According to the court, this policy, which was tied to the FCC's power to revoke the licenses of stations that did not follow it, constituted direct and unconstitutional censorship of content. *Id.* at 1141-43. Although the Ninth Circuit ultimately vacated the decision on jurisdictional grounds, the "Family Viewing Hour" was never reinstated. *See Writers Guild of Am., W., Inc. v. FCC*, 609 F.2d 355 (9th Cir. 1979).

The acknowledgment that context matters to any regulatory definition of violence is crucial to understanding the complicated nature of any governmental efforts to define "violent" media content. Even among those who advocate regulation of violent programming, there is little consensus on what constitutes violence. For example, some researchers regard all depictions of potential harm as violence, including comic violence, accidents, or "acts of nature." Signorelli, *supra*, at 56. Others believe the focus should be on the infliction of overt physical pain, hurting, or killing. *Id.* Without an agreed-upon understanding of which violent depictions should be considered "acceptable" and which are appropriate subjects for regulation, the federal government has been unable to formulate a narrowly tailored regulation of supposedly harmful media content.

Most recently, the FCC's 2007 Report on violent television programming and its effect on youth sought to determine whether it is possible to define violence in a way that gives regulated entities fair notice of what speech is subject to regulation. The FCC's Report was issued in response to a congressional request that the agency consider whether it is in the public interest for the government to adopt a definition of "'excessively violent programming that is harmful to children,'" and whether the government could formulate and implement such a definition "in a constitutional manner." Letter from Hon. Joe Barton, Chairman, U.S. House of Rep. Comm. on Energy & Commerce, to Hon. Michael K. Powell, Chairman, FCC (Mar. 5, 2004) ("House Commerce Committee Letter").

After receiving comments on whether or how excessive violence could be defined, the FCC found itself unable to propose a definition of "violence." The FCC noted the concerns expressed by commenters that "violent programming cannot be sufficiently defined to give affected parties the requisite notice to be able to predictably comply with any such regulation." 2007 FCC Report at 18. Rather than proposing or even suggesting a definition, the FCC could only conclude that "developing a definition would be challenging," and expressed its view that Congress is in a better position than the FCC to undertake the definitional task. *Id.*

Reflecting these definitional "challenges," the California statute at issue in this case makes no serious effort to identify and define the objective characteristics of content that is unacceptably "violent." Instead, it regulates content using vague terms: depictions that "appeal[] to a deviant or morbid interest of minors," "[are] patently offensive to prevailing standards in the community as to what is suitable for minors," or cause the game to "lack serious literary, artistic, political, or scientific value for minors." Cal. Civ. Code § 1746(d)(1)(A). As a result, the statute leaves retailers to decide whether particular video games are too violent to sell or rent to minors, and subjects them to a civil penalty if a court determines after the fact that their judgments were incorrect. *Id.* § 1746.1(a). Faced with the prospect of severe penalties for violating vague and amorphous statutory prohibitions, retailers will be induced to err on the side of refusing to sell videos to minors, and producers and distributors will have little choice but to designate content that should otherwise be acceptable as unavailable to minors. The California statute thus is a classic example of a vague law that has an unconstitutional chilling effect. *See, e.g.*, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 689 (1968) (striking down an ordinance classifying films as suitable or unsuitable for young persons on vagueness grounds, and noting that vagueness concerns are not eliminated simply because the ordinance "was adopted for the salutary purpose of protecting children").

Rather than attempting to define violence in concrete terms, the California statute instead borrows the judicial and regulatory definitions used in the context of obscene materials. Decades of precedent, however, make clear that violent material is distinct from obscene content. *See Winters v. New York*, 333 U.S. 507 (1948). Based on this distinction, numerous courts have held, both with respect to video games and other media, that laws restricting violent materials using a modified obscenity standard are unconstitutionally vague. *See Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574-75 (7th Cir. 2001); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 687 (8th Cir. 1992).

Last Term, the Court struck down a federal law that criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. In so doing, the Court noted that "there is substantial disagreement on what types of conduct are properly regarded as cruel." *United States v. Stevens*, 130 S. Ct. 1577, 1588-89 (2010). Decades of government attempts to study and define "violence" in the broadcast industry demonstrate that there is no significant agreement on a workable definition of violent content, and any definition is even less likely to provide notice to those being regulated than the term "cruel" provided in *Stevens*.

B. Decades of Government Study Have Failed To Establish A Causal Connection Between Violence In The Media And Actual Harm To Youth.

The problem with regulating "violence" on television is not merely the government's inability to define the term. The government also must demonstrate that televised "violence" causes the harm meant to be redressed. Without clear evidence of such a causal connection, government regulation that infringes on speech is unwarranted.

The subject of violent content in television programming has received attention almost from the beginning of television broadcasting. Each time public attention has focused on the media, regulators have studied the issue in an attempt to establish that media violence produces real world harm. This pattern, repeated over a period of decades, has failed to establish that violence in the media is causally connected to antisocial behavior or youth aggression.

Congress studied the issue in 1954 when the Senate Subcommittee to Investigate Juvenile Delinquency in the United States considered whether crime programs on television were encouraging juvenile delinquency. *See* Signorielli, *supra*, at 4. The subcommittee limited its study to anecdotal evidence—for example, playing a 60-minute compilation of fist and gun fights from the CBS show *Hopalong Cassidy*, which CBS protested was taken out of context and represented only a small fraction of the program's content. Lawrence Laurent, *Senator Asks TV Policing to Keep Children From Seeing Gruesome Acts*, Washington Post at 8 (Oct. 20, 1954). Although it ultimately endorsed the view that exposure to violence on television caused crime and violence in the real world, Drew Pearson, *TV-Crime Report Alarms Networks*, Washington Post at 71 (Feb. 11, 1955), the subcommittee acknowledged the absence of any supporting research and called for scientific inquiry into the influence of television on children's behavior, C.P. Trussel, *Senate Unit Asks Curb on TV Crime*, N.Y. Times at 21 (Aug. 26, 1955).

Over the ensuing decades, criticism of depictions of violence on television continued to surface, often in response to widely publicized violent incidents. Cooper, *supra*, at 135. In 1968, just days after Robert Kennedy was assassinated, the White House established the National Commission on the Causes and Prevention of Violence (NCCPV). Signorielli, *supra*, at 7-8. Although the NCCPV did not engage in a study of (or gather meaningful data related to) violence on television, it nevertheless declared that television violence encouraged violent behavior and desensitized children to violence in real life. Cooper, *supra*, at 57. Based on this conclusion, the NCCPV called for a reduction in programming, including cartoons, that involved any degree of violence. *Id.*

Around the same time, the Surgeon General attempted to determine whether there was evidence of a causal link between violent programming and youth behavior. The committee convened by the Surgeon General issued its final report in 1972. *See* Television and Growing Up: The Impact of Televised Violence, Report to the Surgeon General (1972). This report, however, "was marred by inconclusive results, controversy surrounding the committee make-up, and a weak set of recommended actions." Cooper, *supra*, at 69.

Citing the attack on a female jogger in Central Park by a gang of youths in 1989, Congress held hearings to consider the Television Violence Act of 1989, which extended antitrust exemptions to the television industry to allow broadcasters to cooperatively develop and implement standards aimed at reducing television violence. *Id.* at 111. Although Congress still lacked evidence sufficient to establish that television violence caused aggressive behavior, the bill was enacted as the Television Program Improvement Act of 1990, Pub. L. No. 101-650, § 501, 104 Stat. 5127, which was to be in effect for three years. *See* Signorielli, *supra*, at 13.

In 1993, as the expiration date for the 1990 Act approached, Congress held hearings to consider additional government regulation of television programming. Signorielli, *supra*, at 14. During the hearings, various bills were introduced to reduce violent programming. Cooper, *supra*, at 123-24.

Legal scholars and commentators testified that each of these bills violated the First Amendment, and none were enacted. *Id.* at 127-30.

Congress, however, continued to consider a less intrusive proposal to require the installation of parental control devices, known as V-chips, in new television sets, which would work in conjunction with a standardized rating system to allow parents to decide what their children could watch. Signorielli, *supra*, at 15. The V-chip proposal was implemented by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Signorielli, *supra*, at 15. In addition to requiring V-chips, the 1996 Act called upon the television industry to establish a voluntary system for rating television programming. Pub. L. No. 104-104, § 551, 110 Stat. 56, 139 (1996).

In December 1996, the television industry announced the creation of TV Parental Guidelines, a voluntary, age-based system to provide parents with information about TV programs and help them make informed decisions about programs that are appropriate for their children. *See* Part II *infra*. In 1997, the industry supplemented the age-based ratings with specific information about the content of TV programs, through the use of coded "content descriptors" that demarcate violence, sexual content, and coarse language. *Id.*

In the wake of the Columbine shootings in 1999, the Surgeon General again examined whether television violence is causally linked to aggressive behavior. Signorielli, *supra*, at 90. The Surgeon General's 2001 report concluded that exposure to television violence might at most cause a short-term increase in aggressive behavior among some children, but that it has little or no role in causing real-life violence. *See* Dep't of Health & Human Services, *Youth Violence: A Report of the Surgeon General*, ch 3 (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/toc.html.

In 2004, Congress sought still another study of the issue. *See* House Commerce Committee Letter. The House asked the FCC to investigate what, if any, are "the effects of viewing violent programming on children and other segments of the population." *See* FCC, *Notice of Inquiry in the Matter of Violent Television Programming and Its Impact on Children* at 2 (July 28, 2004).

In 2007, the FCC issued a report detailing its findings. The FCC commissioned no studies of its own, and "very little new information on the issue was submitted into the record." *See* 2007 FCC Report at 3, 4. The FCC cited the Surgeon General's report for the conclusion that "on balance, research provides strong evidence that exposure to violence in the media can increase aggressive behavior in children." *Id.* The FCC's Report did not address the Surgeon General's conclusions that any such effects are short-lived, and that there is no evidence that violence on television causes "real world" violent behavior.

In 2002, Professor Jonathan Freedman reviewed the existing research on this issue, and found that none of the available evidence supported the hypothesis that exposure to violence in films or television causes children or adults to be aggressive. Jonathan L. Freedman, *Inquiry on the Effects of Televised Violence: What Does The Scientific*

Research Show? (2002). After reviewing the 2007 FCC Report, Professor Freedman concluded:

> Rather than analyzing the conflicting evidence and opinion, the report simply comes down on the side of those who believe that television violence is harmful. There is no careful analysis of the research, there is no careful explanation of their conclusions; there seems to be mainly an acceptance of that view because more of those they talked with favored it than favored the other view.

Jonathan L. Freedman, *Television Violence and Aggression: Setting The Record Straight*, The Media Institute/Policy Views 2 (May 2007), *available at* http://www.mediainstitute.org/comments/FreedmanTelevisionViolence.pdf.[5]

In sum, the 2007 FCC Report is only the most recent of the government's series of failed attempts to establish a causal relationship between television violence and youth behavior. Decades of study of violence on television have not established adequate empirical support for a government speech restriction. *See* Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 Nw. U. L. Rev. 1487, 1553 (1995) ("The heart of the problem is that available research does not supply a basis upon which one could determine with adequate certainty whether a particular 'violent' program will cause harmful behavior.").[6] The evidence that violent video games cause real-world violence is similarly lacking.

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[5] Other researchers have reached similar conclusions. *See, e.g.*, Christopher J. Ferguson, *Media Violence Effects: Confirmed Truth or Just Another X-File?*, 9 J. of Forensic Psychol. 103-126 (2009); Christopher J. Ferguson & John Kulburn, *The Public Health Risks of Media Violence: A Meta-Analytic Review*, 154 J. of Pediatrics 759-63 (2009); Joanne Savage, *Does Viewing Violent Media Really Cause Criminal Violence? A Methodological Review*, 10 Aggression and Violent Behavior 99-128 (2004).

II. Less Restrictive Alternatives Allow Parents To Monitor And Control Their Children's Exposure To Video Games And Television.

Even when the "Government's ends are compelling," the "means must be carefully tailored to achieve those ends." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). A blanket ban on video game sales to minors is not "carefully tailored" because less restrictive alternatives are readily available. In particular, programming data and technology can assist parents in limiting children's exposure to content they deem inappropriate without restricting free speech rights.

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[6] Empirical evidence regarding violent crime rates also provides no support for restrictions on speech. Proponents of regulation assert that violence on television continues to increase (particularly in light of the proliferation of cable and premium channels), but the rates of violent crimes have declined significantly since 1993. *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *available* at http://bjs.ojp.usdoj.gov/content/glance/cv2.cfm. If allegedly pervasive violent programming causes violent crime and the amount of violent programming is increasing, then the crime rates should also be increasing, not decreasing.

As discussed in detail in Respondents' brief, the video game industry has developed a voluntary and widely-used rating system for video games. The Entertainment Software Rating Board ("ESRB") assigns independent age ratings and content descriptors for video games. Pet. App. 10. These ratings are used in conjunction with technology on current-generation game consoles that include parental controls allowing parents to limit a child's playing of games based on the game's rating.

The Federal Trade Commission, which monitors the entertainment industries' self-regulatory efforts, has praised the ESRB's rating system. FTC, *Marketing Violent Entertainment to Children: A Sixth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Gaming Industries*, at iii (Dec. 2009). The success of the rating system can be attributed to a number of factors. Ninety-four percent of parents say ESRB's ratings are "moderately easy" to "very easy" to understand. *See* Peter D. Hart Research Associates, *Awareness & Use* (March 2008). The system is comprehensive, and its careful design has led to widespread use of the ESRB's ratings. For example, as many as 89 percent of parents with children who play video games are aware of the ESRB's rating system, and 76 percent of those parents check the rating every time or most of the time when buying and renting games. *Id.*

In the broadcast context, industry's efforts to assist parents in restricting access to television programming they deem inappropriate for their children have been similarly successful and effective. Like its video game counterpart, the broadcast rating system is widely available and easy to use. V-chip technology (and similar technology built into every major cable and satellite operators' consumer set-top boxes) allows parents to control the content of programming available to their children without direct government regulation of the content itself.

A. Government Has Played A Constructive Role In Developing And Encouraging This Voluntary Blocking Technology.

In the Telecommunications Act of 1996, Congress called upon the television industry to establish a voluntary system for rating television programming. Pub. L. No. 104-104, § 551, 110 Stat. 56, 139. In drafting the 1996 Act, Congress was sensitive to the First Amendment implications of government-imposed restrictions on speech. Rather than restricting speech, it offered the television industry an opportunity to establish a voluntary system for rating programs. *See* Telecommunications Act of 1996, §§ 551(b) & (e); *see also* S. Conf. Rep. No. 104-230, at 195 (1996). Congress expressly found that providing parents with information about the content of video programming and the technological tools to block programming was a "nonintrusive and narrowly tailored means" of promoting the "governmental interest in empowering parents." Telecommunications Act of 1996, § 551(a)(8) & (9), 110 Stat. at 140.

In December 1996, the television industry announced the creation of the TV Parental Guidelines, a voluntary, age-based system to provide parents with information about TV programs and help them make informed decisions about programs that are appropriate for their family's viewing. The Guidelines are modeled after familiar motion picture ratings, so they are easily recognizable and simple to use. They include four categories for programs: TV-G (General Audience), TV-PG (Parental Guidance Suggested), TV-14 (Parents Strongly Cautioned — may be unsuitable for children under 14), and TV-MA (Mature Audience Only — may be unsuitable for children under 17). The Guidelines also contain two categories for children's programming: TV-Y (All Children) and TV-Y7 (Directed to Children aged 7 and older).

In 1997, the industry supplemented the age-based ratings with specific information about the content of television programs. Working collaboratively with children's and medical groups, the industry enhanced the information provided by the TV Parental Guidelines by adding five content descriptors: "FV" for fantasy violence in children's programming; "V" for violence; "S" for sexual content; "D" for suggestive dialogue; and "L" for strong language in programming designed for the general audience.

A key component of the ratings system is the TV Parental Guidelines Monitoring Board ("Monitoring Board"). The Monitoring Board is composed of representatives from cable and broadcast networks, broadcast stations, and syndicators, as well as children's advocacy groups. The Monitoring Board works with interested parties (including content producers, distributors, and consumers) to ensure that there is uniformity and consistency in the application of the Guidelines to TV programming.

The television industry submitted the TV Parental Guidelines to the FCC in 1997. A number of prominent advocacy groups, including educational, medical, and children's organizations and associations, endorsed the Guidelines. *See* FCC, *Commission Finds Industry Video Programming Rating System Acceptable*, Report No. GN 98-3 (Mar. 12, 1998). On March 12, 1998, the FCC issued an order finding that the TV Parental Guidelines satisfied Section 551(e) of the 1996 Act. *See* FCC, *Implementation of Section 551 of the Telecommunications Act of 1996, Video Programming Ratings*, Report and Order, 13 FCC Rcd. 8232 ¶¶ 18-19 (1998).

Today, the program ratings and content descriptors are familiar to TV viewers. The ratings icons and associated content descriptors appear for 15 seconds in the upper-left corner of the TV screen at the beginning of all rated programming. If the program is more than one hour in length, the icon reappears at the beginning of the second hour. Many broadcast and cable networks also display the ratings icon after each commercial break to alert viewers of the TV rating throughout the program.

Simultaneously with the development of Guidelines, the FCC adopted technical requirements for the V-chip. *Id.*; *see also* 47 C.F.R. § 15.120(b). Every television 13 inches or larger sold in the United States since January 2000 contains a V-chip, which allows parents to block programs based on the standardized rating system. 47 U.S.C. § 303(x). Since June 12, 2009 when the United States made the transition to digital television, anyone using a digital converter box also has access to a V-chip. FCC, *Implementation of the Child Safe Viewing Act, Examination of Parental Control Technologies for Vidio or Audio Programming,* Report and Order, 24 F.C.C. Rcd. 11413, at ¶ 11 (2009).

Cable networks and broadcast stations encode the ratings information in their program streams so it can be "read" by television sets and other retail devices equipped with the V-chip. Consumers can block programs with certain ratings by following an onscreen menu of options available on their V-chip-equipped TV sets. Using the Guidelines, parents can block programming according to the age-based categories (such as TV-14) or content labels (such as V for violence). The V-chip works in a hierarchical manner, so that when a parent chooses to block programming with a certain age-based rating, all programming with ratings above that level are blocked automatically.

Other technological innovations, in addition to the V-chip, enable parents to customize the TV viewing experience for their families. For example, cable and satellite distributors include robust parental controls in the set-top boxes they make available to their customers. These additional controls enable parents to block programming based on a number of factors, including program ratings and content descriptors, as well as day and date, program title, and channel.

These widely available technologies empower parents to monitor their children's television viewing. They involve far less intrusion on First

Amendment rights than government attempts to ban or regulate television broadcasts directly.

B. Blocking Technologies Provide An Effective Solution To Concerns About Violent Television Programming.

Narrow tailoring requires the government to prove that a "plausible, less restrictive alternative . . . . will be ineffective to achieve its goals." *See United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000). Solutions such as the V-chip and other blocking mechanisms in the broadcast context present workable, tailored ways to assist parents in supervising their children's viewing habits without suppressing the content of television programming for everyone.

In 2006, the broadcast industry launched a multi-year, $340 million advertising campaign with the Ad Council and others to encourage parents to take a more active role in their children's television viewing and help educate parents about the Guidelines and the V-chip. Those educational efforts, as well as efforts led by the FCC and other public and private entities, have been successful.

A 2007 report issued by the Kaiser Family Foundation found that an overwhelming majority of parents are aware of the TV Parental Guidelines. The Foundation found that 81 percent of parents have heard of the TV ratings, and 53 percent reported using the ratings system. *See* The Henry J. Kaiser Foundation, *Parents, Children & Media: A Kaiser Family Foundation Survey*, at 8, 20 (June 2007) ("2007 Kaiser Report"). Almost 90 percent of parents who used the ratings system found it to be very useful (49 percent) or somewhat useful (40 percent). *Id.* at 21.

Likewise, parental awareness of the V-chip has grown over the last decade. The 2007 Kaiser Report found that 70 percent of parents were aware of the V-chip, up from 63 percent two years earlier. *Id.* at 8; *see also* Luntz, Maslansky Strategic Research & Hart Research, *TV Watch Survey of Parents Topline*, at 5 (June 2007) (finding that 69 percent of surveyed parents are aware of the V-chip), *available at* http://www.televisionwatch.org/junepollresults.pdf.

The proportion of parents who have used the V-chip also has increased. Seven percent of parents used the V-chip in 2001. *See* Kaiser Family Foundation, News Release, *Few Parents Use V-Chip To Block TV Sex and Violence, But More than Half Use TV Ratings to Pick What Kids Can Watch* (July 24, 2001). That number had increased to 16 percent by 2006, and nearly three out of four parents (71 percent) who had tried the V-chip found it "very useful." 2007 Kaiser Report at 10. Thus, the industry has found a way to give parents control over what television shows are available to their children. Parents who are interested in controlling what their children watch have multiple, simple means to do so.[7]

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[7] The fact that the V-chip is still gaining momentum does not diminish its constitutional status as a viable less restrictive alternative. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court identified as a less restrictive means to banning indecent speech on the internet "possible alternatives" such as technology systems that would allow parents to prevent their children from accessing sexually (...continued)

Although use of the V-chip and the program ratings system has increased, it is clear that some parents have decided not to use either tool. That does not mean that these tools are failing to fulfill their intended purpose. Parents may use other available blocking technology. *Id.* (25 percent of parents use parental controls provided through their cable or DBS provider). Among parents aware of the V-chip but who have chosen not to use it, 50 percent report that they usually monitor their children's television viewing in person and 14 percent say that they "trust their children to make their own decisions." *Id.* at 7. In such cases, any asserted interest in preventing children from watching violent programming is minimized by consistent parental oversight.

In sum, technology that can limit youth access to violent media has proven to be effective. The development and implementation of blocking technology in the broadcast industry is a model for a "least restrictive means" of limiting youth exposure to media violence without unduly restricting speech. Especially in light of the impossibility of defining "violent" media content in an objective, precise and constitutionally acceptable manner, the government should continue its constitutionally appropriate role in developing and promoting technological tools to

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explicit material on the internet, which "will soon be widely available." *Id.* at 877, 879. Likewise, in *Playboy*, 529 U.S. 803, the Court held that voluntary blocking regime for sexually explicit content was a less restrictive alternative, even though fewer than 0.5% of cable subscribers had taken steps to block such content. *Id.* at 816, 823-24.

assist parents in monitoring their children's use of media. *See Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 669 (2004) ("Congress undoubtedly may act to encourage the use of [parental] filters.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS
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BRIEF

No. 08-1448

IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State
of California, and EDMUND G. BROWN, Jr.,
Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and
ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF *AMICUS CURIAE* OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90 percent of the nation's cable television households as well as most widely viewed cable programmers.

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[1] All parties have consented to the filing of this brief. The parties' blanket letters of consent are on file with the Clerk.

No counsel for a party has written this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

This Court has recognized that "[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994). In this case, petitioners seek to narrow prevailing First Amendment standards, arguing that this Court should allow government regulation of speech to minors "so long as it [is] not irrational for the . . . legislature to determine that exposure to the material regulated by the statute is harmful to minors." Petrs Br. 8, citing *Ginsberg v. New York*, 390 U.S. 629 (1968). It is NCTA's view that this deferential standard — which petitioners would apparently apply to all forms of speech to minors — provides inadequate protection for important First Amendment rights. NCTA thus has a direct and immediate interest in the proper resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that content-based restrictions on speech are presumptively unlawful. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). The Court has thus required governments to justify content based laws by showing, not just that they have a compelling government interest in regulating the speech, but also that the speech poses a real threat to the specified interest and that no less restrictive way of dealing with the threat would be effective. *See, e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Applying those standards, the Ninth Circuit in this case determined that California's law prohibiting the sale of violent video games to minors violated the First Amendment. The court of appeals acknowledged that California had a compelling interest in protecting minors' well-being, *see* Pet. App. 25a, but it found that California had not shown either that the video games posed a genuine problem with respect to minors' well-being, or that other methods of addressing the purported problem were inadequate. *See* Pet. App. 25a-34a. That decision was correct, in both approach and conclusion, and should be affirmed.

1. Petitioners' primary argument — and the one that we primarily address — is that government regulation of speech to minors should be treated with a high degree of deference. Relying principally on *Ginsberg v. New York*, 390 U.S. 629 (1968) — an "obscenity for minors" case — they propose that even content-based laws should be upheld "so long as it [is] not irrational for the . . . legislature to determine that exposure to the material . . . is harmful to minors." Petrs' Br. 8. But this unexacting standard would dispense with what, in practice, are the most critical elements of First Amendment analysis. Given that it is a relatively simple matter for governments to advance an interest that, judged only in the abstract, appears to be substantial, the real force of First Amendment protection almost always lies in the additional requirements that government establish "that the harms it recites are real . . . ," *Edenfield v. Fane*, 507 U.S. 761, 771 (1993), and "that speech is restricted no further than necessary to achieve the goal . . . ." *Ashcroft v. American Civil Liberties Union*,

542 U.S. 656, 666 (2004). Indeed, this Court has repeatedly struck down laws for failing to meet one or both of those latter requirements, even while expressly acknowledging that the speech-restricting government had put forward a facially sufficient interest. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 46 (1976); *Edenfield*, 507 U.S. at 769; *United States v. National Treasury Employees Union*, 513 U.S. 454, 472 (1995).

Much of this established First Amendment protection would be lost under petitioners' compelling-interest-plus-rational-belief test. Once it is accepted that government has a compelling interest in safeguarding "the physical and psychological well-being of minors," *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989), petitioners' test is really little more than a speech-specific application of the notoriously deferential rational-basis test. Under that test, courts would have little ability to undertake the critical task of distinguishing regulation of truly harmful speech from regulation of merely objectionable speech. This Court has emphasized that, under the rational-basis test, courts are not entitled to "judge the wisdom, fairness, or logic of legislative choices," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), and that legislative judgments "may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. Indeed, petitioners claim that States should have almost total latitude to ban speech to minors merely by "finding" that the speech would be potentially harmful to their "'ethical and moral development.'" Petrs Br. 30, quoting *Ginsberg*, 390 U.S. at 641. That standard would make government censorship of speech to minors presumptively lawful rather than the other way around.

Such government control over speech might be tolerable if it were obvious that governments rarely overreached in regulating speech to minors. But that is not the case. Indeed, some of this Court's best-known decisions involve unconstitutional state attempts to dictate what minors — often school children — say and hear. *See, e.g., West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943) (law requiring students to recite Pledge of Allegiance); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (law barring teaching of evolutionary theory in public schools). Similarly, this Court has invalidated a number of federal laws aimed at suppressing the availability of indecent sexual material to minors on the ground that the restrictions were either unjustified on the record or overbroad. *See, e.g., Sable Communications*, 492 U.S. at 126-31; *Playboy Entertainment Group*, 529 U.S. at 819-27.

Petitioners stress that minors are generally less mature than adults, but that fact, while true, does not justify making government the presumptive gatekeeper of permissible speech. What petitioners fail to come to grips with is that government's legitimate interest in banning speech to minors is a carefully limited one: it lies only in protecting minors from the rare examples of speech that cause cognizable harm, not in shielding them from speech that is merely offensive or objectionable. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (government may limit speech to minors "only in relatively narrow and well-defined circumstances"). In order to assure that government is pursuing the former rather than the latter course, it is necessary to have a First Amendment standard that will assess whether the banned speech does, in fact, pose a threat to minors' well-being. Yet, the *Ginsberg* test would foreclose any meaningful examination of just that issue. That alone is reason to reject it.

2. The decision in *Ginsberg* is also an especially precarious foundation on which to base a broad government power over speech to minors. To start with, *Ginsberg* was largely an exercise in *ipse dixit* lawmaking. Although the Court in *Ginsberg* announced that New York's "girlie magazine" statute should be upheld unless it was "irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors," 390 U.S. at 641, it neither cited specific authority for, nor provided any independent explanation of, that extremely lax standard. In fact, the Court carried its deference to state censorship of speech one step further, refusing to give any weight to record evidence indicating divided expert opinion about whether such magazines actually caused any harm to minors. *See id.* at 642.

Ginsberg did rely heavily on *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), but that case involved very different circumstances. The law at issue in *Prince* was simply one subpart of a broad-based state law directed at the problem of child labor, having only an incidental effect on speech (*i.e.*, when the labor happened to involve distribution of speech). As a result, it is probable that such a law would now be subjected, not to the strict scrutiny given to laws directly regulating the content of speech, but to the intermediate level of scrutiny given to laws regulating a combination of conduct and speech. *See, e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997). Thus, *Prince* was hardly good authority even for the deferential review accorded in *Ginsberg* — which did involve a content-based restriction on speech – let alone a proper basis on which to ground a present-day expansion of state power over all speech to minors.

Petitioners' other arguments are likewise unavailing. Although petitioners say that States should be able to support parents by restricting certain kinds of speech to minors, that argument raises serious questions of its own. In particular, petitioners do not account for the fact that different parents will commonly be of different minds about the kind of speech that their (and other) children should hear. As a result, a State's ban on particular speech will often be more likely to reflect officials' own opinions about the value of that speech than some universal "parental" view, just the sort of value-based government judgment that the First Amendment is meant to protect against. And any related interest in avoiding the impression of state approval of the speech should be addressed by means other than direct censorship. "[M]ore speech" is "[t]he preferred First Amendment remedy." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

Finally, petitioners cannot shore up the *Ginsberg* standard by relying on government's greater power to restrict speech over the public airwaves and in public schools. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). This Court has recognized that the federal government has unique power over speech by broadcast licensees, *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), a power that includes authority to protect children from unwilling exposure to objectionable (not just harmful) material. It has likewise observed that the First Amendment "must be applied in light of the special circumstances of the school environment." *Tinker*, 393 U.S. at 506; *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). But these distinct rules — created to deal with particular contexts in which unlimited speech would literally be impossible — cannot be carried forward to the world at large, simply because government regards certain speech to minors as unworthy of constitutional protection.

ARGUMENT

Petitioners argue that this Court should adopt a new constitutional doctrine allowing States to prohibit communication of speech to minors, based on its content, "so long as it [is] not irrational for the . . . legislature to determine that exposure to the material . . . is harmful to minors." Petrs Br. 8, citing *Ginsberg v. New York*, 390 U.S. 629 (1968).[2] But this borrowed, excessively forgiving standard has no place in general First Amendment law. To begin with, the proposed test has the fatal flaw of eliminating what, in practice, are the most critical elements of traditional First Amendment scrutiny: that a State demonstrate that it is addressing a genuine problem and doing so in a properly limited way. To replace this rigorous analysis with a mere rational-belief inquiry — especially when addressed to highly subjective matters like the effects of particular speech on minors' "ethical and moral development" — would effectively disable reviewing courts from performing the necessary function of distinguishing regulation of truly harmful speech (permissible under the First Amendment) from regulation of speech that government merely finds offensive (impermissible under the First Amendment). Moreover, petitioners' effort to rest this expansion of government power on the narrow decision in *Ginsberg* suffers from the fact that *Ginsberg* was a poorly grounded and casually reasoned decision, providing little solid foundation for sweeping government authority to decide what speech is suitable for minors to hear. Petitioners' attempt to redefine First Amendment law should thus be rejected.

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[2] Although petitioners would require States to demonstrate a compelling state interest in regulating speech to minors, that antecedent requirement would presumably be satisfied, at least on paper, by a State's claim that it is censoring speech to protect minors from purported harm. This Court has repeatedly recognized that there is a compelling government interest "in protecting the physical and psychological well-being of minors." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *see also New York v. Ferber*, 458 U.S. 747, 756-67 (1982); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 754-58 (1996); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 869 (1997).

I. THE STATE'S PROPOSED STANDARD WOULD ELIMINATE CRITICAL PARTS OF PROPER FIRST AMENDMENT SCRUTINY

A. The first problem with petitioners' proposed compelling-interest-plus-rational-belief standard is that the very reason for its existence — to allow government to regulate speech without meaningful oversight — is contrary to core First Amendment principles. This Court has made clear that, "[a]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010) (internal quotation marks omitted); *New York State Bd. of Elections v. Lopez Torres*, 552

U.S. 196, 208 (2008) ("First Amendment creates an open marketplace . . . without government interference"). Rather than having government be the final arbiter of permissible speech, "'[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us . . . .'" *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991), quoting *Cohen v. California*, 403 U.S. 15, 24 (1971). "[O]pinions and judgments, including esthetic and moral judgments about art and literature, . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of the majority." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000).

The fundamental rule, therefore, is that government attempts to control speech are inherently suspect. "When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed." *Playboy Entertainment Group*, 529 U.S. at 817. As a result, "[c]ontent-based regulations are presumptively invalid," *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972), and seldom upheld. *See Playboy Entertainment Group*, 529 U.S. at 818. Indeed, even when government is engaging in less intrusive regulation of speech – for example, restricting speech-related conduct or setting rules for commercial speech – "it bears the burden of proving the constitutionality of its actions." *Id.* at 816-17; *see also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

The Court has given force to this presumption of illegality by applying several exacting tests, invalidating speech-restricting laws unless the government can make each of three interrelated showings. As a threshold matter, the government must establish that it has undertaken regulation of the speech in order to serve a compelling, or at least a substantial, government interest. *See, e.g., Playboy Entertainment Group*, 529 U.S. at 813 (compelling interest); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) (important or substantial interest). Significantly for present purposes, however, the Court has also required the government to do more than simply advance an interest that is compelling or important in theory: rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. Finally, the government must always show that its restriction on speech is properly tailored to address the identified problem, without burdening too much speech. *See, e.g., Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004); *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

Petitioners' proposal would work a radical alteration of this traditional approach. Where speech to minors is concerned, they say that the Court should apply only the compelling-interest part of the established three-part test, with further review limited to asking whether the State had a rational basis for believing that the restricted speech would be harmful to minors. *See* Petrs Br. 8, 16-17, 28; *Ginsberg*, 390 U.S. at 639, 641. But that is not a sufficiently robust First Amendment standard. While petitioners' proposed test does require an important reason for regulating speech, the fact is that, as a practical matter, governments tend to have little difficulty in meeting that requirement in and of itself. Although a government may sometimes rely on an interest that is *illegitimate, see, e.g., Buckley v. Valeo,* 424 U.S. 1, 56-67 (1976) ("interest in equalizing the financial resources of candidates"), it is the rare case in which the Court has prohibited government regulation of speech on the ground that the asserted government interest is *insufficient*. *But see City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994) (interest in preventing "visual clutter" does not justify broad ban on residential signs). In general, therefore, governments have almost always been able to put forth some government interest that — judged in the abstract — would be significant enough to support restrictions on speech, just as California has done here. *See* note 2 *supra*.

The Court has thus safeguarded central First Amendment values largely by finding that government has failed to meet one of the other parts of the recognized tests: that is, by determining that, even though the claimed interest is important or even compelling, the danger to that interest is largely conjectural or the means of regulation overbroad. In cases challenging restrictions on campaign expenditures, for example, this Court has continually given close scrutiny to whether unrestrained expenditures truly threaten the government's concededly important interest in preventing actual or apparent corruption. In *Buckley v. Valeo*, having found that "the Act's primary purpose to limit the actuality and appearance of corruption" provided "a constitutionally sufficient justification for the $1,000 contribution limitation," 424 U.S. at 26, the Court went on to conclude that the same interest nevertheless could not support limits on independent expenditures, observing, among other things, that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. Similarly, in *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759 (2008), the Court invalidated a penalty on personal expenditures by a candidate for the House of Representatives, observing that use of a candidate's own funds would tend to reduce, not increase, the possibility of corruption or the appearance of corruption. *See id.* at 2773. And, most recently, in *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), the Court held that Congress could not constitutionally ban independent expenditures by domestic corporations and unions, relying in part on the determination, previously set forth in *Buckley*, that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption." *Id.* at 910.

The Court has followed the same course in many other First Amendment cases as well. In *Edenfield*, it agreed that the State had identified substantial interests to justify its regulation of solicitation by public accountants — "ensuring the accuracy of commercial information in the marketplace" and "the protection of potential clients' privacy" (507 U.S. at 769) — but struck down the particular Florida law at issue because "[t]he Board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way." *Id.* at 771. *See also Ibanez v. Florida Dept. of Bus. and Prof. Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994). In *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), even though the Court acknowledged that the government had an "undeniably powerful" interest in preventing officials from abusing their offices by accepting honoraria, *id.* at 472, it nonetheless found that the sweeping honoraria ban violated the First Amendment, citing the government's failure to present "evidence of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16." *Id.* In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991), the Court accepted that "the State has a compelling interest in compensating victims from the fruits of the crime," *id.* at 120-21, but nullified the law in question as "significantly overinclusive." *Id.* *See also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (city failed to "establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485, 486-90 (1995) (finding that federal government had a "significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength" but concluding that law did not advance that interest).

It thus would significantly lessen First Amendment protections if, once a significant government interest had been invoked, the Court were to dispense with careful scrutiny of laws limiting speech, employing little more than a rational-basis test applied to a subcategory of speech (speech to minors). This Court has emphasized that the rational-basis test "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). In keeping with that model of judicial restraint, it has further admonished that "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315. *See also Heller v. Doe*, 509 U.S. 312, 319-321 (1993). Under petitioners' test, therefore, the presumption against government regulation of speech would be turned backwards, leaving reviewing courts hard pressed to question any but the most farfetched legislative conclusion that disfavored material might be harmful to children.

Petitioners try to stack the deck still further, maintaining that "the governmental interest served by restricting minors' access to certain expressive material is not limited to protecting them from physical or psychological harm," Petrs Br. 30, but goes beyond that to "preventing the impairment of minors' 'ethical and moral development.'" Petrs Br. 30, quoting *Ginsberg*, 390 U.S. at 641. According to petitioners, the inherent subjectivity of this inquiry is actually an additional reason to defer to state judgments, because "the First Amendment cannot be applied in a manner that would require empirical proof of how expressive material impacts such nebulous concepts as one's ethics or morals." Petrs Br. 30. But, even if one accepts that States may restrict speech to minors without any threat of harm to their "physical and psychological well-being" — a view that is in considerable tension with the Court's definition of the States' legitimate interest, *see* note 2 *supra* —

The quoted language in *Ginsberg* was from a "legislative finding" in the New York statute, not from any independent discussion of the State's interest in regulating the speech in question. *See* 390 U.S. at 641 ("Section 484-e of the law states a legislative finding that the material condemned by § 484-h is 'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state'"). In the immediately following sentence, the Court noted: "It is very doubtful that this finding expresses an accepted scientific fact." *Id.*

the fact that ethics and morals are "nebulous concepts" provides all the more reason for courts to scrutinize whether, in purporting to protect them, a State is doing anything more than just enforcing its views about the value of particular speech. Otherwise, the category of speech regarded as potentially detrimental to minors' ethics and morals will inevitably become as nebulous and open-ended as those concepts themselves, varying from State to State, depending on differing subjective legislative opinions.[4]

This case provides a ready example of the potential problem. Although extremely violent video games may be offensive to many people, the fact that speech is offensive does not mean, by itself, that it has a harmful effect on those who hear it. Yet, when put to the test of demonstrating that violent video games actually cause cognizable harm to minors, petitioners were unable to show anything more than a general correlation between violent video games and some aggressive behavior. *See* Pet. App. 27a-32a. Noting that this evidence fell short of demonstrating a proper causal link between speech and harm, the

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[4] It also seems self-evident that minors' "ethical and moral development" will vary by age, further emphasizing the need for a close examination of the basis for restricting speech to minors as a class. Even with the recognition that minors are still developing maturity through "late adolescence," *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010), the fact remains that a seventeen-year-old—who is, after all, nearly old enough to vote and can drive in many States—has a greater capacity for judgment than a child many years younger. Just as government cannot "reduce the adult population . . . to reading only what is fit for children," *Butler v. Michigan*, 352 U.S. 380, 383 (1957), it should not be able to limit seventeen-year-olds to materials fit only for ten-year-olds.

Ninth Circuit held that the ban on selling video games to minors was invalid. *See* Pet. App. 32a.

Petitioners seem to believe that it should be enough for a State to show a *possibility* of harm to minors, rather than actual harm. But First Amendment scrutiny is designed to protect against regulation of speech based on possibilities alone. In *Playboy Enterprises*, for example, this Court struck down federal regulations addressed to sexually explicit cable channels, finding that the evidence regarding a threat to children "was at best a draw." 529 U.S. at 819. In that situation, the Court observed, "the tie goes to free expression." *Id.* The same principle should apply here.

B. The fundamental weakness in the *Ginsberg* standard is that it does not do—indeed, cannot do—what a meaningful First Amendment test should do: provide a useful way to distinguish between those rare instances in which regulation of speech is needed to prevent significant harm and those instances in which regulation of speech simply reflects official distaste for its nature. That might not matter if there were good reason to think that, for the particular subcategory of "speech to minors," the risks of government overreaching were slight, but no such confidence is warranted. To the contrary, numerous cases reveal that government officials have a natural tendency to seek influence over minors' psychological and moral development, and that, in taking those steps, officials have frequently crossed the line into constitutionally protected areas.

Many examples of this overreaching are well-known. For example, the Court has often overturned efforts by state and local school officials to decree what students should say and hear, even though, as a general matter, government has *greater* power to regulate speech in public schools. *See, e.g., Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); page 30 *infra*. Thus, the Court held that the State of West Virginia could not, consistently with the First Amendment, attempt to instill feelings of patriotism by having students recite the Pledge of Allegiance in schools. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *see also Bd. Of Educ., Island Trees Union Free Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion) ("local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books"). Applying a different part of the First Amendment, the Court likewise has struck down repeated state attempts to encourage students' religious beliefs by providing for school prayer. *See Wallace v. Jaffree*, 472 U.S. 38 (1985); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). And, the Court invalidated an Arkansas statute that "prohibit[ed] the teaching in its public schools and universities of the theory that man evolved from other species of life," *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968), a law embodying one State's view that exposure to evolutionary theory would be harmful to its students' religious training. *See also Edwards v. Aguillard*, 482 U.S. 578 (1987).

The Court has similarly set aside laws addressing potential harm to minors from indecent sexual material, which petitioners treat as a close cousin to "offensively violent" material (*see* Petrs Br. 37-38). In *Sable Communications*, although the Court acknowledged the government's compelling interest in protecting minors, 492 U.S. at 126, it declined to approve a total ban on indecent telephone communications, saying that the government had failed to show that a less restrictive alternative could not address its concerns. *See id.* at 126-31. Nearly a decade later, in *Playboy Entertainment Group*, the Court found "legitimate reasons" for regulating sexually explicit programming in order to protect minors, 529 U.S. at 811, but saw no persuasive evidence that the government had adopted the least restrictive means of doing so. *Id.* at 819-27. *See also Denver Area Educational Telecommunications Consortium*, 518 U.S. at 755 (government restriction on speech "considerably more extensive than necessary") (internal quotation marks omitted); *Butler*, 352 U.S. at 383 (state statute designed to protect minors was "not reasonably restricted to the evil with which it is said to deal"). In addition, the Court has held that certain restrictions on virtual child pornography violated the First Amendment, *see Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002), stating that "[t]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." *Id.*[7]

Petitioners claim that States have had a long history of prohibiting unsavory communications to minors, citing statutes that bar sale of publications involving, among other things, "blasphemy," "profanity," "immoral deeds," "crime," "bloodshed," "police reports," and "immorality." *See* Petrs. Br. at 31-33, 34-36. But these kinds of broad-based prohibitions raise their own First Amendment problems. *See Winters v. New York*, 333 U.S. 507 (1948) (striking down similar statute as unconstitutionally vague). Indeed, if such bans were taken literally, minors would likely be prevented from buying daily newspapers, as well as many commonly read books and magazines, making the restrictions appear to reach well beyond any true need to protect minors from foreseeable harm. Fifty years ago, in fact, the California Supreme Court struck down a comparable law aimed at the distribution of "crime" comic books for just that reason, finding that, even as limited to such material, it was far too broad. *See Katzev v. County of Los Angeles*, 341 P.2d 310 (1959). In doing so, the Court pointedly observed that, by its terms, "[t]he ordinance brings within its scope such publications as New Funnies (town attacked by bandits in Woody Woodpecker story); Bugs Bunny (Bugs steals diamonds); and Classic Comics (Treasure Island)." *Id* at 315.

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[7] The Court has also invalidated state regulations aimed at protecting minors from exposure to advertising of tobacco products. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). There, the Court observed that the State's regulatory attempts "do not demonstrate a careful calculation of the speech interests involved." *Id.* at 562.

Petitioners insist that States must have broad power to limit speech to minors because minors have "'[a] lack of maturity and an underdeveloped sense of responsibility . . . .'" Petrs Br. 25, quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005). But this argument misses an important point: a State's compell[illegible] interest in restricting speech to minors is strictly limited to protecting them from cognizable harm, *see Sable Communications*, 492 U.S. at 126, and does not entitle the State simply to block speech that it finds offensive. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) ("minors are entitled to a significant measure of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them") (citations omitted). Thus, minors' diminished maturity is a legitimate reason for government censorship *only* in the unusual case where exposure to the speech in question would actually be detrimental to minors in some important way. Yet, petitioners' proposed analysis would prevent — indeed, is designed to prevent — reviewing courts from giving close scrutiny to that very question.

Petitioners' argument also proves too much. "The question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." *Carey v. Population Services, Int'l*, 431 U.S. 678, 692 (1977) (plurality opinion). For that reason, this Court has frequently struggled with the task of identifying the specific point at which minors' constitutional rights leave off and the regulatory power of the State takes hold. *See, e.g., Reno v. American Civil Liberties Union*; *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *In re Gault*, 387 U.S. 1 (1967). Importantly, however, the Court has not chosen to resolve such cases simply by pointing to minors' lack of maturity and then accepting the lawmaking State's judgment about what is best for them. To the contrary, the Court itself has carefully examined whether the particular law was necessary to advance the State's claimed interest in assisting minors. *See, e.g., Hodgson*, 497 U.S. at 450-456 (invalidating State's two-parent notification statute partly on ground that "it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families"). There is no good reason to adopt a more deferential posture in the area of constitutionally protected speech.

Petitioners imply that States would use their new wide-ranging power over speech to minors with sensitivity, suggesting at one point that States might not (perhaps, could not) censor material that "has serious redeeming value for minors." Petrs Br. 28. But there are at least two problems with this notion. First, although the California video game law includes an exemption for games with redeeming value, nothing in the *Ginsberg* test itself limits its application to "valueless" speech. Under *Ginsberg*, the question is not whether the censored speech might offer some benefit to minors, but whether it could do them harm. Second, while the Court could rewrite the *Ginsberg* standard to import a "redeeming value" limitation, that amendment would effectively contradict the very assumption on which the *Ginsberg* standard supposedly rests: that States can be trusted to decide what speech might or might not be suitable for minors. Although we think that assumption to be insupportable anyway, *see* pages 17-20 *supra*, a test that needs an exception to its own basic premise is hardly worth adopting in the first place.

Petitioners' approach to speech regulation would be troubling enough even if it applied just to video games, and nothing more. But, while petitioners and their *amici* make a point of stressing the unique role-playing of participants in such games (*see, e.g.*, Petrs Br. 55; Br. *Amicus Curiae* Eagle Forum Education & Legal Defense Fund, 2, 7; Br. *Amicus Curiae* California State Senator Leland Y. Yee, Ph.D *et al.*, 4, 16-17), their arguments seemingly apply to speech well beyond that particular context. In addition to their reliance on laws that prohibit distribution of printed materials about crime and blasphemy, *see* pages 19-20 *supra*, petitioners invoke concerns about "violent scenes in television and movies," Petrs Br. 44, as well as "violent music lyrics." Petrs Br. 45. If petitioners were to have their way, therefore, it appears that States would be free to regulate *any* form of speech that they deemed potentially harmful to minors' emotional development, all without effective judicial supervision.

This is simply bad constitutional law. In the end, government restrictions on speech should remain the exception, not the rule, even where speech to minors is concerned. Despite petitioners' suggestions to the contrary, traditional First Amendment tests are not so rigid that States cannot satisfy them when speech presents a real threat to important interests. *See, e.g., Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2722-30 (2010). But, given governments' enduring propensity to restrict speech that they dislike or find disturbing, and the fact that speech by itself is seldom truly harmful even to minors, it is appropriate for governments to bear the burden of identifying a genuine speech-caused problem that cannot be remedied by narrower regulation. For that reason alone, petitioners' request to dispense with those essential parts of First Amendment analysis should be denied.

II. THE DECISION IN GINSBERG IS ESPECIALLY WEAK AUTHORITY ON WHICH TO BASE A DRAMATIC REVISION OF FIRST AMENDMENT STANDARDS

A. Petitioners argue that the decision in *Ginsberg* provides ample support for according broad discretion to state legislatures over speech to minors. *See* Petrs Br. 16-18, 28. But, even leaving aside the fact that *Ginsberg* involved the sale of sexually explicit materials—an area of law that occupies its own idiosyncratic corner of the First Amendment landscape — the decision is hardly a model of careful analysis. Most notably, the Court in *Ginsberg* never really explained why its lax rational-belief standard is the proper test for assessing government restrictions on speech to minors. Having begun with the uncontroversial proposition that "'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,'" 390 U.S. at 638, quoting *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944), the Court simply announced, without any relevant citations, that the State may justify regulation of indecent speech to minors by showing that it was rational to regard the speech as harmful. *See* 390 U.S. at 639 (stated government interests would "justify the limitations in [the statute] upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful"); *id.* at 641 ("[t]he only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by [the statute] constitutes such an 'abuse'"); *id.* ("[t]o sustain state power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors"). The Court even acknowledged that studies about the effects of indecency on minors were far from conclusive, 390 U.S. at 642, but it quickly dismissed that lack of consensus by saying that "[w]e do not demand of legislatures 'scientifically certain criteria of legislation.'" *Id.* at 642-43, quoting *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911) (a non-speech case). Thus, instead of requiring the

State to show that the indecent material actually would be harmful to minors in some way — as opposed to conceivably harmful — the Court essentially accepted the State's assertion to that effect, without more.[7]

The principal authority cited in *Ginsberg* — though not for the rationality standard itself — was the Court's earlier decision in *Prince*, where the Court had upheld a statute barring, among other things, distribution of literature by children on the public streets. *See* 321 U.S. at 165-71. But *Prince* was a very different case. The particular law at issue in *Prince* was not a stand-alone law aimed specifically at suppressing speech, but was part of a wide-ranging labor law that sought to limit the employment of minor children. As the Supreme Judicial Court of Massachusetts noted, the state law "contains many sections obviously intended to protect children against hazardous occupations, to insure that they shall not be permitted to work in particular trades or processes or at hours considered detrimental to the health or morals of minors of various ages, or to secure proper school attendance." *Commonwealth v. Prince*, 46 N.E.2d 755, 758 (1943). This Court, in declining to invalidate the law as applied to a nine-year-old girl's distribution of religious pamphlets, emphasized that Massachusetts was addressing the general problem of child labor, remarking that "[t]he state's authority over children's *activities* is broader than over like actions of adults," 321 U.S. at 168 (emphasis added), and stressing that "[t]his is peculiarly true of public activities and in matters of employment." *Id.*

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[7] The Court may have seen little reason for extended First Amendment analysis of a law restricting sale of "obscenity for minors," given that the Court had held that obscenity itself falls wholly outside First Amendment boundaries. *See Roth v. United States*, 354 U.S. 476, 485 (1957). But, at least outside the specific context of sexually explicit material, the issue is more complicated than that. The vast majority of speech *is* constitutionally protected, in the sense that government cannot entirely forbid its sale; and the real question, therefore, is whether government has justified its censorship of that speech to minors on the ground that it would cause them (though presumably not adults) cognizable harm.

This statutory focus on the evils of child labor significantly alters the appropriate First Amendment analysis. Taking the Massachusetts law as a whole, it is apparent that the restrictions of the statute were really aimed at *conduct*, with only an incidental effect on speech (*i.e.*, when the labor happened to involve speech). *See* 321 U.S. at 160-61 (law prohibits, *inter alia*, employment of a minor in "the trade of bootblack or scavenger"). As a consequence, if the same case were to arise today, the law would likely not be subjected to the strict scrutiny typically applied to laws that are directed at the content of speech, but rather to the lesser scrutiny given to laws that have a more indirect impact on speech. *See United States v. O'Brien*, 391 U.S. 368 (1968); *Turner Broadcasting*, 520 U.S. at 189. The decision in *Prince* thus stands as poor authority for *Ginsberg* itself—which, like the California law in this case, did involve a content-based limitation on speech—and would provide an especially unstable cornerstone for a new, greatly expanded doctrine based upon the *Ginsberg* analysis.

The *Prince* decision also offers another cautionary example of why undue deference to legislative opinions is incompatible with enforcement of important constitutional principles. *See* pages 17-19 *supra*. There, the Massachusetts law drew an

Petitioners also cite *Ginsberg* for the idea that States may use their lawmaking powers to reinforce parental authority, *see* Petrs Br. 38-39, 44, but, as an initial matter, neither *Ginsberg* (nor *Prince*, on which it relied for this point) offers much backing for that principle. In *Prince*, the State was actually bringing a criminal prosecution *against* the child's guardian, *see* 321 U.S. at 161, who had allowed her ward to distribute religious literature on the public streets. Massachusetts was thus overriding, not reinforcing, "parental" choice. And, in *Ginsberg*, the minor evidently came into possession of the prohibited material only because he was "enlisted by his mother to go to the [defendant's] luncheonette and buy some 'girlie' magazines so that [the defendant] could be prosecuted." 390 U.S. at 671-72 (Fortas, J., dissenting). Although the interests of the parent and State in *Ginsberg* were thus apparently aligned to some extent, it remains the fact that the obedient minor might never have obtained the forbidden magazines at all, absent the directive from his mother to purchase them.

In any event, petitioners' focus on state support for parental views masks a deeper question about this kind of justification for limiting speech. Except in the

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explicit distinction between the statutory protection offered to boys and girls, specifying that "no boy under twelve and no girl under eighteen" could engage in the prohibited activities. Although no one challenged that differential treatment, the terms of the law might well have passed a rationality test at the time, given the then-prevailing tendency for society to be more protective of young females than males. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464 (1948). Since then, of course, the Court has given more critical attention to statutory lines drawn on the basis of gender. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996).

most egregious cases, it may be expected that different parents will have different views about the desirability of censoring speech, and it is not the proper role of government to impose orthodoxy where none exists. *See Turner Broadcasting*, 512 U.S. at 641 ("[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence"). Indeed, given this predictable lack of parental unanimity, it is highly likely that state officials purporting to be backstopping parental views about particular speech will actually just be picking the side that accords with their own views about the speech's worth, precisely the kind of determination that the First Amendment makes suspect. If a State cannot censor speech on its own, it gains no greater power from a claim that some parents, or even a majority of parents, are in favor of its attempts to do so. *See Playboy Entertainment Group*, 529 U.S. at 818 (protected speech not subject to "mandate or approval of the majority").[7]

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[7] The fact that California allows parents to obtain video games for their children lessens, but does not eliminate, the First Amendment problem. The State has still chosen a default rule that bans speech and, unless the State can demonstrate that the speech actually causes harm to minors, its law must be deemed to rest on nothing more than official disapproval of the content of the speech. That is always a constitutionally suspect justification for censoring speech. *See Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n of New York*, 447 U.S. 530, 536 (1980) ("when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views") (internal quotation marks omitted).

Petitioners are also off-base in contending that States should use censorship of speech "to remove any possible imprimatur of societal approval." Petrs Br. 41. Here, the question is one of means, not ends. Although a State may certainly take the public position that it objects to particular kinds of speech, the proper method for conveying that message is to say so directly, rather than to extinguish the offending speech. As this Court has repeatedly admonished, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Texas v. Johnson*, 491 U.S. 397, 419 (1989), quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977). Open discussion is thus "[t]he preferred First Amendment remedy." *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

B. Petitioners try to bolster *Ginsberg* by claiming that the decision is part of a wider body of precedent giving government expanded powers over speech to minors, *see* Petrs Br. 18-22, citing cases involving regulation of broadcasting and speech in public schools. *See, e.g.*, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). But those cases cannot be isolated from their own particular contexts. This Court, of course, has long recognized that the federal government has unique power over speech delivered by means of the public airwaves. *See Turner Broadcasting*, 512 U.S. at 637 ("our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). That power naturally encompasses the lesser-included power to ensure that broadcast licensees refrain from airing material to which children should not be inadvertently exposed, a point expressly made clear by *Pacifica*. *See* 438 U.S. at 748-50. There is no basis, however, for extending that rare power to situations that do not involve the use of scarce government spectrum.

The same is true for efforts to transfer the government's greater power over speech in public schools to other contexts. Although it is accepted that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, the Court has often emphasized that school authorities must have considerable latitude to assure that schools are able to achieve their intended purpose. *See id.* (First Amendment must be applied "in light of the special characteristics of the school environment"); *Hazelwood School District*, 484 U.S. at 266 (same); *Morse v. Frederick*, 551 U.S. 393, 397 (2007) (same). This is hardly surprising, given the fact that it would be impossible to conduct a sensible educational program if every teacher and student were free to say anything at any time. *See Hazelwood School District*, 484 U.S. at 266 ("[a] school need not tolerate student speech that is inconsistent with the basic educational mission") (internal quotation marks omitted). "[T]he special characteristics of the school environment" are not present in society at large, however, and the First Amendment balance struck in the former cannot simply be exported to the latter.

All in all, therefore, there is little sound authority for permitting States to control speech to minors, based on nothing more than their rational belief that it would be best for minors if they did so. Although

Ginsberg may well have reached the correct result in the narrow context of limits on obscenity, it is hardly a decision on which to base a striking expansion of governmental power to limit speech to minors. Protection of minors is admittedly a compelling state interest, *see Sable Communications*, 492 U.S. at 126, but traditional First Amendment tests nevertheless require — and should continue to require — that States identify a real problem to be addressed, as well as a carefully tailored solution to that problem. The Ninth Circuit found that petitioners could not meet that test, and petitioners have offered no sufficient reason to second-guess that conclusion. Thus, the Ninth Circuit correctly held that the California video games law violates the First Amendment.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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AMICUS CURIAE BRIEF

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ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE PROGRESS & FREEDOM FOUNDATION AND THE ELECTRONIC FRONTIER FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae The Progress & Freedom Foundation, through the undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

Amicus curiae Electronic Frontier Foundation, through the undersigned counsel, hereby states that it does not have a parent corporation and that no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*[1]

Amici consist of the following non-profit 501(c)(3) organizations that seek to preserve First Amendment rights by advancing less restrictive alternatives to regulation of speech and requiring government firmly establish the need for speech controls:

Founded in 1993, The Progress & Freedom Foundation (PFF) is a market-oriented non-profit think tank that studies the digital revolution and its implications for public policy. Its mission is to educate policymakers, opinion leaders and the public about issues associated with technological change, based on a philosophy of limited government, free markets and individual sovereignty. PFF regularly publishes a comprehensive catalogue of parental control tools and methods[2] and has filed numerous *amicus* briefs in free speech cases.

Founded in 1990, the Electronic Frontier Foundation (EFF) is a member-supported, non-profit legal foundation that litigates to protect free speech and privacy rights in the digital world. As part of its mission, EFF has often served as counsel or *amicus* in key cases addressing constitutional and statutory rights of privacy in electronic communications.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

[2] ADAM THIERER, PARENTAL CONTROLS & ONLINE CHILD PROTECTION, Version 4.0 (2009), *available at* http://pff.org/parentalcontrols/.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully urge this Court to affirm the Ninth Circuit's decision holding that the statute in this case[3] violates the First Amendment.

1. This Court has long held that content-based regulation of speech must yield to less restrictive means that do not affect First Amendment interests of speakers and willing listeners. Here, *amici* explain how a highly descriptive content rating system, an extensive array of parental empowerment tools, numerous household media control methods, and enforcement of existing consumer deception laws together constitute a less restrictive alternative to California's law. Indeed, survey research conducted by the Federal Trade Commission shows that the videogame industry's official rating and labeling system is not only widely recognized and used by parents but is also well enforced. Whatever the state's interest, parents today already have the capacity to choose and control their children's videogame consumption based on their own household standards. Government can help build awareness of parental control tools and methods, and punish deception, but there is no Constitutional justification for restricting this new and evolving form of speech.

2. Videogames are speech fully protected by the First Amendment, and both the "violence" and "interactivity" feared by California are integral, expressive aspects of books, plays and movies, as well as videogames. Every state "violent" videogame law

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[3] "A person may not sell or rent a video game that has been labeled as a violent video game to a minor." CAL. CIV. CODE § 1746.1(a).

has therefore failed strict scrutiny, and the Ninth Circuit's decision was wholly consistent with the considered judgment of numerous courts. *Amici* fear that California's age-based restrictions will migrate to the Internet, where the ineffectiveness of age-verification tools could inspire identity-verification requirements that would chill adults' access to fully protected speech.

3. The laboratory research on which California bases its legislative findings—to which California now asks this Court to defer—does not support harm to any compelling state interest. Social scientists hotly debate the methodological validity of media-violence research, and that research defines "violence" and "aggression" in ways that conflict with society's understandings: Research that classifies the well-known children's videogame "Super Mario Brothers" as "violent" is of dubious relevance to real-world concerns about violence. Moreover, *Turner* deference is completely inapplicable to content-based regulation of fully protected speech.

California's legislature has succumbed to moral panic, as lawmakers have so often done when confronted with the media of a new generation. Speech is undoubtedly powerful, and new forms of speech are always controversial. Time and again, however, the feared harms of new forms of expression have proven to be fears, not harms. This case is no different.

ARGUMENT

I. Parental Control Tools, Household Media Control Methods, Self-Regulation and Enforcement of Existing Laws Constitute Less Restrictive Means of Limiting Access to Objectionable Content than Government Regulation of Constitutionally Protected Speech

A decade ago, this Court decided that "targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners ... targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000);[4] *id.* at 824 ("It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.").

Here, a highly descriptive content rating system, an extensive array of parental empowerment tools, numerous household media control methods, and enforcement of existing consumer deception laws together constitute a less restrictive alternative to California's law. Because "[t]echnology expand[ed] the capacity to choose" in this area, this Court cannot

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[4] *See infra* at 23 (discussing First Amendment interests of adults affected by application of the law to online sales).

"assume the Government is best positioned to make these choices for us," *id.* at 818, and must uphold the Ninth Circuit.

A. The Videogame Industry's Official Rating and Labeling System is Highly Descriptive, Widely Recognized, and Extensively Utilized

Amicus Eagle Forum asserts: "parents have no way of screening video game content for offensive material." Brief for Eagle Forum Education & Legal Defense Fund as *Amicus Curiae* 19. But parents need not actually play a game to "screen" it. The videogame industry's rating and labeling system provides an effective, less-restrictive method of labeling content so that individuals can make content consumption decisions for themselves and their children.

The Entertainment Software Rating Board (ESRB) is a self-regulatory rating and labeling body that rates over 1,000 games per year in most years; it rated 1,677 games in 2008 and has rated a total of 19,650 games.[5] ESRB applies six different rating symbols to games it rates (or a "Ratings Pending" (RP) placeholder).

ESRB employs 30+ "content descriptors" to give consumers highly detailed information about game content before purchase—especially parents who simply want to glance at the back of each game container to quickly gauge the appropriateness of the title for their children. ESRB requires that game publishers display ratings in advertising and marketing materials in all media, and fully disclose all pertinent content to ESRB. Companies that do not comply can be fined by ESRB or subject to other sanctions, including product recall.[6] ESRB's website also allows parents to enter the name of any game and retrieve its rating and content descriptors.[7]

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[5] ESRB, www.esrb.org/ratings/search.jsp (last visited Sept. 15, 2010).

ESRB and industry continue to promote awareness of these ratings and labels, including:

- A free "ESRB Rating Search Widget" easily installed on the PC that launched March 2008 allows users to instantly search for any game title and retrieve its rating and content descriptors.[8]
- Game "rating summaries," launched November 2008, offer a "supplementary source of information about game content that parents can use when considering which games to purchase for their children."[9] These can be accessed through ESRB's website or search widget, and explain to parents and players the context and relevant content that led to ESRB's assignment of a specific rating.

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[6] ESRB, *Principles and Guidelines for Responsible Advertising Practices*, www.esrb.org/ratings/principles_guidlines.jsp.

[7] ESRB, *ESRB Game Ratings*, www.esrb.org/ratings/search.jsp.

[8] ESRB, *ESRB Entertainment Software Widget*, www.esrb.org/about/widget/widget-consumer.jsp.

[9] ESRB, *ESRB Announces New Video Game Rating Summaries*, Press Release, Nov. 12, 2008, www.esrb.org/about/news/downloads/ESRB_Rating_Summaries_Release_11.12.08.pdf.

- A free iPhone app, launched December 2009, "giving parents instant, on-the-spot access to its new rating summaries right at the store when making decisions about which games to give as gifts."[10]

Surveys have shown most parents find the ratings and labels helpful: In 2008, 86% of American parents of children who play videogames were aware of the ESRB ratings and 78% consult the ratings regularly when buying games for their families.[11] As Exhibit 1 illustrates, these results have been generally increasing steadily since Hart Research Associates began conducting these surveys for ESRB in 1999.

Surveys conducted by the Entertainment Software Association (ESA), which represents the videogame industry, have also shown high parental involvement: The average videogame purchaser is 40 years old, and parents are present 93% of the time when games are purchased or rented.[12] Of parents surveyed, 76% said they find videogame console parental controls useful and 86% of the time children receive their parents' permission before purchasing or renting a game.[13]

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[10] ESRB, *ESRB Releases Free Rating Search App For iPhone*, Press Release, Dec. 1, 2009, www.esrb.org/about/news/downloads/ESRB_Rating_Search_app_release_12.1.09.pdf.

[11] ESRB, *Consumer Research: ESRB Survey: Parental Awareness, Use & Satisfaction*, www.esrb.org/about/awareness.jsp.

[12] Entertainment Software Association, Essential Facts about the Computer and Video Game Industry: 2010 Sales, Demographics and Usage Data 3, 6 (2010), *available at* www.theesa.com/facts/pdfs/ESA_Essential_Facts_2010.PDF.

The Federal Trade Commission (FTC) found in 2007 that:[14]

- 89% of parents are involved in the purchase or rental of a videogame for their child;
- 87% of parents were aware of the ESRB videogame ratings system;
- 73% use ratings "all," "nearly all" or "most of the time" when buying games;
- 87% reported being "very" to "somewhat" satisfied with ESRB ratings; and
- 93% said ESRB ratings are "moderately" to "very easy" to understand.

ESRB also takes extensive steps to self-regulate and police its own rating and labeling system. ESRB's Advertising Review Council (ARC) monitors compliance with ESRB guidelines and restricts marketing of ESRB-rated games through its "Principles for Responsible Advertising" and "Advertising Code of Conduct."[15]

Through its "OK to Play?" education campaign, ESRB provides materials to retailers, including an employee training manual, a quiz about the rating system, and signage displayed at 13 top national retailers who account for nearly 90% of all game sales.[16] Prominent retailers involved include Wal-Mart, Best Buy, Target, Toys-R-Us, and Game Stop. That in-store signage is reproduced as consumer advertising in magazines, newspapers, and websites. In 2005, ESRB also created the ESRB Retail Council:[17] Participating retailers commit to supporting ESRB's game sales policies and to twice-annual audits to test compliance with store policy and signage requirements.

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[13] *Id.* at 6.

[14] FTC REPORT TO CONGRESS, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN 28-9 (April 2007), *available at* www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf.

[15] ESRB, *Principles and Guidelines for Responsible Advertising Practices*, www.esrb.org/ratings/principles_guidlines.jsp.

ESRB also works with third-party groups to promote awareness of its system. For example, ESRB partners with the Parent-Teacher Association (PTA) to "encourage and enable state and local PTAs to educate their community's parents about the [ESRB] ratings."[18] In this education campaign, 1.3 million brochures were distributed to 26,000 PTAs nationwide in both English and Spanish. The ESRB and PTA websites offer additional online support and downloadable manuals and educational materials.[19] In 2008, ESRB produced and distributed to PTAs nationwide a booklet entitled, "A Parent's Guide to Video Games, Parental Controls and Online Safety."[20]

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[16] ESRB, *ESRB Statement on the MediaWise Video Game Report Card*, Press Release, Nov. 23, 2004, www.esrb.org/about/news/news_archive.jsp#11232004.

[17] ESRB, *ESRB Retail Council*, www.esrb.org/retailers/retail_council.jsp.

[18] Parent Teacher Association, *PTA and ESRB Launch Nationwide Video Game Ratings Educational Partnership*, Press Release, Nov. 15, 2006, www.pta.org/ne_press_release_detail_1163547309281.html.

[19] ESRB, *ESRB and PTA*, www.esrb.org/about/pta_partnership.jsp.

ESRB has developed several TV public service announcements endorsed by federal lawmakers[21] and state attorneys general[22] in which public officials encourage parents to use the videogame ratings when buying games for their children and to use parental controls on gaming devices.[23]

ESRB's education and awareness-building efforts have helped reduce underage game purchases. Since 2000, the FTC has surveyed the marketing and advertising practices of major media sectors (movies, music and videogames) in its annual *Marketing Violent Entertainment to Children* report,[24] using teenage "secret shoppers" to test point-of-sale enforcement of voluntary media rating systems (MPAA, ESRB, RIAA). These reports show dramatic improvements in ESRB ratings enforcement: Whereas 85% of undercover minors were able to purchase an M-rated videogame in 2000, only 20% could do so in 2008.[25] Of course, the number of minors who *actually* buy videogames is smaller still, since few kids buy games without their parents present.

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[20] ESRB, *ESRB and PTA Launch New National Campaign to Educate Parents about Game Ratings, Parental Controls and Online Video Game Safety*, Press Release, April 21, 2008, www.esrb.org/about/news/downloads/ESRB-PTA%20Press%20Release_4.21.08_F.pdf.

[21] ESRB, *Senators Hillary Rodham Clinton and Joe Lieberman Join ESRB to Launch Nationwide Video Game Ratings TV PSA Campaign*, Press Release, Dec. 7, 2006, www.esrb.org/about/news/12072006.jsp.

[22] *Kansas Attorney General Teams Up with ESRB on Ratings Awareness*, GAMEPOLITICS.COM, Jun. 9, 2009, www.gamepolitics.com/2009/06/09/kansas-attorney-general-teams-esrb-ratings-awareness

[23] These videos can be viewed at the "Media Library" on the ESRB website. ESRB, *Media Library*, www.esrb.org/about/media_library.jsp.

[24] Past FTC reports can be found at: www.ftc.gov/reports/index.shtm.

B. Third-Party Pressure, Ratings and Advice Supplement Parental Control Technologies and the Official Industry Rating System

Parents can find detailed videogame reviews and information about the specific types of content that kids will see or hear in a game at websites like Common Sense Media,[26] What They Play,[27] Gaming With Children,[28] Game Pro Family,[29] Children's Technology Review,[30] and others listed at www.esrb.org/about/resources.jsp. User-generated reviews on sites like Amazon.com[31] and Metacritic.com[32] feature excellent product summaries, often by other parents, that help parents decide which games are appropriate for their children.

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[25] FTC, *Undercover Shoppers Find it Increasingly Difficult for Children to Buy M-Rated Games*, Press Release, May 8, 2008, www.ftc.gov/opa/2008/05/secretshop.shtm.

[26] Common Sense Media, *Video Game Reviews*, www.commonsensemedia.org/game-reviews.

[27] www.whattheyplay.com

[28] www.gamingwithchildren.com

[29] http://gpfamily.blogfaction.com

[30] http://childrenstech.com

[31] www.amazon.com

[32] www.metacritic.com

C. Self-Regulation and Deceptive Advertising Laws Already Effectively Prevent Circumvention of the Videogame Ratings System

Amicus Eagle Forum asserts: "The California statute provides the only effective way to guard against manufacturers' slipping inappropriate material into video games."[33] Yet the incident cited by Eagle Forum actually proves both the rarity of this problem and the effectiveness of less-restrictive legal alternatives to the California law.

When *Grand Theft Auto: San Andreas* was released for Sony PlayStation in 2004, it included a hidden sex scene as a minigame dubbed "Hot Coffee." Unlike standard "Easter Eggs"—generally whimsical or surreal common features consistent with a game's ratings that can only be accessed via obscure and undocumented commands—this minigame, written during internal prototyping, had been rendered inaccessible without complicated software modifications. It is common practice in the industry to block activation of, rather than remove, sections of code not intended for consumer use.[34]

Within six weeks of the minigame's discovery by hackers, ESRB re-rated the game from Mature (M) to Adults Only 18+ (AO). Two weeks later, the developer released a downloadable software patch for the game, received by all Internet-connected game consoles and PCs, that made the offending content completely inaccessible. Another two weeks later, the developer issued a mandatory recall for the game. Within a year, the FTC settled deceptive advertising charges against the developer, requiring them to fully disclose all hidden content to game raters or the public.[35] The incident sent a powerful signal to game developers: Both industry and government will punish any attempt to circumvent the ESRB ratings system. No such controversy has occurred since.

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[33] Brief for Eagle Forum Education & Legal Defense Fund as *Amicus Curiae* 20.

[34] Rom's Rants, *My Take on "Hot Coffee,"* July 20, 2005, www.romsteady.net/blog/2005/07/my-take-on-hot-coffee.html.

D. Parental Control Technologies Empower Parents to Manage Videogame Consumption

The ESRB rating system not only informs parents; it directly facilitates "targeted blocking" that is far more sophisticated than the on/off control the Court deemed adequate in *Playboy*. 529 U.S. at 815. Major game console developers (Microsoft,[36] Sony,[37] and Nintendo[38]) all recognize the digitally embedded ESRB ratings and offer blocking tools in their new gaming systems,[39] as do Microsoft[40] and Apple[41] in their operating systems. For example, the Microsoft Xbox 360 and the Nintendo Wii consoles allow parents to enter the ESRB rating level they believe suits their children—so that no game rated above that level can be played. If a parent set the rating threshold on their child's videogame console or personal computer to T for Teen, no games rated Mature (M) or Adults Only (AO) could be played on the console unless a password is first entered. Sony's system for the PlayStation 3 console and PlayStation Portable (PSP) works only slightly differently: A 1-11 scale is used worldwide, but corresponds to the ESRB system. (Roughly speaking, "2" on the Sony scale means "EC" while "10" means "AO").[42]

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[35] Take-Two Interactive Software, Inc., F.T.C. No. 052 3158 (June 2, 2006), *available at* www.ftc.gov/os/caselist/0523158/0523158Take-TwoInteractiveandRockstarConsentAgreement.pdf.

[36] Xbox, *Introduction to Family Settings*, www.xbox.com/en-US/support/familysettings/xbox360/familysettings-intro.htm.

[37] PlayStation, *PlayStation 3 User's Guide*, http://manuals.playstation.net/document/en/ps3/current/basicoperations/parentallock.html.

[38] Nintendo, *Parental Controls*, www.nintendo.com/consumer/systems/wii/en_na/settingsParentalControls.jsp.

[39] *See* Mike Musgrove, *A Computer Game's Quiet Little Extra: Parental Control Software*, WASH. POST, Dec. 23, 2006, at

Other console and PC parental control tools allow parents to password-restrict device access, purchases of new games or add-ons, chat functionality, and when and for how long children can play videogames—all of which facilitate parental supervision. An estimated 75% of parents surveyed found such tools to be useful.[43]

D1, *available at* www.washingtonpost.com/wp-dyn/content/article/2006/12/22/AR2006122201278.html.

[40] Microsoft Windows, *Choose Which Games Children Can Play*, http://windows.microsoft.com/en-us/windows7/Choose-which-games-children-can-play.

[41] Apple, *Find Out How: Parental Controls*, www.apple.com/findouthow/mac/#parentalcontrols.

[42] For the entire equivalency scale, *see* ESRB, *Sony PlayStation 3 and PlayStation Portable*, www.esrb.org/about/parentalcontrol-ps3psp.jsp.

[43] ENTERTAINMENT SOFTWARE ASSOCIATION, ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY: 2008 SALES, DEMOGRAPHICS AND USAGE DATA 8 (2008), www.theesa.com/facts/pdfs/ESA_EF_2008.pdf.

E. Parents Utilize a Wide Variety of Non-Technical Household Media Rules and Methods to Control Videogame Consumption

Surveys confirm that household-level "media consumption rules" and informal parental control methods often substitute for, or supplement, parental control technologies. These rules include: (1) "where" rules (assigning a place for media consumption); (2) "when and how much" rules (creating a media allowance); (3) "under what conditions" rules (carrot-and-stick incentives); and, (4) "what" rules (specifying the content kids are allowed to consume). Many households reject technical blocking tools in favor of these household media rules; others simply shun certain media and communications technologies altogether.

A 2003 survey found that "Almost all parents say they have some type of rules about their children's use of media."[44] A 2007 survey found that 59% of parents limit how long their kids can play videogames and 67% have rules for the kinds of videogames they can play.[45] A 2010 ESA survey revealed even greater parental involvement: 83% of parents have placed time limits on videogame playing in their homes and 97% of parents report always or sometimes monitoring which games their children play.[46]

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[44] KAISER FAMILY FOUNDATION, ZERO TO SIX: ELECTRONIC MEDIA IN THE LIVES OF INFANTS, TODDLERS AND PRESCHOOLERS 9 (Fall 2003), www.kff.org/entmedia/entmedia102803pkg.cfm.

[45] AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, TEENS, PRIVACY, AND ONLINE SOCIAL NETWORKS 9 (2007), www.pewinternet.org/PPF/r/211/report_display.asp.

Finally, because most videogames cost $40-60, parents can exercise their "power of the purse" to control what is brought into the home, and have a strong financial incentive to do so.

II. Videogame Content is Constitutionally Protected Speech Deserving Strict Scrutiny

California's law regulates non-obscene speech that deserves full First Amendment protection. Although the law's supporters insist it merely facilitates parental control over objectionable retail purchases, in fact, the law would necessarily affect other media and the free speech rights of adults, especially online.

A. Game Expression and Interactive Media is Expressive Speech Fully Protected by the First Amendment

Every court challenge to state "violent" videogame laws has ultimately accorded videogame content full First Amendment protection. Videogames "are expressive and qualify as speech for purposes of the First Amendment"[47] and "are just as entitled to First Amendment protection as is the finest literature." *Entm't Merchs. Ass'n v. Henry*, No. 06-675 2007 U.S. Dist. LEXIS 69139, at *9 (W.D. Okla. 2007). "They contain original artwork, graphics, music, storylines, and characters similar to movies and television shows, both of which are considered protected free speech." *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006).

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[46] ENTERTAINMENT SOFTWARE ASSOCIATION, ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY: 2008 SALES, DEMOGRAPHICS AND USAGE DATA 6 (2008), www.theesa.com/facts/pdfs/ESA_EF_2008.pdf.

[47] *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2005).

Several such decisions rejected arguments that the interactivity of videogames distinguishes them from previous entertainment media. "[T]he presence of increased viewer control and interactivity does not remove these games from the release of First Amendment protection." *Henry*, 2007 WL 2743097, at *5. Perhaps most notably, in *Kendrick*, Judge Posner argued:

> [T]his point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.[48]

Moreover, "video games contain creative, expressive free speech, inseparable from their interactive functional elements, and are therefore protected by the First Amendment." *Granholm*, 426 F. Supp. 2d at 651.

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[48] *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

B. Depictions of Violence Have Always been Part of Literature and Media But Have Never Been Regulated Under *Ginsberg's* Obscenity Standard

It is a myth that videogames reflect a new, inordinate societal preoccupation with violent entertainment. Shakespeare's plays reveal how deeply this instinct is ingrained in the human psyche. How many pretend-knives have been plunged into how many backs over the last four centuries? *Julius Caesar, King Lear, Macbeth,* and *Titus Andronicus*, in particular, contain scenes of extreme violence, murder, and even mutilation. Yet, such plays are available in almost every school and library in America, and their scenes are regularly acted out by high school students. Yet, California would not allow such students to buy videogame versions of these plays.

Harold Schechter has meticulously documented the prevalence of violent fare throughout the history of art and entertainment, noting that even "the supposedly halcyon days of the 1950s" were replete with violent media, much of it aimed at children.[49] For example, the top-rated television program of 1954, Disney's *Davy Crockett* series (aired Wednesday nights at 7:30 p.m. to target elementary school children before they went to bed), "contained a staggering amount of graphic violence," including scalpings, stabbings, "brainings," hatchet and tomahawk blows, and so on.[50]

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[49] HAROLD SCHECHTER, SAVAGE PASTIMES: A CULTURAL HISTORY OF VIOLENT ENTERTAINMENT 137 (2005).

[50] *Id.* at 24-5.

Perhaps then, as Judge Posner suggested in *Kendrick*, nothing much has really changed throughout the history of art and entertainment: "Self-defense, protection of others, dread of the 'undead,' fighting against overwhelming odds--these are all age-old themes of literature, and ones particularly appealing to the young."[51] He continued: "To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it."[52]

Similarly, the co-founders and directors of the Harvard Medical School Center for Mental Health and Media, argue:

> The threads of violence are woven throughout the fabric of children's play and literature from a very early age. We sing them to sleep with lullabies that describe boughs breaking, cradles falling and babies plummeting helplessly to earth. We entertain them with fairy tales in which a talking wolf devours a girl's grandmother and an old woman tries to roast children alive in her oven. Even religious instruction is replete with stories about plagues, pestilence, jealousy, betrayal, torture and death.
>
> While the stories and songs may be different, the underlying themes are generally the same in cultures throughout the world. Ogres, monsters, sexual infidelities, beheadings, thievery, abandonment, cannibalism,

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[51] *Kendrick*, 244 F.3d at 578.

[52] *Id.* at 577.

drownings—such was the stuff of children's literature long before video games.[53]

Kutner and Olson conclude that "children are drawn to violent themes because listening to and playing with those frightening images helps them safely master the experience of being frightened. This is an important skill, perhaps even a life-saving one."[54] Indeed, this is entirely normal; even healthy. Children might imagine themselves to be role-playing or living out fantasies in the imaginary worlds created by videogame designers:

> One of the functions of stories and games is to help children rehearse for what they'll be in later life. Anthropologists and psychologists who study play, however, have shown that there are many other functions as well—one of which is to enable children to pretend to be just what they know they'll *never* be. Exploring, in a safe and controlled context, what is impossible or too dangerous or forbidden to them is a crucial tool in accepting the limits of reality. Playing with rage is a valuable way to reduce its power. Being evil and destructive in imagination is a vital compensation for the wildness we all have to surrender on our way to being good people.[55]

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[53] LAWRENCE KUTNER & CHERYL K. OLSON, GRAND THEFT CHILDHOOD: THE SURPRISING TRUTH ABOUT VIOLENT VIDEO GAMES AND WHAT PARENTS CAN DO 118-9 (2008).

[54] *Id* at 121.

[55] GERALD JONES, KILLING MONSTERS: WHY CHILDREN NEED FANTASY, SUPER-HEROES, AND MAKE-BELIEVE VIOLENCE 11 (2002).

As Judge Posner concluded in *Kendrick*, "People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble."[56]

Thus, it would be foolhardy to attempt to apply the *Ginsberg* obscenity standard to depictions of violence in media.

C. This Case Has Profound Ramifications for Many Other Forms of Expression and Other Communications and Media Platforms

1. Other Forms of Media Content are Increasingly Intertwined with Videogame Content

Videogames today are not a discrete category of visual entertainment. With a rich combination of cinematic visuals, epic story-telling, and engrossing soundtracks, videogames are increasingly part movie, part record, and part book. The *Lord of the Rings* movie and videogame series both drew on the famous J.R.R. Tolkien novels, just as *The Godfather* videogames and movies were inspired by the novel of the same name. California Governor Arnold Schwarzenegger, who signed the California bill into law, is most famous for having starred in *The Terminator* movies, which also inspired a wide variety of videogames rated "Teen" for their violent content.)

But videogames have also inspired movies, music, books, and comics.[57] The *Star Wars* movies inspired a diverse array of novels and comics in addition to a long line of games. Many other notable games have inspired books, comics, and/or movies, including: *Prince of Persia, Resident Evil, Tomb Raider, Doom, Final Fantasy, Halo,* and *Gears of War*. The characters and storylines in the books, comics, and movies based on these games often closely track the videogames that inspired them. Increasingly, therefore, games are developed along parallel tracks with these other media.

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[56] *Kendrick*, 244 F.3d at 577.

[57] *Movie-themed Video Games Transforming the Industry*, NIELSENWIRE, June 29, 2009,

If the First Amendment permitted California to prohibit the sale of violent videogames to minors, would it not also permit the state to restrict minors' access to violent books, comics, movies, or even theme park attractions?[58] *Not* to regulate those other forms of media while regulating videogame content would produce the "type of facial underinclusiveness [that] undermines the claim that the regulation materially advances its alleged interests." *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 833 (M.D. La. 2007). The Court cannot carve out videogames for special treatment; upholding the Cali-

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http://blog.nielsen.com/nielsenwire/consumer/movie-themed-video-games-transforming-the-industry.

[58] *The Terminator* movies and video games inspired "Terminator 2: 3D," an attraction at Universal Studios in Orlando, Florida. The show features cinematic action combined with real-life actors who run throughout the arena firing shotguns at cybernetic robots that come out of the walls and floors. During some segments, smoke fills the chamber and the seats and floors vibrate violently as battles take place on stage and on-screen. The actor hosting the show is choked to death by a cyborg. Arnold Schwarzenegger filmed segments for the cinematic portions of the attraction, which children are admitted to without restriction. *See* Universal Studios Hollywood, Terminator 2:3D, www.universalstudioshollywood.com/attraction_terminator.html.

fornia law would permit censorship of other media, especially as media converge.

2. *Given the Shift to Online, California's Law Would Require Mandatory Online Age Verification*

Although California's law appears to cover only videogame sales and rentals made in retail outlets, limiting the law to offline sales would make the law dramatically underinclusive. It would be easily circumvented because videogame content is increasingly sold directly and downloaded through gaming consoles connected to the Internet. But applying the law online would likely require mandatory age verification of *all* online gamers because the law prohibits any sale or rental to a minor, even if the vendor had no evidence that the buyer was a minor.[59]

This would raise the same constitutional issues that caused the Court to enjoin the Child Online Protection Act, which sought to restrict minors' access to online materials deemed "harmful to minors." *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The Court found COPA's age verification requirements to burden the speech of adults and websites, despite being ineffective in preventing children from accessing pornography. *Id.* at 666-67.[60] Yet, the extension of

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[59] CAL. CIV. CODE § 1746.1(a). "Proof that a defendant, or his or her employee or agent, demanded, was shown, and reasonably relied upon evidence that a purchaser or renter of a violent video game was not a minor ... shall be an affirmative defense," *id.* § 1746.1(b) but the law otherwise imposes strict liability.

[60] *See, e.g.*, Internet Safety Technical Task Force, *Enhancing Child Safety and Online Technologies* 29-31 (Dec. 2008) (discussing limited efficacy of age verification); Brief Of *Amici Curiae* Computer & Communications Industry Association,

California's videogame statute would necessitate a similar regulatory regime for online game sales because distinguishing children from adults in anonymous online environments essentially requires requiring *all* users to prove they are not children. It is unlikely the California law would survive a COPA-like challenge.[61]

III. The State Has Not Established a Compelling Government Interest in Restricting the Sale of Videogames to Minors

California has not shown, and cannot show, any compelling governmental interest furthered by its content-based restrictions on videogames. Instead, California claims the First Amendment permits courts to defer to legislative findings of harm. The Court should reject this transparent attempt to evade strict First Amendment review. First, the research upon which California's legislative findings are based does not establish harm to minors. Second, *Turner* deference is never appropriate when the legislature targets content. California's unwarranted reliance on flawed empirical research demonstrates the wisdom of the principle that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

Consumer Electronics Association, Information Technology Industry Council, TechAmerica, Center For Democracy & Technology, and Digital Liberty Project 18-21 (same) ("CDT Brief").

[61] *See* CDT Brief at 21-26.

A. The State Has Not Satisfied Its Burden of Proof

1. The State of California's Enactment Represents a Classic Case of "Moral Panic" Legislation Based on Conjectural Harms

In 2009, the United Kingdom Department for Children, Schools and Families concluded:

> Concerns about the harmful effects of popular culture on children and young people have a very long history, dating back well before electronic technology. These concerns reflect much more general anxieties about the future direction of society; but, as several studies have shown, they can also be inflamed and manipulated by those with much broader political, moral or religious motivations. These concerns occasionally reach the level of a 'moral panic', in which particular social groups and practices are publicly demonised – often on the basis of what are ultimately found to be quite spurious accusations.[62]

Indeed, from the waltz to rock-and-roll to rap music, from movies to comic books to videogames, from radio and television to the Internet and social networking sites—each new media has spawned a fresh debate about potential harm to kids.[63] *The*

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[62] DEPARTMENT FOR SCHOOLS, CHILDREN AND FAMILIES (U.K.), THE IMPACT OF THE COMMERCIAL WORLD ON CHILDREN'S WELLBEING, 25 (2009), http://publications.dcsf.gov.uk/eOrderingDownload/00669-2009DOM-EN.pdf.

[63] "New media are often met by public concern about their impact on society and anxiety and polarisation of the debate

Economist found that "opposition to gaming springs largely from the neophobia that has pitted the old against the entertainment of the young for centuries."[64] They noted:

> Novels were once considered too low-brow for university literature courses, but eventually the disapproving professors retired. Waltz music and dancing were condemned in the 19th century; all that was thought to be 'intoxicating' and 'depraved', and the music was outlawed in some places. Today it is hard to imagine what the fuss was about.[65]

Inevitably, these social and cultural debates become political debates, especially if a full-blown "moral panic" or "techno-panic" ensues.[66] This seems

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can lead to emotive calls for action." Byron Review on Children and New Technology & Department for Children, Schools and Families, [U.K.], Safer Children in a Digital World 3 (2008), www.dfes.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf. For other examples, *see* Tom Standage, *Those Darn Kids and Their Darn New Technology*, Wired, April 2006, at 114-5; James A. Monroe, Hellfire Nation: The Politics of Sin in American History (2003).

[64] *Breeding Evil?* The Economist, Aug. 6, 2005, *available at* www.economist.com/PrinterFriendly.cfm?story_id=4247084.

[65] *Id.*

[66] Alice Marwick, *To Catch a Predator? The MySpace Moral Panic*, 13 First Monday 2 (June 2008), www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2152/1966; Anne Collier, *Why Technopanics are Bad*, Net Family News, April 23, 2009, www.netfamilynews.org/2009/04/why-technopanics-are-bad.html, Wade Roush, *The Moral Panic over Social Networking Sites*, Technology Review, Aug. 7, 2006, www.technologyreview.com/communications/17266; Adam Thierer, *Parents, Kids & Policymakers in the Digital Age:*

to be the case with the California law, especially considering its sponsor's claim that videogames "teach [children] to do the very things we put people in jail for."[67]

2. *Social Science Has Established No Firm Link between Exposure to Depictions of Violence and Real-World Acts of Violence or Aggressive Behavior*

To establish a compelling interest in regulating violent videogame speech, California must prove a definitive link between exposure to depictions of violence and real-world violence or aggressive behavior.

Instead, California has misinterpreted well-known empirical social science research, making two dangerous errors. First, California incorrectly equates laboratory findings of "aggressive" feelings and behavior with real-world violent behavior—defining "violent" so broadly as to reach the majority of videogames, not to mention popular media. Second, California incorrectly views any statistically significant relationship between violent videogame play and aggression—whether small or large, correlative or causal—as compelling evidence that videogames are injurious, damaging, or otherwise detrimental to children.

Safeguarding Against 'Techno-Panics,' INSIDE ALEC, July 2009, at 16-7, www.alec.org/am/pdf/Inside_July09.pdf.

[67] *California Advances Bill on Violent Video Games*, REUTERS, May 6, 2005 (quoting California Sen. Leland Yee). *See also*, DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL (1999).

a. *The Research Does Not Define or Measure "Aggression" or "Violence" as Commonly Understood*

Most parents would be surprised to know that media-violence researchers consider the videogame "Super Mario Brothers" to be violent. Yet Super Mario Brothers "involve[s] considerable violence in the sense that the player typically spends a considerable amount of time destroying other creatures," although "it is not classified as violent by many people."[68] These researchers define "violent media" as "those that depict characters intentionally harming other characters who presumably wish to avoid being harmed."[69] Thus, "traditional Saturday-morning cartoons (*e.g.*, 'Mighty Mouse,' 'Road Runner') are filled with violence."[70] Even "many cartoonish E-rated children's games are violent. They're just not bloody. You know, you shoot a ray gun and things disappear, and there's happy music and bright colors."[71]

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[68] Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings and Behaviors in the Laboratory and in Life*, 78 J. OF PERSONALITY AND SOC. PSYCH. 772, 779 (2000).

[69] Craig A. Anderson, Akira Sakamoto, et al., *Longitudinal Effects of Violent Video Games on Aggression in Japan and the United States*, 122 PEDIATRICS e1067, e1068 (2008) (noting that the general public thinks of "violent media" as "only those [] that include graphic images of blood and gore").

[70] Craig A. Anderson & B.J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Physiological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 PSYCHOLOGICAL SCIENCE 353, 354 (2001).

Under this definition, greater than 90% of games currently classified as E10+, appropriate for everyone aged 10 and older, contain violence.[72] By contrast, "football is no longer aggression. You can play it in kind of an aggressive way, but you're not actually intending to injure the other people."[73]

Media-violence research also relies on artificial proxies for real-world aggression and violence. In a common experimental paradigm, "aggressive" behavior is modeled as delivering a "noise blast" to an unknown, unseen (and unreal) opponent in an experimenter-rigged competitive "game" that a subject plays immediately after playing either a violent or non-violent videogame.[74] The hypothesis is that subjects who played the violent videogame will deliver louder noise bursts in the second game.

Similarly, "aggressive thoughts" are often modeled as laboratory behaviors, such as the increased percentage of trials on which players complete a word puzzle with a letter that results in an aggressive, rather than a neutral, word. For example, completing the word puzzle "explo_e" with the word "explode" supposedly signifies aggressive thoughts, while completing it with the word "explore" does not.[75] Kutner and Olson rightly criticize this approach:[76]

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[71] Matt Peckham, *Violent Cases: A Conversation with Doug Gentile, Part One*, PCWORLD.COM, Apr. 13, 2007, http://blogs.pcworld.com/gameon/archives/004098.html (quoting Prof. Gentile, Assistant Professor of Psychology at Iowa State University and co-author of VIOLENT VIDEO GAME EFFECTS ON CHILDREN AND ADOLESCENTS (2007) (with Craig Anderson and Katherine Buckley)).

[72] Anderson & Sakamoto, *supra* note 69, at e1067 (citation omitted).

[73] Peckham, *supra* note 71.

[74] *See, e.g.*, Anderson & Dill, *supra* note 68, at 784.

> Their logic assumes that the subjects in these experiments—usually college students who participate to earn some spending money or to get credit for a class—cannot tell the fantasy from reality and don't know that "punishing" a person with a mild electric shock or a 9mm pistol will lead to different outcomes. Can someone who delivers a brief blast of noise really be said to have the same malicious intent as someone who shoots a convenience store clerk or stabs someone in a bar fight?[77]

The research also shows that the aspect of violent media targeted by California and most disturbing to concerned parents—the realistic depiction of violence—predicts neither aggression nor violence. "[W]e've assumed that what matters is how realistic the violence is. But ... what we found is that even the children's games that included violence [by their definition] had the same size effect as T-rated games, which are more graphic, and the same size effect as

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[75] *See, e.g.*, Craig A. Anderson, N. Carnagey, et al, *Violent video games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior*, 36 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 208 (2004)).

[76] Lawrence Kutner & Cheryl K. Olson, GRAND THEFT CHILDHOOD: THE SURPRISING TRUTH ABOUT VIOLENT VIDEO GAMES AND WHAT PARENTS CAN DO 65 (2008)

[77] *Id.* at 65

M-rated games in other studies that we've done."[78] Rather, "what seems to matter is whether the game includes aggressive content .... even if the game violence was not at all graphic, gory, or realistic."[79] Here again, California's law is facially underinclusive given its purported rationale: It targets realistic depictions of violence even though realism is irrelevant.

b. *The Research Does Not Show That "Violent" Videogames Harm Minors*

Clearly, "violence" and "aggression" in the social science literature bear little resemblance to real-world aggression or violence. But California also fails to appreciate the vast differences between statistical significance and effect size, and between correlation and causation.

First, California confuses statistically significant experimental findings with real-world harm. Nearly every introductory statistics course or textbook, however, takes pains to distinguish between the concepts of significance (the probability a given effect occurred by chance) and effect size, or "real world" meaning.[80]

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[78] Peckham, *supra* note 71.

[79] Craig Anderson, Douglas Gentile, & Katherine Buckley, VIOLENT VIDEO GAME EFFECTS ON CHILDREN AND ADOLESCENTS 66-67 (2007); *id.* at 67 ("We were also somewhat surprised that there was no apparent difference between the children and the college students. Many people have assumed that children are more vulnerable to media violence effects, but it seems that the college students were just as affected.")

[80] *See, e.g.*, ROGER E. KIRK, STATISTICS: AN INTRODUCTION 333 (1999) ("statistically significant results are not necessarily important, large, or even useful. What is needed is a meas-

For instance, in the "noise blast" experiments, the difference in loudness between violent and nonviolent videogames was approximately 10 decibels,[81] about the difference between the sound of a refrigerator hum (40dB) and the sound of rainfall (50dB).[82]

This effect, while statistically significant, is small. Similarly, participants in the word choice study made significantly more "aggressive" word completions after playing violent videogames (14.7% aggressive words) than after playing nonviolent videogames (12.5% aggressive words).[83] But while this 2.2% difference is of interest to social scientists modeling aggression, it has little real-world meaning.

The conflation of statistical significance with effect size is especially pernicious here because there are no established clinical thresholds beyond which aggressive behavior is considered pathological within experimental contexts.

Second, it is not enough to suggest the *possibility* of a causal correlation: As every statistician and social scientist recognizes, correlation does not necessarily equal causation. "[B]ecause two phenomena are both disturbing and coincident in time does not make them causally connected," notes Dr. Stuart Fischoff of the Media Psychology lab at Californian

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ure of the practical significance of results. Unfortunately, such a measure does not exist. However, measures of effect magnitude can assist a researcher in deciding whether results are practically significant.").

[81] Anderson, Carnagey, et al., *supra* note 75, at 221, Table II.

[82] American Tinnitus Association, last accessed on August 3, 2010, at www.ata.org/about-tinnitus/how-loud-too-loud.

[83] Anderson, Carnagey), et al, *supra* note 75 at 208.

State University in Los Angeles.[84] *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 317 (2002) (correlational evidence "suffers from its inability to establish a causal connection between the correlated phenomena. It is frequently the case that two phenomena are positively correlated precisely because they are both caused by some third phenomena.").

Indeed, no such link has been clearly established in the "scientific" literature on this subject. The literature is ambiguous at best and perhaps even leans against the "causal hypothesis" that media violence causes aggression.

The most comprehensive review of major literature on the impact of movie and television media violence on aggression revealed that "the results do not support the view that exposure to media violence causes children or anyone else to become aggressive or to commit crimes; nor does it support the idea that it causes people to be less sensitive to real violence."[85] After reviewing all the laboratory experiments, field experiments, longitudinal studies, and other studies conducted through 2002, the author concluded that "not one type of research provided the kind of supportive evidence that is ordinarily required to support a hypothesis. Not one found 90% supportive or 80% supportive or 70% supportive or even 50%. In fact, regardless of the method used, fewer than half the studies found results that supported the [causal] hypothesis—sometimes considerably fewer than half."[86]

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[84] GERALD JONES, KILLING MONSTERS: WHY CHILDREN NEED FANTASY, SUPER-HEROES, AND MAKE-BELIEVE VIOLENCE 28 (2002).

[85] JONATHAN L. FREEDMAN, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION: ASSESSING THE SCIENTIFIC EVIDENCE x-xi (2002).

Similarly, the most recent meta-analysis "does not find support for either a causal or correlational link between violent media and subsequent aggression in viewers" and stressed that "media violence effects research may be driven by poor methodology, including inadequate aggression measures and failure to consider third variables."[87] Laboratory studies that "take account of potentially confounding 'third' variables such as personality, family violence, or genetics ... consistently find that the link between video game violence and aggression is greatly weakened by the inclusion of 'third' variables."[88]

Indeed, even researchers relied on by California recognize that "the correlational nature of [this study] means that causal statements are risky at best. It could be that the obtained videogame violence links to aggressive and nonaggressive delinquency are wholly due to the fact that highly aggressive individuals are especially attracted to violent videogames."[89]

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[86] *Id.* at 200-201.

[87] Christopher J. Ferguson & John Kilburn, *The Public Health Risks of Media Violence: A Meta-Analytic Review*, 154 J. OF PEDIATRICS 759, 762 (May 2009), www.tamiu.edu/~cferguson/MVJPED.pdf; *see also* Steven D. Levitt & John A. List, *What Do Laboratory Experiments Measuring Social Preferences Reveal About the Real World?* 21 J. ECON. PERSP. 2 (Spring 2007) 153-174, 154.

[88] Christopher Ferguson, *The School Shooting / Violent Video Game Link: Causal Relationship or Moral Panic?*, 5 J. INVESTIGATIVE PSYCH. OFFENDER PROFIL. 5, 25-37, 27 (Dec. 2009), www.gameinsociety.com/public/The_school_shooting_-_violent_video_game_link.pdf

Other studies have attempted to measure real-world violence relative to violent media exposure. For instance, one study examined videogame store sales and localized reports of violence, concluding that "most crimes decrease in a county as the number of game stores increases" and suggesting *subsidies* for increased game consumption by youth rather than prohibition.[90]

Given the obvious weakness of the media-violence research on showing any link to actual harm to children, California also relies on neurological studies finding some reduction of neural activity in the brain's frontal lobes as a result of playing "violent" videogames.

This reliance is misplaced because these effects are not harmful; rather, the brain may simply become more efficient: "[l]ess cortical activation without a behavioral deficit implies that fewer neurons are necessary to produce the same response."[91] Studies suggest that such neural efficiency is associated with the expertise of highly trained athletes, dancers, and musicians. "The key concept is that of increasing automaticity: controlled processes are attention demanding, conscious and inefficient, whereas automatic processes are rapid, smooth, effortless, demand little attentional capacity and are difficult to consciously disrupt."[92] Accordingly, "extensive practice over a long period of time leads experts to develop a focused and efficient organization of task-related neural networks, whereas novices have difficulty filtering out irrelevant information."[93]

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[89] Anderson & Dill, supra note 68, at 782.

[90] Michael R. Ward, *Video Games and Crime*, CONTEMPORARY ECON. POL., http://onlinelibrary.wiley.com/doi/10.1111/j.1465-7287.2010.00216.x/full

[91] Joshua A. Granek,, Diana L. Gorbet, & Lauren E. Sergio, *Extensive Video-Game Experience Alters Cortical Networks for Complex Visuomotor Transformations*, 46 CORTEX 1165, 1166 (2010), http://tinyurl.com/3xfnkhx.

Anyone who has played modern videogames knows that they require intricate perceptual-motor coordination. Thus, this neurological effect likely represents nothing more than skilled videogamers handling complexity better than novices. There is no harm here.

3. *Almost Every Social or Cultural Indicator of Importance Has Been Improving Even as Videogame Use Among Youth Has Increased*

Whatever lab experiments suggest, evidence of a link between depictions of media violence and real-world violence simply does not appear in real-world data. The FBI's research reports show that violent crime rates have fallen steadily over the past two decades and that the juvenile crime rate has fallen 36% since 1995 (and the juvenile murder rate has plummeted by 62%)[94]—even as videogame consumption has exploded: "youth exposure to just about all forms of media is up. The amount of time they spent with videogames rose from an estimated 26 minutes in 1999 to 73 minutes in 2009.[95]

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[92] Kielan Yarrow, Peter Brown, & John W. Krakauer, *Inside the Brain of an Elite Athlete: The Neural Processes That Support High Achievement in Sports*, 10 NATURE REVIEWS NEUROSCIENCE 585, 588 (2009).

[93] John Milton, Ana Solodkin, Petr Hluštík, & Steven L. Small, *The Mind of Expert Motor Performance is Cool and Focused*, 35 NEUROIMAGE 804, 804 (2007); *see also id.* at 810.

[94] FBI, CRIME IN THE UNITED STATES (2008), www.fbi.gov/ucr/cius2008/index.html.

Indeed, real-world data trends show stunning drops in crime during a period of increased exposure to videogames. The FBI's latest crime report revealed even more stunning declines in crime with violent crimes declining by 5.5% relative to 2008.[96] Exhibit 4 shows the percentage declines by overall crime category for the past four years, and the subsequent tables and charts depict the declines for various categories of crime over the past 15-25 years.[97]

This real-world evidence makes the State's claim of a compelling interest for regulation highly dubious: no positive statistical correlation between gaming and real-work acts of violence or aggression has been proven.

B. *Turner* Deference Cannot Be Applied Here

California argues that, in requiring proof of causation (rather than mere correlation), the Ninth Circuit misapplied *Turner Broad. Sys., Inc. v. FCC*, 512

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[95] Kaiser Family Foundation, Generation M2: Media in the Lives of 8- to 18-Year-Olds (Jan. 2010), www.kff.org/entmedia/8010.cfm.

[96] FBI, *Preliminary Annual Uniform Crime Report of 2009* (May 24, 2010), www.fbi.gov/ucr/prelimsem2009/index.html.

[97] Surprisingly, these declines occurred in the midst of one of the most significant economic downturns that America has experienced in decades. *See* Charlie Savage, *U.S. Crime Rates Fell Despite Economy*, N.Y. Times, May 24, 2010, www.nytimes.com/2010/05/25/us/25crime.html?_r=2&hp.

U.S. 622, 666 (1994). *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009) (applying *Turner*).

California's argument fails for two simple reasons. First, California has cited no persuasive authority for applying *Turner* deference to content-based restrictions under strict scrutiny—and for good reason: The First Amendment does not permit deference to legislative findings on the primary effects of protected speech on its audience. Second, California's legislative findings are not supported by substantial evidence and do not reflect the critical exercise of sound judgment that might warrant such deference. California's problem was not that the Ninth Circuit required proof of causation, but that the evidence is itself deeply flawed.

1. Turner Deference Does Not Apply to Content-Based Restrictions on Speech, and No Authority Holds Otherwise

"Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *id.* at 844 ("Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.").

California's law is a content-based restriction on speech. *See, e.g., Playboy*, 529 U.S. at 811-812 (a law that "focuses *only* on the content of the speech and the direct impact that speech has on listeners ... is the essence of content-based regulation") (internal quotation marks and citations omitted) (emphasis in original). *Amici* cite no persuasive authority for

Turner deference where strict scrutiny is required of a content-based restriction on protected speech.

This should surprise no one: Because content-based regulation of speech is presumptively invalid, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-118 (1991), deference to legislative findings about the primary effects of protected speech is incoherent.

One reason lies in the differences between strict and intermediate scrutiny. Strict scrutiny's least-restrictive-means requirement seeks to minimize speech loss even where a compelling government interest exists, while intermediate scrutiny's narrow-tailoring requirement accepts a range of trade-offs between speech and a substantial government interest. Some deference to legislative fact-finding makes sense when such trade-offs are allowed, but not when costs to speech are being minimized. *See Playboy*, 529 U.S. at 815 ("[T]he lesser scrutiny afforded regulations targeting the secondary effects of crime ... has no application to content-based regulations targeting the primary effects of protected speech.") (citations omitted).

Similarly, in *Reno v. ACLU*, 521 U.S. 844 (1997), this Court rejected deference to legislative findings, instead asserting "an 'over-arching commitment' to make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'" *Id.* at 876 (*quoting Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996)). The Court cited district court findings to demonstrate "incorrect factual premises" relied upon by Congress. *Reno*, 521 U.S. at 876.

Here, California seeks to use empirical studies to show that "violent" videogames are harmful, and thus low-value speech, or that graphic depictions of violence lack serious value. This attempt must be rejected: "the First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010); *id.* at 1591 ("*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value)") (emphasis in original).

Decades ago, this Court rejected a similar argument about "vulgar" speech, explaining that the First Amendment protects the "emotive" force or function of expression, and that "governmental officials cannot make principled distinctions in this area." *Cohen v. California*, 403 U.S. 15, 25-26 (1971).

2. *The California Legislature's use of Empirical Evidence Here Does Not Reflect the Critical Exercise of Sound Predictive Judgment and Warrants No Deference*

This Court's precedents amply refute California's call for substantial deference to its legislative findings. But as shown above, California's legislative findings deserve no deference in the first place.

First, the record here is sparse compared to the "'record of tens of thousands of pages' of evidence" developed through "three years of pre-enactment hearings... as well as additional expert submissions, sworn declarations and testimony, and industry documents" in support of the complex must-carry provisions in *Turner*. *Playboy*, 529 U.S. at 822.

Second, unlike in *Turner*, California made no "predictive judgments" based on "vast amounts of data."[98] Rather, the legislature relied upon a modest number of social science studies that all other courts had correctly rejected. The legislature did not so much apply its own critical analysis skills to the evidence (weighing disparate findings objectively and drawing conclusions based on the totality of the evidence) as outsource its reasoning to one side of a genuine scientific debate.

The First Amendment does not permit California to misinterpret social science simply because the actual state of the science is inconclusive; this Court should not defer to these legislative findings.

CONCLUSION

The judgment of the Ninth Circuit overturning California's unconstitutional restrictions on videogame speech should be affirmed.

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[98] *Turner*, 512 U.S. at 665-6 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985)).

Respectfully submitted,

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SEPTEMBER 2010

APPENDIX A - EXHIBITS

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Exhibit 1: Parental Awareness & Use of Videogame Ratings is High

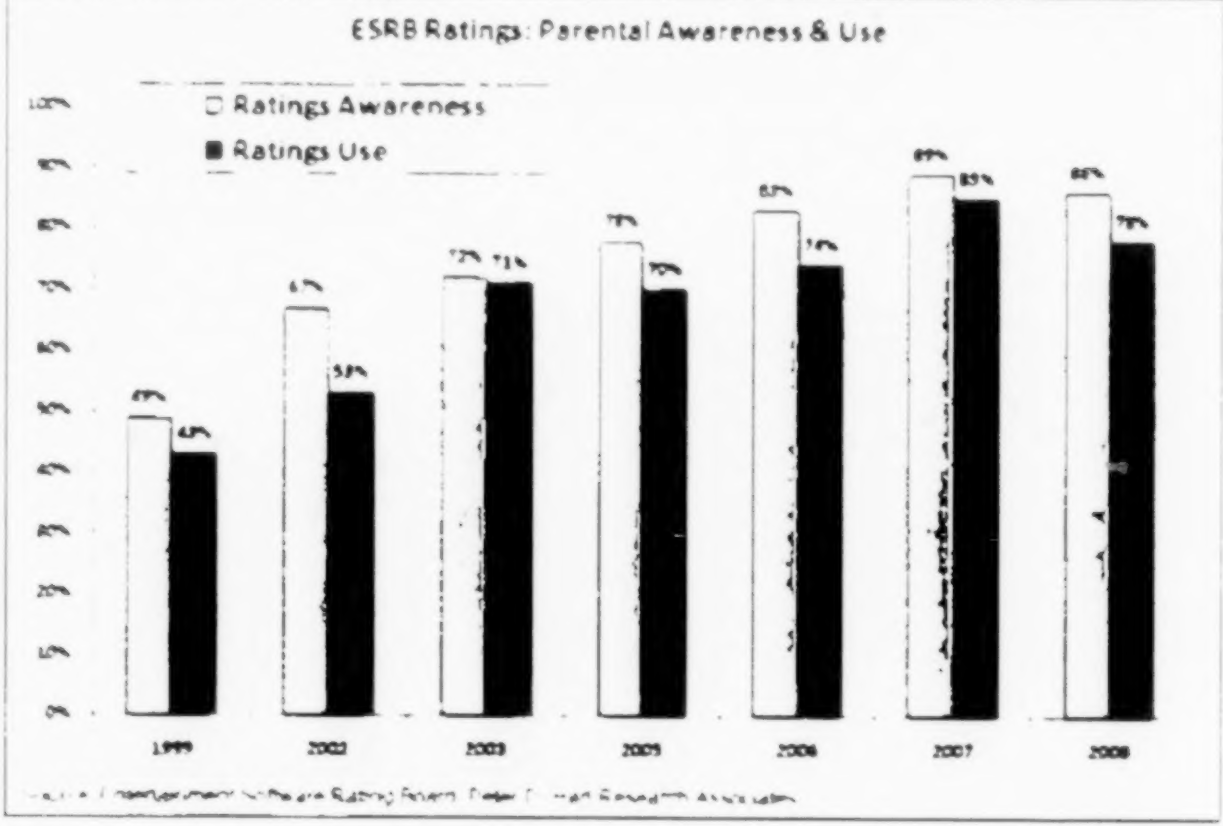

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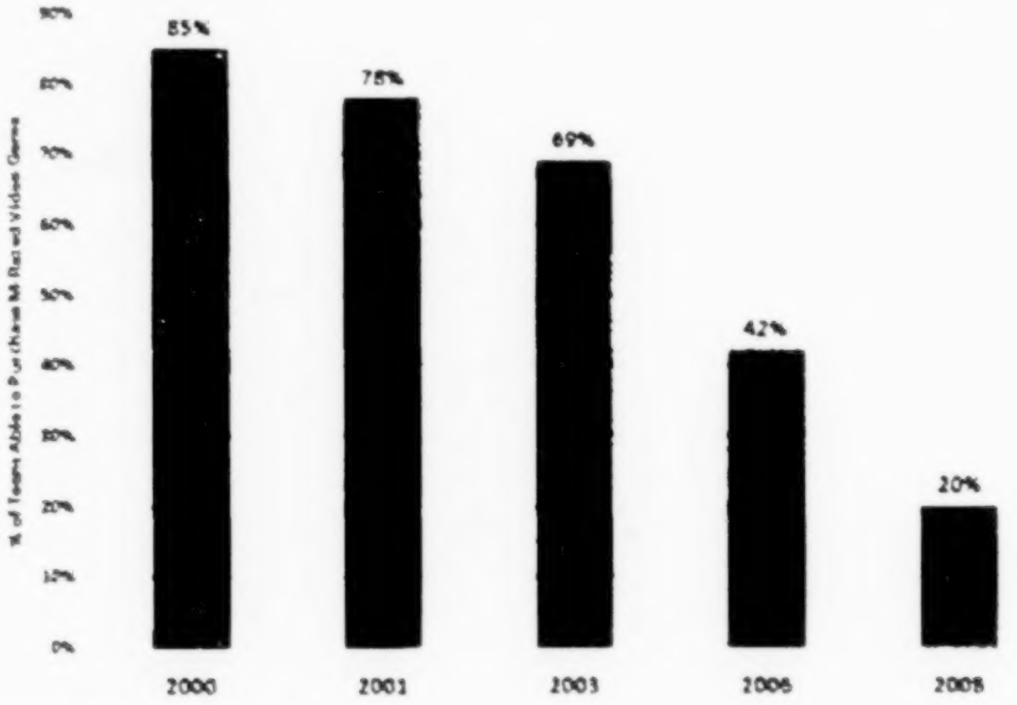
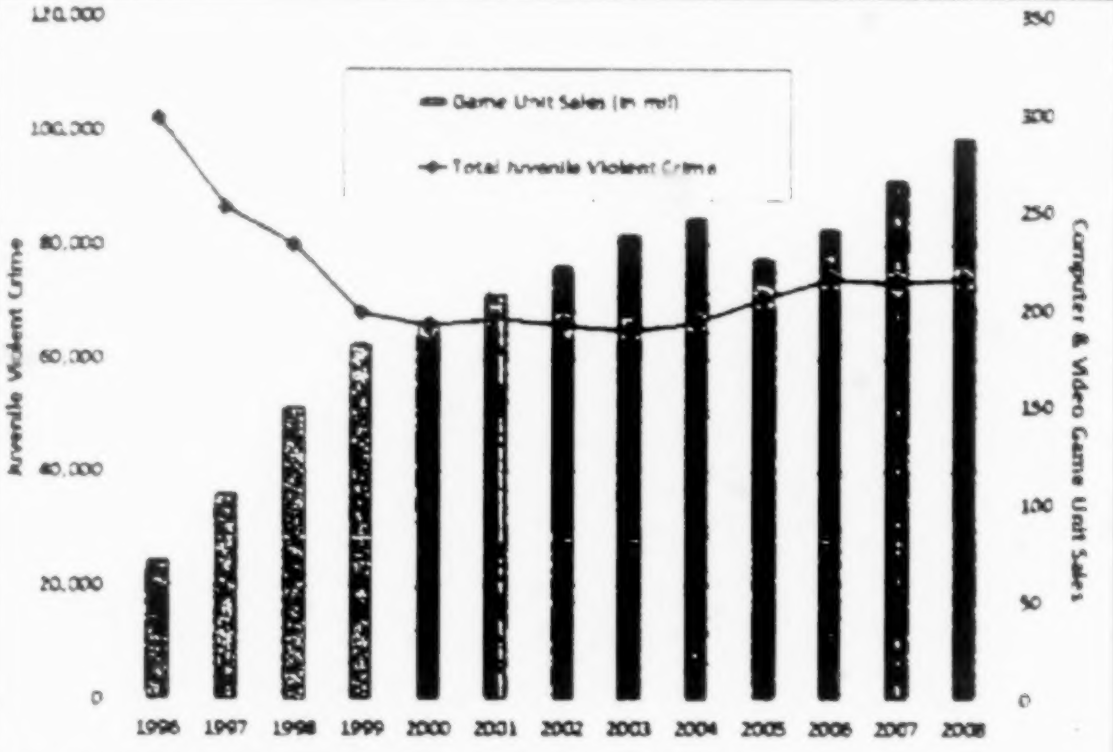
Exhibit 2: FTC "Secret Shopper" Surveys Show Improved Retailer Enforcement



Source: Federal Trade Commission

Exhibit 3: Comparison of Youth Violence and Videogame Sales 1996-2005



Source: Federal Bureau of Investigation (crime data), NPD Group (sales data)

Exhibit 4: Year-Over-Year Percentage Change in Violent Crime 2005-2009

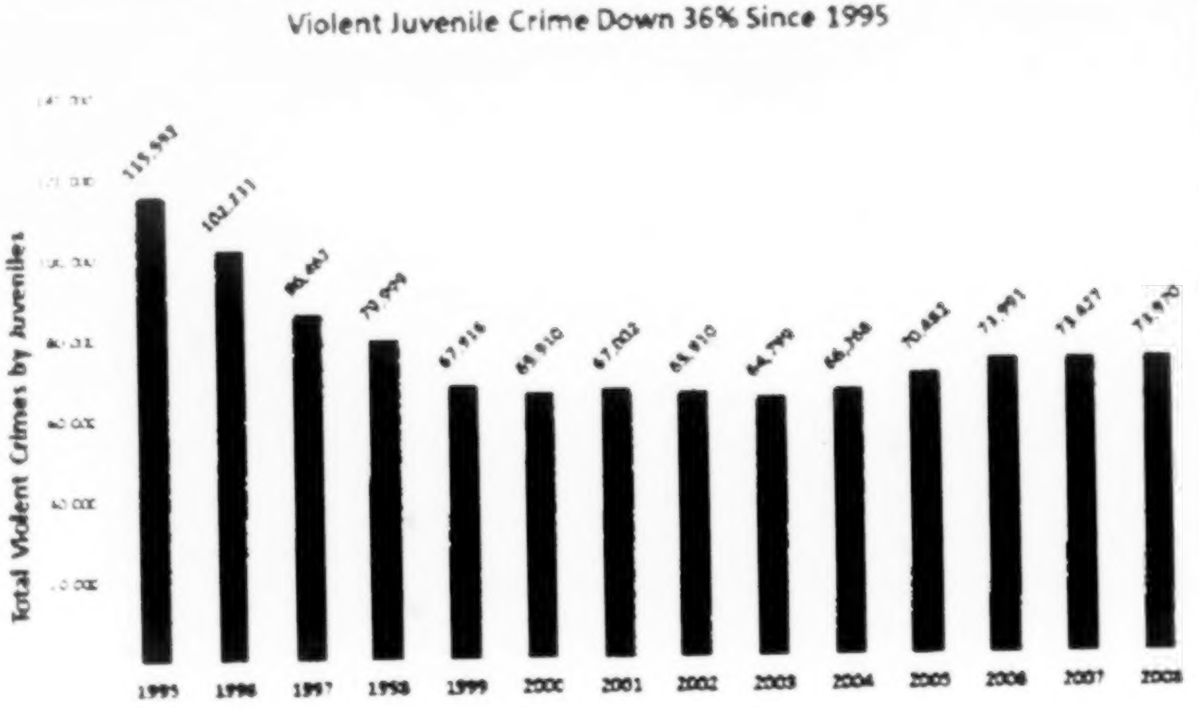
Years	Violent crime	Murder	Forcible rape	Robbery	Aggravated assault	Property crime	Burglary	Larceny-theft	Motor vehicle theft	Arson
2006/2005	+1.9	+1.8	-2.0	+7.2	-0.2	-1.9	+1.3	-2.6	-3.5	+2.1
2007/2006	-0.7	-0.6	-2.5	-0.5	-0.6	-1.4	-0.2	-0.6	-8.1	-6.7
2008/2007	-1.9	-3.9	-1.6	-0.7	-2.5	-0.8	+2.0	+0.3	-12.7	-3.6
2009/2008	**-5.5**	**-7.2**	**-3.1**	**-8.1**	**-4.2**	**-4.9**	**-1.7**	**-4.2**	**-17.2**	**-10.4**

Exhibit 5: Juvenile Violent Crime Data 1995-2008

	Murder	Forcible Rape	Robbery	Aggravated Assault	Total Juvenile Violent Crime	Change from Previous Year
1995	2,560	4,190	44,508	64,334	**115,592**	
1996	2,172	4,128	39,037	56,894	**102,231**	-12%
1997	1,731	3,792	28,069	52,870	**86,462**	-15%
1998	1,470	3,769	23,400	51,360	**79,999**	-7%
1999	919	3,182	18,735	45,080	**67,916**	-15%
2000	806	2,937	18,288	43,879	**65,910**	-3%
2001	957	3,119	18,111	44,815	**67,002**	2%
2002	806	2,937	18,288	43,879	**65,910**	-2%
2003	783	2,966	17,900	43,150	**64,799**	-2%
2004	1,065	3,038	18,554	43,611	**66,268**	2%
2005	929	2,888	21,515	45,150	**70,482**	6%
2006	956	2,519	26,092	44,424	**73,991**	5%
2007	1,011	2,633	26,324	43,459	**73,427**	-1%
2008	974	2,505	27,522	42,969	**73,970**	1%
% change 95-08	**-62%**	**-40%**	**-38%**	**-33%**	**-36%**	

Source: Federal Bureau of Investigation, *Crime in the United States, various years*

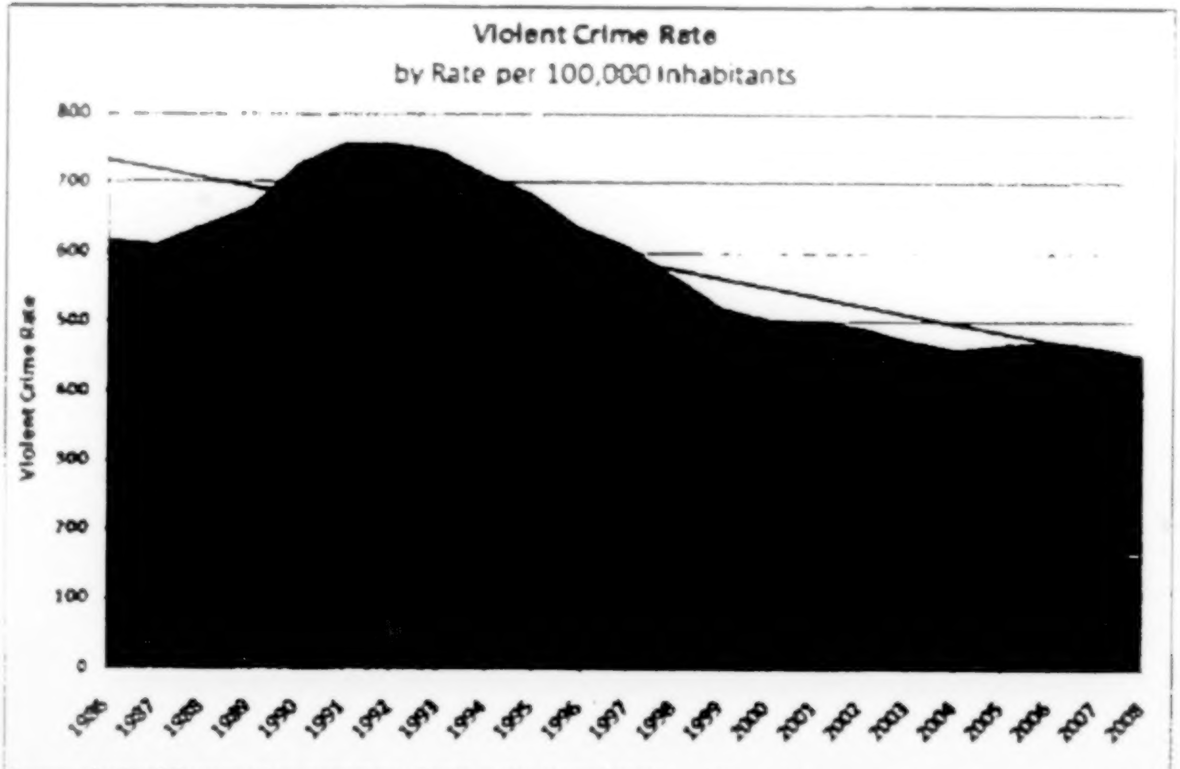
Exhibit 6: Total Juvenile Violent Crime Data 1995-2008



Violent Juvenile Crime Down 36% Since 1995

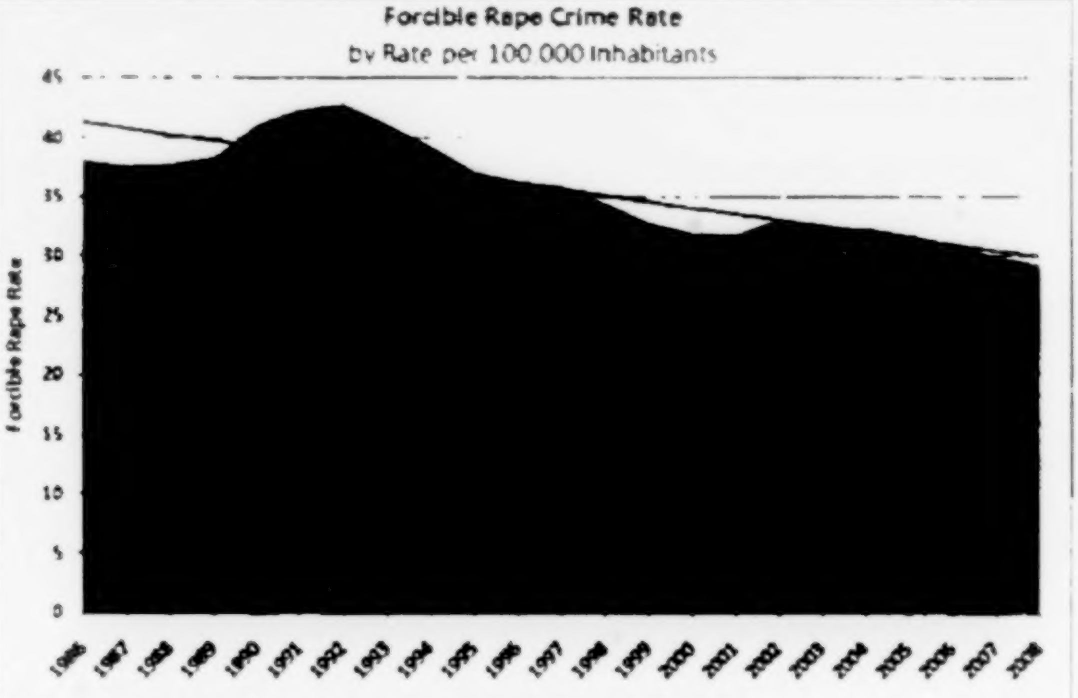
Source: Federal Bureau of Investigation. ("Violent crime" includes murder, rape, robbery and assaults)

Exhibit 7: Overall Violent Crime Rate 1986-2008



Source: Federal Bureau of Investigation, Crime in the United States, various years

Exhibit 8: Overall Forcible Rape Rate 1986-2008



Source: Federal Bureau of Investigation, Crime in the United States, various years

AMICUS
CURIAE
BRIEF

No. 08-1448 6

SEP 17 2010

IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER,
GOVERNOR OF CALIFORNIA, ET AL.,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWS EDITORS, THE FIRST AMENDMENT PROJECT, THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE RADIO-TELEVISION DIGITAL NEWS ASSOCIATION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, AND STUDENT PRESS LAW CENTER, IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici (described in Appendix A) and the journalists that they represent have an interest in this case and in prohibiting expansion of unprotected categories of speech under the First Amendment. Establishing violence as a new, additional unprotected category of speech could severely affect news reporting. Furthermore, historical efforts to regulate new media and methods of communication repeatedly demonstrate that such efforts are both unconstitutional, because they violate the First Amendment, and unnecessary, because the perceived need to regulate the media eventually recedes.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the amicus made a monetary contribution to the preparation and submission of this brief; and that blanket written consent of all parties to the filing of *amicus curiae* briefs has been filed with the Clerk.

SUMMARY OF ARGUMENT

As this Court reaffirmed last term in *United States v. Stevens*, 130 S. Ct. 1577 (2010), attempts by legislative bodies to enact bans on entire categories of speech must be greeted skeptically by courts in this country. Furthermore, regulating violence in speech and expression rarely survives constitutional scrutiny, and courts have correctly refused to extend obscenity restrictions to depictions of violence. Allowing broad regulations of violence in this case would allow legislatures to push those restrictions beyond simply the sale of violent content to minors, thus affecting a wider range of expression.

History has demonstrated that new forms of media often are greeted with alarm. These immediate reactions are soon followed by claims of harm to viewers or listeners, particularly children, but initial reactions are usually tempered with time and with efforts by those producing the media to self-regulate how their products are distributed. This pattern is evident with violent video games, and a broad restriction of expression is an inappropriate means of addressing an overstated problem.

Allowing broad discretion to regulate violence in speech and expression would have devastating consequences for the news media, who seek to faithfully report on the conditions in an obviously violent world. Attempts to impose such content regulations have always been done in the name of protecting viewers from what is perceived as harmful imagery.

ARGUMENT

I. This Court should not create any new categories of unprotected speech, particularly when challenges to violent speech have been repeatedly rejected on First Amendment grounds.

The United States courts have always interpreted the First Amendment as meaning that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010). While there are exceptions to this important constitutional guarantee of freedom of expression, the unprotected categories of speech are extremely limited and only include "historic and traditional categories long familiar to the bar," such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.* Over the years, parties have claimed that violent speech does not deserve First Amendment protection, but the courts have consistently refused – and rightly so – to rule that violence should become an unprotected category of speech.

In fact, in *Stevens*, this Court very recently rejected a demand to establish a form of violent speech as an unprotected category under the First Amendment. The federal government asked this Court to declare depictions of animal cruelty to be unprotected based on a balancing test of the purported value of the speech against its costs to society. *Id.* at 1585. In response, this Court emphasized the strict limitations on establishing new categories of unprotected speech, calling the government's proposed balancing test "startling and dangerous." *Id.*

Furthermore, in *Stevens*, this Court repeatedly emphasized that a key factor in determining whether speech is truly unprotected is whether it has historically been recognized as such. It noted that previous case law designating unprotected speech was grounded in an analysis of "a previously recognized, long-established category of unprotected speech" and declared that these cases could not be read "as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *Id.* at 1586. It further ruled that while there might be some categories of speech that have been historically unprotected that have not yet been identified, depictions of violence were not among them. *Id.*

Much like depictions of animal cruelty, there is no historical tradition of excluding depictions of violence in video games or other forms of media from First Amendment protection. In fact, several courts have expressly stated that violence is not an unprotected category of speech, even when minors are involved. *See James v. Meow Media,* 300 F.3d 683, 698 (6th Cir. 2002) (declining "to extend our obscenity jurisprudence to violent, instead of sexually explicit, material"); *Video Software Dealers Ass'n v. Webster*, 773 F.Supp. 1275, 1280 (W.D. Mo. 1991) (noting that "[u]nlike obscenity, violent expression is protected by the First Amendment"). The U. S. Court of Appeals for the Second Circuit addressed this very issue in *Gulotta v. Eclipse Enterprises,* when it held that a county ordinance that prohibited the sale of trading cards depicting heinous crimes to minors was unconstitutional. 134 F.3d 63, 69 (2nd Cir. 1997). Noting that the U.S. Supreme Court "historically has confined the categories of unprotected speech to defamation, fighting words, direct incitement of lawless action, and obscenity," the Second Circuit stated that it would "decline any invitation to expand these narrow categories of speech to include depictions of violence." *Id.* at 66. The court also noted that there was "no possibility that the First Amendment permits the banning of the sale of such cards to either adults or minors." *Id.* at 71. Likewise, in *Bookfriends, Inc. v. Taft*, the U. S. District Court for the Southern District of Ohio noted that "[c]ourts have held that the First Amendment forbids governments from preventing juveniles from being exposed to depictions of violence" and held that legislation prohibiting dissemination to juveniles of "harmful materials" violated the First Amendment. 223 F.Supp.2d 932, 949 (S.D. Ohio 2002).

While California's legislation is aimed at restricting the sale of violent video games only to minors, the effects of such a law will be similar to an outright ban on violent speech, because it will open the door for other challenges to its protected status. Furthermore, multiple courts have already considered this type of restricted legislation, and have already struck down laws banning the sale of violent video games to minors – laws almost identical to California's proposed legislation. In overturning these laws, the courts have again ruled that violence does not qualify as a category of unprotected speech. The U. S. District Court for the Western District of Washington in 2004, in striking down that state's proposed ban on the sale of violent video games, noted that depictions of violence "have been used in literature, art and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the First Amendment or subject to government regulation." *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180, 1185 (W.D. Wash. 2004). Similar reasoning echoes throughout the opinions of the other federal courts that have struck down such laws. *See, e.g.*, *Entertainment Software Ass'n v. Blagojevich*, 404 F.Supp.2d 1051, 1076 (N.D. Ill. 2005) (noting that the violent speech at issue was protected); *Interactive Digital Software Ass'n v. St. Louis Co.*, 329 F.3d 954, 959 (8th Cir. 2003) (noting that violent material was not the same as obscene material and therefore, obscenity case law was not applicable because it involved unprotected speech).

The courts' continuous denials of demands to include violence as unprotected speech are well-founded. As the following sections demonstrate, protests against violent speech often come after it appears in new media or methods of communication, such as video games, comic books, theater, film, and music. After a period of time passes and society accepts the presence of the once-new media, the protests inevitably die down, with the alleged harms never having come to pass.

II. This Court should not eliminate First Amendment protection for violent speech based on society's current views of a new media, as history repeatedly demonstrates that initial fears of new media dissipate as the media becomes familiar.

Throughout this country's history, new media or methods of communication and expression have always been met with heavy suspicion, claims that the new media will result in the detriment of society and children, and attempts at banning or strict regulation of the media. In fact, organized campaigns to restrict materials have existed since the latter part of the 19th century, when the dime novel first appeared on the scene. Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society – From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741 (1992). *See also* Eric Nuzum, Parental Advisory 5 (2001). History has proven time and time again that the "ability to convey information through a newly devised medium, especially multi-sensorial media like films and video games, is a powerful tool that has the potential to create great anxiety in a society, which in turn leads to political pressures that are catalytic in the formation of laws." Jeffrey O'Holleran, *Blood Code: The History and Future of Video Game Censorship*, 8 J. Telecomm. & High Tech. L. 571 (2010).

The push for restrictive measures has always been greater when the media involved has appealed to children. As film, radio, and comic books were all introduced into popular culture, they quickly became part of children's lives, and hence, the subject of attack from "guardians of children's morality." Amy Kiste Nyberg, Seal of Approval: the History of the Comics Code viii (1998). Opposition to violence in new forms of media always arises, despite the fact that traditional stories, like classic literature, fairy tales, and biblical stories, include just as much, if not more, violence as some types of video games, comic books, and films. *See* Harold Schechter, Savage Pastimes 1-14 (2005). These protests occur in each generation. In 1957, British scholar Margaret Dalziel criticized people for widely believing that modern publications such as comics, crime fiction, and "true confessions" love stories were so much worse than their counterparts of former days, but failed to take a long, hard look at the popular literature of the past. *Id.* at 17.

Whether the media involved is print media or visual media, the story is always the same – the new media appears on the scene, adults claim that it will negatively affect children, the legislature holds hearings and investigates methods of regulating the new media, courts hear cases attempting to restrict the dissemination of the media, the industry responds by suggesting some form of self-regulation, and the societal anxiety dissipates. As years pass, the media becomes ingrained in society until the idea that it was once considered destructive becomes difficult to imagine. For example, it would be difficult for most people today to imagine a high number of complaints about a prolonged kiss in a movie, as they occurred in the early 1900s. Blanchard, *supra*, at 761. Many times, the new media even becomes a cultural symbol of the era, such as the rock and roll music of the 1950s.

A. The opposition to dime novels and comic books was almost identical to the opposition to violent video games, and is highly instructive as to why this Court should not concede to the demand to regulate these games.

1. Dime novels.

Dime novels provide one of the best examples of overblown societal response to new media and how quickly opposition to new media is eliminated. Dime novels were short pamphlets of stories that are similar to today's popular genre fiction (e.g., mystery, romance, fantasy, and science fiction) and were among the first new forms of mass media to draw criticism from society in their time. Christine Jeffords, *Dime Novels: The Popular Paperback of the Nineteenth Century, available at* http://freepages.genealogy.rootsweb.ancestry.com/~poindexterfamily/ChristinesPages/Dimers.html (last viewed 8/10/10). The novels were published beginning about the time of the Civil War and were popular from approximately 1860 to 1915. *Id.* Although dime novels were originally written for adults, publishers quickly began creating stories for children, focusing on the adventures of explorers, cowboys, soldiers, city detectives, and Western heroes like Jesse James and Billy the Kid. Nyberg, *supra*, at 2. *See also* Charles M. Harvey, *The Dime Novel in American Life*, 100 Atlantic Monthly 37 (1907) (noting that the "aim of the original dime novel was to give, in cheap and wholesome form, a picture of American wild life").

Almost immediately, dime novels for children drew protests from vice societies, led by Anthony Comstock, the head of the New York Society for the Suppression of Vice. Nyberg, *supra*, at 2. In Comstock's eyes, "these dime novels were leading youths down the path to destruction, for once a child had read such stories, no one could prevent a career of crime and the loss of an immortal soul." Blanchard, *supra*, at 757. His campaign against these dime novels, which he called "devil-traps for the young," quickly escalated and was joined by judges, teachers, and church workers, who all claimed that reading the dime novel resulted in antisocial behavior in children. *Id.* Dime novels were also quickly – and unsuccessfully – blamed for violence in society. During an 1874 murder trial, it was suggested that dime novels prompted the defendant's actions – a claim that was quickly dropped when the defendant stated he had never read dime novels. *Id.* Another defendant on trial for murder tried to blame his actions on reading a certain book; however, when his claim was investigated, it was discovered that the named book was just a regular novel. *Id.* As one 1929 author noted, reading of dime novels "was the most useful explanation of crime, and the easiest excuse for the offender, until its place was taken by the cigarette, and then by the moving pictures." Edmund Pearson, Dime Novels: or Following an old trail in popular literature (1929), *available at* http://gaslight.mtroyal.ca/dimex01.htm (last viewed 8/1/10).

In response to societal pressure, Erastus Beadle, the head of one of the major dime novel publishing houses, established what may be the first self-regulation code for media industries. Beadle told his authors to follow certain rules when writing the stories – they needed to avoid "all things offensive to good taste," "subjects or characters that carry an immoral taint," and anything that "cannot be read with satisfaction by every right-minded person – old and young alike." Blanchard, *supra*, at 757-758. Beadle's self-regulation code was in essence duplicated by other, later media industries that faced opposition, from the new moving picture industry to television.

Beadle's code, combined with the passage of time, caused the once-offensive dime novels to become sanitized in the eyes of society. In fact, as the war against comic books escalated, the dime novels were held up as an example of more desirable children's literature. Literary critic Sterling North even wrote an editorial on May 8, 1940 arguing that the old dime novel could be considered "classic literature" compared with comic books. Nyberg, *supra*, at 4.

2. Comic books.

Comic strips, and later comic books, quickly followed dime novels as the primary target of criticism from social critics. The war against comic books is analogous to the war against violent video games today, particularly since they were regarded in the same manner, "as a danger to the health and well-being of their school-age audience, an incitement to bloodshed and vice." Schechter, *supra*, at 16. Likewise, Petitioners are claiming that violent video games are "likely to harm the development of a child." Petitioners' Brief, *Schwarzenegger v. Entertainment Merchants Assn.*, On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, filed Jul. 12, 2010, at 30.

Societal opposition to comics began in 1909, when an article in the *Ladies Home Journal* criticized the comics appearing in the Sunday newspaper, calling them "inane," "vulgar," and "nothing short of a national crime against our children." David Hajdu, The Ten Cent Plague: The Great Comic-Book Scare and How it Changed America 12 (2008). However, comic strips quickly became normal in society; by the 1940s, "the juvenile pranksterism of old-style newspaper strips had become so ingrained in the popular consciousness that it no longer seemed improper." *Id.* at 60. In fact, a childrearing expert, Josette Frank, even published a book claiming that comic strips were a necessary literary evil, noting that comic characters typically did something that a child was forbidden to do, with "swift retribution" following, and that the child could experience vicariously "the pleasure of transgression and the expiation of his guilty feelings through the pictured culprit who is punished." *Id.* at 60-61. She further noted that the reading appeared to fulfill a deep psychic need of childhood. *Id.* at 61.

While the protests against comic strips were dying down, the war against comic books was gearing up. Comic books first began to be sold on newsstands in 1933, with typical stories focusing on superheroes, science fiction, and crime. Kenneth A. Paulson, *Regulation Through Intimidation: Congressional Hearings and Political Pressure on America's Entertainment Media*, 7 Vand. J. Ent. L. & Prac. 61, 68 (2004). Religious leaders denounced the books, stating that the superheroes in the books were examples of fascism that would prepare a child to become the next Adolf Hitler and that a link between comic books and juvenile delinquency was clearly evident. Hajdu, *supra*, at 80. Many of the complaints against comic books – focusing on allegedly violent content and the lack of respect for parental authority – were similar to the complaints made against dime novels. *Id.* at 12.

In the late 1940s, critics of comic books began investigating ways to regulate the content of the books. Paulson, *supra*, at 69. The legislative efforts were stalled, however, by the U.S. Supreme Court decision in *Winters v. New York*. Murray Winters was convicted of possessing with intent to sell a magazine called *Headquarters Detective, True Cases from the Police Blotter*, under a New York law that prohibited selling any materials "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust, or crime." *Winters v. New York*, 333 U.S. 507, 508 (1948). The law was originally aimed at protecting minors from accessing criminal news and stories. *Id.* at 511. This Court overturned Winters' conviction, stating that the law violated both the First Amendment and the Fourteenth Amendment. *Id.* Specifically, this Court noted:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

Id. at 510. The Court's decision provided a presumption of protection under the First Amendment for comic books and led to laws similar to New York's being overturned in eighteen other states. Paulson, *supra*, at 69.

Despite this Court's decision, opponents of comic books attempted further regulation, and soon found a new leader in Dr. Fredric Wertham, the senior psychiatrist for New York City's Department of Hospitals and frequent author of papers and books claiming that comic books were detrimental to society's youth. *Id.* Wertham claimed were that comic books offered "a correspondence course in crime" to children, exposed them to sexually abnormal ideas, and made children into perverts, but offered little evidence to support his claims.[2] Paulson, *supra*, at 69. In late 1953, the Senate Subcommittee on Juvenile Delinquency sent out a questionnaire to 2000 people, asking for opinions about the causes of juvenile delinquency. Paulson, *supra*, at 69-70. After Wertham published an article criticizing Batman comic books, a majority of the questionnaires stated that comic books were a cause. *Id.* at 70.

The Senate questionnaire led to an April 1954 hearing to investigate the content of comic books. *Id.* at 70. Despite the ruling in *Winters* that there was no difference between the freedom of the press and the freedom of expressing ideas in entertainment, the Senators claimed they were not infringing upon First Amendment rights because freedom of the press was not at issue. *Id.* at 71. Although the Senate heard from multiple witnesses with opposing viewpoints, the star witness Dr. Wertham told the Senate that if he wanted to teach children how to rape and seduce girls, how to cheat and rob people, and how to do any other known crime, he would enlist the help of the comic book industry. *Id.* Much of Wertham's testimony ended up being anecdotal evidence of the harm comic books caused; for example, he told the committee that two boys had attacked another boy and "twisted his arm so viciously that it broke in two places, and *just like in a comic book*, the bone came through the skin." Nyberg, *supra*, (emphasis added), *excerpt available at* http://www.crimeboss.com/history03-2.html (last viewed 8/19/10). Even with Wertham's testimony, the Senate failed to recommend legislative action. *Id.* at intro., pg. *x*.

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[2] *See also* HAJDU, *supra*, at 101 (noting that, for example, one of Wertham's reports claims that comic-book reading was a distinct influencing factor on juvenile delinquents, yet cites only one example of a child imitating behavior seen in a comic book – and none of the other subjects had even read comic books before or after becoming juvenile delinquents).

Wertham's battle was also failing in the courts, as several courts ruled that laws aimed at preventing the viewing and distribution of comic books, particularly for minors, were unconstitutional. In 1959, the Supreme Court of California ruled that an ordinance prohibiting the sale of circulation of any crime comic book to a minor was unconstitutional. *Katzev v. Los Angeles*, 341 P.2d 310, 318 (Cal. 1959). "Publications containing criminal news, accounts of criminal deeds, or pictures and stories of the bloodshed, lust, or crime are as much entitled to the protection of free speech as other literature," the court wrote, citing *Winters*. *Id.* at 315. The court also ruled that the record failed to show a clear and present danger that crime comic books would "injure the character of persons under the age of 18 years and inculcate in them a preference for crime." *Id.* at 315. In 1960, in the case of *Police Commissioner of Baltimore City v. Siegel Enterprises, Inc.*, a Maryland court overturned a law that made it illegal for stores to sell any crime books or comics to minors or to make crime comics visible from the street. 162 A.2d 727, 729-30 (Md. 1960). While acknowledging that some unprotected speech existed, the court also agreed with a previous ruling that "[t]he right of young persons to read what they will, within the limits of permissible State or Federal action, is vital not only to them but to all our citizenry." *Id.* at 731. The Supreme Court of Washington also found that a statute that made it a criminal offense to sell comic books without a license was unconstitutional. *Adams v. Hinkle*, 322 P.2d 844 (Wash. 1958).

Like the dime novel industry, the comic book industry reacted to the growing pressure by establishing a code of self-regulation. The first Comic Book Code prohibited comic book artists from presenting authority figures such as government officials and judges in any way that would create disrespect for established authority, excessive bloodshed, and suggestive illustrations. Hajdu, *supra*, at 291-92. Although the code has been revised on a few occasions, it still stands as a method of self-regulation for the comic book industry today. *See* First Amendment Center, *Comic Books*, *available at* http://www.firstamendmentcenter.org/ (last viewed 6/30/10).

After the creation of the Comic Book Code, and as television began to attract the attention of new media critics, the opposition against comic books quickly died out. Hajdu, *supra*, at 330. In 1973, Wertham, who was once the most vocal opponent of comic books, published a book called The World of Fanzines, which glorified the comic book fan subculture. *Comic Books*, *supra*. Notably, he also recanted his earlier claims that comic books were the major cause of juvenile delinquency and reported instead that comic book readers often grew up to be normal, well adjusted adults. *See* Robert Corn-Revere, *Regulating*

TV Violence: The FCC's National Rorschach Test, 22 Comm. L. 1, 25 (Fall 2004).

B. Movies, theater, and television have been opposed just as strongly as violent video games, but like comic books and dime novels, the opposition has greatly decreased.

1. Movies and television.

Complaints about another new medium of communication – film and motion pictures – arose at the same time dime novels were causing a stir. Because motion pictures were highly appealing to young people, adults quickly expressed concerns about corruption of children's morals and values. Paulson, *supra*, at 63. People protested scenes such as a "prolonged kiss" in a movie entitled *The Widow Jones*, and a 1907 editorial in the *Chicago Tribune* claimed that movies were nothing but "schools of crime where murders, robberies, and holdups are illustrated." Blanchard, *supra*, at 761. Movies were almost instantaneously blamed for most of the decade's social ills, including "liberated women" and disrespectful children. Blanchard, *supra*, at 778. Likewise, the public protested certain plays in the theater that were seen as indecent.

As with dime novels and comic books, many of the complaints against films were of scenes that are commonplace today. In 1900, the police closed down a play and arrested the lead actress on the charge of corrupting public morals because she acted out a scene where her lover carried her up the stairs to her bedroom, a curtain was lowered to denote the hours passing, and when the curtain was raised, the light ing indicated that it was now dawn and the actress was seen running out of the bedroom and down the stairs. Abe Laufe, The Wicked Stage: A History of Theater Censorship and Harassment in the United States 25 (1978). A 1931 version of Frankenstein – a movie which "hardly causes a reaction among most viewers today" – was banned because the scene where the monster drowns a little girl was deemed to be too violent and many people protested that the film would be traumatizing for children. Dawn B. Sova, Forbidden Films: Censorship Histories of 125 Motion Pictures 137 (2001).

Attempts at regulation were inevitable, and the first came in 1907, when the City of Chicago granted power to the chief of police to censor movies. Paulson, *supra*, at 63. Other cities followed suit, and two years later, the first censorship body, the National Board of Censorship of Motion Pictures, sprang forth. *Id.* at 63. Legal challenges to regulation were initially unsuccessful. In the earliest major case, *Mutual Film Corp. v. Industrial Commission of Ohio*, this Court said that the Ohio film censorship board was constitutional because the motion picture was not a form of true expression protected by the constitution, but instead was a commercial endeavor. 236 U.S. 230, 242 (1915). Challenges to the showing of movies arose throughout the country, threatening potentially devastating economic consequences to the brand-new industry.

The movie industry quickly responded by enacting a self-regulating Production Code in 1930. Paulson, *supra*, at 66. Key principles in the Code included: (1) never throwing the sympathy of the audience to the side of crime, wrongdoing, evil, or sin; (2) the use of liquor, when not required by the plot or characterization, would not be shown; (3) excessive and lustful kissing and embraces will not be shown; (4) and profanity, including words like "Jesus," "hell," and "S.O.B." would not be used. *Id.* Producers of now-legendary movies, such as *Gone with the Wind*, *Casablanca*, and *A Streetcar Named Desire*, were told that they could not use certain lines, suggest sexual relationships between certain characters, or portray a character as a homosexual. *Id.*

Once again, however, the courts began to rule in favor of the entertainment industry. In 1948, this Court held that movies were a protected form of expression in *United States v. Paramount Pictures*. 334 U.S. 131, 166 (1948) (concluding, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment"). Then, in 1952, this Court began reversing the trend of heavy regulation of movies when, in the case of *Joseph Burstyn, Inc. v. Wilson*, it determined that the New York Board of Regents could not ban the film *The Miracle* for being sacrilegious. 343 U.S. 495, 531 (1952). As the court noted:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.

Id. at 501. *Burstyn* was used in overturning other restrictive movie ordinances. For example, in 1959, this Court found in *Kingsley Int'l Pictures Corp. v. Regents of the University of the State of New York* that a New York statute requiring a denial of a license to exhibit motion pictures deemed to be immoral was unconstitutional. 360 U.S. 684, 690 (1959). Other courts followed in *Excelsior Pictures Corp. v. Regents of the University of the State of New York*, 2 A.D.2d 941, 943 (N.Y. App. Div. 1956) (court overturned a decision to refuse a license for a general exhibition of a film that showed nudity); *Hallmark Productions, Inc. v. Carroll*, 121 A.2d 584, 589 (Penn. 1956) (Pennsylvania Supreme Court held that a motion picture censorship statute is unconstitutional); *Paramount Film Distributing Corp. v. Chicago*, 172 F.Supp. 69, 72 (N.D. Ill. 1959) (invalidating a statute that authorized limited permits if it was found that a film was obscene and immoral only with regards to minors); *Brattle Films, Inc. v. Commissioner of Public Safety*, 127 N.E.2d 891, 892 (Mass. 1955) (holding that a statute authorizing a city manager to withhold a license to exhibit a film on Sunday was an unconstitutional prior restraint).

Furthermore, by the 1960s, society's values had begun to drastically change from what they were in the 1930s. Unwed couples were openly living together, teenagers and young adults were experimenting with drugs, and nudity was working its way into theatrical productions. Paulson, *supra*, at 67. *See also* Laufe, *supra*, at 164 (noting that in the 1970s, "the uninhibited freedom of expression was evident in the permissiveness of New York Officials and in the acceptance by audiences and critics of former taboos in several productions that opened to excellent reviews and received recognition as distinguished dramas by winning major drama awards"). The trend continued into the 1970s with musicals such as *Grease* and *Bye-Bye Birdie*. *Grease*, a musical which satirizes the rock and roll era of the 1950s, actually provides a perfect example of how what was once highly objectionable becomes ingrained in society:

> In the 1920s, the vice brigade would have undoubtedly protested against Grease; newspaper editorials would probably have condemned the musical and called it an insult to the youth of America. In 1972, however, the earthy language had lost its shock value for most theatergoers. The critics, for the most part, ignored the dialogue and praised Grease for its lampoon of the 1950s, its rhythmic score, and its exuberant young cast.

Laufe, *supra*, at 166 (noting also that the musical "amused the young people who had grown up in the late 1950s but shocked some of their parents with the references to sex and pregnancy"). In order to keep up with the changing times, the Production Code was retired in 1968 and replaced with a new age based rating system. Paulson, *supra*, at 67. That rating system is still in effect for movies today.

Meanwhile, courts have continued to reject efforts to regulate and control violent movies on First Amendment grounds. In 1991, a Missouri federal district court ruled that a state statute restricting dissemination to minors of video cassettes depicting violence to minors was unconstitutional. *Webster*, 773 F.Supp. at 1281. The law had been aimed at regulating so-called "slasher movies." *Id.* at 1280. In 1993, the Tennessee Supreme Court held that a part of a statute that criminalized the display of media, including films and videocassettes containing "excess violence" to minors was unconstitutional. *Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 522 (Tenn. 1993). As with dime novels and comic books, attempted regulation of movies typically failed because it violated the First Amendment.

2. Television

Naturally, as television became commonplace in American households, it also drew opposition. Although television violence attracted the attention of Congress in the 1950s, most legislators still focused on regulating film content. *See* Keisha L. Hoerrner, *The Forgotten Battles: Congressional Hearings on Television Violence in the 1950s* (Jun. 1999), *available at* http://www.scripps.ohiou.edu/wjmcr/vol02/2-3a-B.htm (last viewed 7/1/10). The first Congressional Hearing occurred in 1952, conducted by the House Committee on Interstate and Foreign Commerce's Federal Communications Commission Subcommittee, and produced only a brief final report stating that television was changing too rapidly to "pass any conclusive judgment" on it. *Id.* Additional hearings were held in the 1950s and 1960s, but it was not until 1972 that the government argued that there was a strong link between violence on television and violence in real life. Mark A. MacCarthy, *The N.A.B. Codes, Family Viewing Hour, and Television Violence*, 13 Cardozo Arts & Ent. L. J. 667, 677 (1995).

In response, the Federal Communications Commission pressured the television industry to adopt a "family viewing policy" that prohibited certain family inappropriate programming during prime time. *Id.* at 679. The policy was abandoned after a series of court battles. *See e.g.*, *Writers Guild of America West*, *Inc. v. Nat'l Ass'n of Broadcasters*, 609 F.2d 355 (9th Cir. 1979). However, in 1996, Congress passed legislation requiring televisions to contain a "v-chip," which would allow parents to closely monitor programming for children. MacCarthy, *supra*, at 684. However, evidence shows that the v-chip technology is hardly ever used by parents. *Parents, Children, and Media*, Kaiser Family Foundation, *available at* http://www.kff.org/entmedia/upload/7638.pdf (last viewed 8/12/10).

As with movies and comic books, the courts struck down legal attempts to regulate violence on television. The U. S. Court of Appeals for the Seventh Circuit stated that "violence on television ... is protected speech, however insidious. Any other answer leaves the government in control of all the institutions of culture, the great censor and director of which thoughts are good for us." *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff'd mem.* 475 U.S. 1001 (1986). Television violence represents just one more admission by the courts that violent programming is protected on First Amendment grounds.

C. Music has also been repeatedly blamed for harming children, yet challenges to music content also typically violate the First Amendment.

As early as the turn of the twentieth century, adults have claimed that new types of music harm children. When the saxophone became popular in the 1920s, critics referred to it as "the devil's flute" and claimed that its "low, seductive tones would cause young girls to behave immorally." Eric Nuzum, Parental Advisory: Music Censorship in America 5

(2001). Jazz, ragtime, and blues music all met with significant resistance when they first entered the pop culture scene. Tracy Reilly, *The Spiritual Temperature of Contemporary Popular Music: An Alternative to the Legal Regulation of Death-Metal and Gangsta-Rap Lyrics*, 11 Vand. J. Ent. & Tech. L. 335, 343 (Winter 2009). In the 1940s, critics began claiming that music was the source of national increase in crime. *Id.* at 343.

The complaints against music escalated in the 1950s with the advent of rock and roll, which was aimed at a youthful audience. Parents expressed concern regarding the effects of "tribal, jungle beats" on their children. Nuzum, *supra*, at 6. Congressional representatives attempted to add certain rock records to the list of pornographic materials that were illegal to send through the federal postal service. *Id.* at 214. Interest groups suggested at congressional hearings that the rise in juvenile delinquency can be traced to listening to rock and roll music. *Id.* at 217. Observers mistook dancing at concerts for fighting and riots, leading to rumors that rock music caused young people to break out in spontaneous violence. *Id.* at 218. Florida police threatened Elvis Presley with arrest on obscenity charges if he did not stand still while performing. *Id.* The protests continued through the 1960s and 1970s, with critics protesting the socially-conscious songs and drug-oriented lyrics. Marilyn J. Flood, *Lyrics and the Law: Censorship of Rock-And-Roll in the United States and Great Britain*, 12 N.Y.L. Sch. J. Int'l & Comp. L. 399, 403 (1991).

The 1980s ushered in a new era of regulation for music, after heavy metal music became popular.

Reilly, *supra*, at 348. In 1985, the Parents' Music Resource Center ("PMRC") was formed to wage a war against heavy-metal lyrics, which were seen as introducing violence, suicide, and Satanism to society. Reilly, *supra*, at 347. Typically, the proponents of PMRC argued that the once-criticized music of the past was unprecedented compared to the current music — a co-founder of PMRC and the wife of the Secretary of the Treasury claimed that lyrics like Cole Porter's "the birds do it, the bees do it" could "hardly be compared" to lyrics that talked about having sex like a beast. *Id.* at 348. As with comic books, criminal defendants attempted to place blame for their actions on music; for example, a defendant who killed a Texas State Trooper unsuccessfully claimed that listening to rap music caused him to shoot the trooper. *Id.* at 355. The family of the victim also filed a lawsuit against the musician, claiming that his music incited illegal conduct, but the court held that the artist did not intend to incite violence, nor could the broadcast of an album three years after it is produced and sold over 400,000 copies be likely to incite violence. *Id.*

In 1985, the U.S. Senate Committee on Commerce, Science, and Transportation convened hearings on lyrical content of rock albums. Paulson, *supra*, at 73. Committee members insisted that they were neutral in the matter and that potential government regulation was not under consideration, but statements from Senators suggested otherwise. *Id.* at 73–74. State legislatures moved ahead with enacting statutes targeting music, but most of these were found to be unconstitutional. In 1985, San Antonio, Texas was one of the first cities to enact an ordinance aimed at rock and roll concerts; it prohibited unaccompanied minors from attending musical presentations constituting "obscene performances." Reilly, *supra,* at 379. Washington state enacted a statute designed to prevent obscene music, but the statute was found to be unconstitutional. *Id.* at 379-80. Texas, Maryland, and California all tried to pass legislation designed to prohibit state investment in any company that recorded or produced music found "objectionable," or that "glamorized various acts of violence." All were struck down. *Id.* at 380.

At the same time that the courts were striking down these unconstitutional statutes, the music industry was engaging in a self-regulating effort. Recording companies, for example, began to revise songs when radio stations started to ban music with drug lyrics in the 1960s. Flood, *supra,* at 404. In 1985, the Recording Industry Association of America agreed to include a warning label reading "Explicit Lyrics Parental Advisory" on certain albums, and in 1990, the organization introduced a standardized labeling system. *Id.* at 418. After the introduction of the system, multiple states withdrew legislation calling for a mandatory labeling system. *Id.* at 417-18. Furthermore, some musicians began releasing sanitized versions of their albums, expurgating the objectionable lyrics and negotiating with retailers on album art. Paulson *supra,* at 77.

The self-regulation of the music industry, and the passage of time, once again worked to quell the wave of opposition to new music genres. The same rock and roll songs that once drew such protests in the 1950s are now played regularly on "oldies" radio stations. While there is still some debate over the effects of music today, it is nowhere near the fever pitch it reached in the 1980s and 1990s, particularly since the studies on music's effects on children are so contradictory. Reilly, *supra*, at 386-87. For example, for every researcher that claims there is a causal link between music and aggressive behavior, there is another one that finds that there is no connection between violent lyrics and similar resulting behavior in children. *Id.* Furthermore, many researchers have also pointed out that for studies that do show a link, the subjects of these studies are also influenced by a number of other factors, including unstable backgrounds, divorced parents, violence experienced at home, drugs, and arrest records. *Id.*

D. Video games are just another type of new media that, like the media before it, has created societal anxiety that will eventually be alleviated.

By examining the history and current status of dime novels, comic books, music, television, theater, and film, a pattern quickly becomes evident. Each of these types of media met with great resistance when they were first introduced, followed by proposed regulations and legislation, court rulings that restrictions upon the media violate the First Amendment, and finally, a self-regulation effort by the media industry in question. Video games have followed this same pattern since their inception.

This pattern is even more obvious when examining the previous judicial opinions on legislation attempting to ban the sale of violent video games. Besides the U. S. Court of Appeals for the Ninth Circuit, two other federal appellate courts and six federal district courts have struck down laws prohibited the sale of these types of games. Brief in Opposition to Writ of Certiorari at 12, *Schwarzenegger v. Video Software Dealer's Ass'n*, No. 08-1448 (Jul. 22, 2009). In each case, the courts have found that video games are a form of creative expression entitled to protection under the First Amendment.[3] Furthermore, the courts have rejected the argument that the variable obscenity standard from *Ginsberg v. New York*, 390 U.S. 629 (1968), should be broadened to include violent expression rather than just obscenity.[4] Finally, these courts have all found that these video games laws should be rejected on First Amendment grounds for one or more of the following reasons: (1) the evidence failed to show that the alleged harm to minors was real; (2) the government's attempt to help parents protect the well-being of their children was not an excuse to restrict constitutionally-protected rights; (3) the laws were underinclusive; (4) less-restrictive alternatives existed to achieve the same goal; and (5) the statutory language describing the prohibitive conduct was unconstitutionally vague.[5]

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[3] *See Entm't Software Ass'n v. Swanson*, 519 F.3d 768 (8th Cir. 2008); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Entm't Merchants Ass'n v. Henry*, No. Civ-06-675-C, 2007 WL 2743097 (W.D. Okla. Sept. 17, 2007); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823 (M.D. La. 2006); *Entm't Software Ass'n v. Granholm*, 426 F. Supp. 2d 646 (E.D. Mich. 2006); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005), *aff'd*, 469 F.3d 641 (7th Cir. 2006); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

[4] *Id.*

Creating a new category of unprotected speech for violent video games, when federal courts around the country have repeatedly refused to do so, for a type of media that is drawing the same types of complaints that other types of new media drew when they were first introduced, would be a monumental mistake on the part of this Court. In the not-to-distant future, it is highly likely that these types of video games will no longer be an issue in society. As Harold Schechter, a professor who has studied this subject extensively, said in his 2005 book entitled *Savage Pastimes:*

> And indeed, the controversy raging today over video violence and rap – and that raged fifty years ago over horror comics and rock 'n' roll – has been taking place, in exactly the same terms, since mass-produced popular art first came into existence. I have little doubt that fifty years from now, parents will be raising a howl over virtual-reality shoot-'em-ups that allow their kids to actually feel the splatting blood from the blown-off head of a holographic zombie, and that they will pine for the idyllic days of 2004, when children enjoyed such harmlessly cartoonish pastimes as Resident Evil and Grand Theft Auto. From the vantage point of the present – when the latest state-of-the-art entertainments seem to offer unprecedented levels of stimulation and lifelike gore – yesterday's popular culture always seems innocent and quaint.

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[5] *Id.*

Schechter, *supra*, at 18. Even when the protests over violent video games diminish, as history demonstrates that they are certain to do, a ruling by this Court that allows this legislation to stand will remain. Such a ruling will threaten the First Amendment rights of existing and future new media that draws the ire of society.

III. Restricting the First Amendment rights of media with violent content is a direct threat to news organizations, who must cover violent stories to fulfill their duty of keeping the public informed.

Approving legislation that restricts minor's access to allegedly violent video games opens the door for restriction into other types of media with violent speech content, including news media. News stories may contain descriptions and photographs of violence during wars, criminal acts, descriptions of gang violence, and riots. Clay Calvert and Robert D. Richards, *Mediated Images of Violence and the First Amendment: From Video Games to the Evening News*, 57 Me. L. Rev. 91, 110 (2005). These stories and descriptions of violence are occasionally similar to violent video game content.

Although there is a heavy presumption against regulating freedom of the press, attacks on the news media for covering allegedly violent stories have occurred ever since campaigns against dime novels began. For example, Anthony Comstock, the well-known crusader against dime novels, also conducted campaigns "to force legitimate newspapers to stop carrying stories about football and boxing, sports considered far too violent for the type of society that Comstock envisioned." Blanchard, *supra*, at 757. During the comic book hearings in the 1950s, William M. Gaines, the publisher of Entertaining Comics Groups, used newspapers as a demonstration of how children are exposed to violence. As he was testifying, Gaines held up a copy of a newspaper and discussed how newspapers covered murders and suicides in detail. *Id.* at 792. He also pointed out that "when you talk about banning comics, you are only a step away from banning crimes in the newspapers, because once you start to censor, you must censor everything," including "comic books, radio, television, and newspapers." *Id.*

Currently, multiple parties have attempted to blame the news media for an increase in youth violence, or suggested that the violent stories in the news media are similar to violent video games. One commentator, in defending video games, suggested that legislators should be "far more concerned about the effects of viewing a steady stream of real-life images of graphic violence, from photographs of torture in an Iraqi prison to videotapes of beheadings of United States' citizens in foreign countries, than ... about the effects of viewing fictional images in a game." Calvert et al., *supra*, at 94. In a survey commissioned by *Time* magazine in 2000, the vast majority of parents surveyed responded "yes" to a question that asked them if they thought the way the news media portrayed violence was a major factor in causing youth violence. Clay Calvert, *Media Bashing at the Turn of the Century: The Threat to Free Speech after Columbine High and Jenny Jones*, 2000 L. Rev. Mich. St. U. Det. C.L. 151 (Spring 2000). At least one university psychologist, Leonard Berkowitz, has suggested that intense media coverage surrounding violence incidents partially causes an increase in crime. *Id.* at 162. Other critics have claimed that crime news "exaggerates and sensationalizes violence." Lori Dorfman, Ester Thorson, and Jane Stevens, *Reporting Crime and Violence from a Public Health Perspective*, 2003 J. Inst. Just. Int'l Stud. 53, 54 (2003). *Amici* certainly do not agree with the claims that the news media is causing an increase in crime or affecting youth in this manner; however, these types of reports strongly suggest that the news media could become the next target of those attempting to regulate minors' access to violent materials.

If violence is deemed to be an unprotected category of speech as it applies to minors, there will be little standing in the way of the same critics making the argument that newspapers should not be sold to minors because they contain violent content. As demonstrated above, the groundwork has already been laid for them to make that claim. Even worse, it would become much easier to make the argument that violent content in newspapers should be censored. Petitioners, for example, already argue in their brief that the "First Amendment has never been understood as guaranteeing minors unfettered access to offensively violent material." Petitioners' Brief, *supra*, at 9. Such a general argument is quite dangerous, because people could attempt to apply it to other types of allegedly violent material, including news media, and therefore threaten the First Amendment protection of freedom of the press that is a necessary and vital component of society.

Like the various media industries before it, some news media organizations have attempted to revise the methods by which they report violent and crime news. A television station in Austin, Texas, for example, instituted a policy to determine whether to cover a crime story on the local news based on one or more of five criteria, including determining whether action needed to be taken, whether there is a threat to children or to safety, whether there is a significant community impact, and whether the story will lead to a crime-prevention effort. Robert E. Shepherd, Jr., *Film at Eleven: The News Media and Juvenile Crime*, 18 QLR 687, 696-97 (1999). Certain newspapers in Virginia attempt to address violent crimes in the news through what is commonly known as a "public health model" – their stories will include, if possible, relationships between the victim and perpetrator, involvement of alcohol or other substances, and whether young people were involved. *Id.* at 697. *See also* Dorfman, *supra*, at 134 (discussing the public health model of crime reporting).

By examining different methods of reporting news, the news media is following the same self-regulation path as movies, comic books, dime novels, and music. There is no need to regulate violent materials in any of these areas, because media has been so responsive to society's concerns. Threatening the First Amendment protection of the news media by establishing violence as an unprotected category of speech, even if it is only within the context of the sale of violent materials to minors, is completely unnecessary, given the effectiveness of self-regulation.

CONCLUSION

Petitioners' claim that violence should be an unprotected category of speech is without merit. This Court, and many others, have deemed violent speech worthy of First Amendment protection. Furthermore, the opposition to and criticism of violent video games is nothing more than a repeat of the criticism that has been made against every type of new media that has been introduced into society since the advent of dime novels, more than 150 years ago. Ruling in favor of petitioners would result in a violation of the First Amendment as a reflection of current trends in society – a ruling that could greatly restrict the freedom of expression rights for many other organizations. This Court should find in favor of respondents.

Respectfully submitted,

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September 17, 2010

APPENDIX A

Descriptions of *amici:*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act ("FOIA" or "the Act") litigation since 1970.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The First Amendment Project ("FAP") is a nonprofit organization based in Oakland, California, dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The National Press Photographers Association("NPPA") is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Student Press Law Center (the "SPLC") is a nonprofit, non-partisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. The SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics. Because the SPLC's work focuses in part on the ability of student journalists to meaningfully participate in the discussion of issues of public concern impacting their lives free from untoward government censorship, the SPLC and its members have a special interest in the potential impact of any ruling emboldening schools to restrict journalistic speech describing violence and its consequences.

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
SEP 17 2010
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IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR *AMICI CURIAE* RHODE ISLAND, ARKANSAS, GEORGIA, NEBRASKA, NORTH DAKOTA, OKLAHOMA, PUERTO RICO, SOUTH CAROLINA, UTAH AND WASHINGTON SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The *amici* States are dedicated to protecting the welfare of their young citizens and their parents intelligently, efficiently, and within the bounds of the First Amendment. The States' right to regulate conduct is unquestioned: yet in this narrow circumstance in which government wishes to silence speech based on the content of that speech, exacting Constitutional standards must be met.

Recognizing and following these standards serves the States' interests here, as this content-based restriction would not enhance law enforcement but would hinder it. The restrictions on free speech that California has attempted to impose would lead to an expensive new enforcement regime, in which law enforcement personnel would become culture critics charged with policing games containing simulated violence but judged to be lacking sufficient redeeming artistic or political value. This unnecessary incursion into issues of speech perversely would deplete resources and distract from law enforcement's task of policing actual violence. It would furthermore legitimize criminal defendants' attempts to evade responsibility for breaking the law by invoking the "video game made me do it" defense.

The undersigned believe the benefits of better law enforcement are better served by applying well-established First Amendment principles to the current case and not by creating a brand-new category of free speech restrictions. Accordingly, the *amici* States' interests justify this submission.

SUMMARY OF THE ARGUMENT

The road to unconstitutional and unwise over-regulation is paved with good intentions. Here, the manner in which California has acted – no matter how laudable its goals – runs afoul of the fundamental precept that government "shall make no law . . . abridging the freedom of speech." U.S. Const., amend. I.

California is correct that States have broad authority and responsibility to regulate conduct. It is also undoubtedly true that minors can and should be treated differently than adults in many areas of behavior, so that, for example, they are not allowed to drink alcohol, marry or vote before a certain age. Yet these and almost all other areas of State regulation of conduct do not restrict speech, and thus they are not subject to well-established rules of First Amendment jurisprudence which forbid the abridgement of free speech rights.

As this Court held last Term, the decision as to whether the government should be involved in judging speech was answered in the negative over two hundred years ago. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 559 U.S. ___, 130 S. Ct. 1577, 1585 (2010). The debate over California's statute takes place within this peculiar First Amendment arena.

This Court has held that a content-based restriction on speech shall be subject to strict scrutiny, and shall survive only if it is demonstrably the least restrictive means of achieving the government's goal. All speech, whether lowbrow or high, enjoys the protection of the First Amendment. Abandoning the standard of strict scrutiny for content regulation because it is felt that some video games "go too far" in allowing the player to cause a fictional character to engage in simulated violence in a virtual world would require a restructuring of traditional views of First Amendment rights, and reversal of several of this Court's most important cases.

The undersigned are charged with enforcing their States' criminal laws in addition to upholding the federal and their respective constitutions. Here, altering First Amendment jurisprudence to uphold the California law would work against the goal of effective law enforcement in several different ways.

First, law enforcement resources would be drained by the creation of a new administrative scheme to set up, administer, and prosecute. The Act encourages, and demands in California, law enforcement personnel to spend resources reviewing video games to determine not only whether they are offensively violent, but also whether they have sufficient artistic or other value to counter that virtual violence. Armed with these subjective determinations, these officials are then directed to surveil retailers covertly to discover violations of the new law. Thereafter, novel criminal charges would need to be brought and substantiated on top of an existing caseload, with courts and juries forced to ponder the same subjective, cultural questions of whether a video game contains too much virtual violence and too little redemptive art.

In addition to diverting law enforcement resources away from the myriad responsibilities already facing law enforcement officials, California's statute legitimizes the off-loading of personal responsibility on to a video game. The Act would give credence to a criminal defense seeking exculpation or mitigation based on behaviors a criminal supposedly learned as a minor from playing video games. Video-game defenses are becoming more and more prevalent. An official State endorsement of the pseudo-scientific theory that there is a causal connection between criminal behavior and childhood play of video games that simulate violence would declare open season for criminals to advance arguments that responsibility lies not with them, but with some distant computer programmer. Contrary to the dire warnings that violent video games will spawn a new generation of criminals, Department of Justice statistics show steadily decreasing rates of violent crime in the video game era, so that the empirical data shows no reason to interrupt or jeopardize the success law enforcement has recently enjoyed with such crimes.

Moreover, the need to create a new subset of video game police and an undercover "sting" network seems especially slight when an effective system to prevent minors from gaining access to games that are appropriate for mature audiences is already in place and working. In contrast to the studies and arguments presented by California and its *amici*, the Federal Trade Commission ("FTC") has found that the video game industry "continues to have the strongest self-regulatory code" among all sectors of the entertainment industry, and that the Entertainment Software Rating Board ("ESRB") guidelines are rigorously and effectively enforced. FTC, *Marketing Violent Entertainment to Children: A Sixth Follow-up Review* *of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* iii (2009), http://www.ftc.gov/os/2009/12/P994511violententertainment.pdf. Under the ESRB standards, consumers swipe or show their drivers' licenses to buy mature-rated games – the California law contemplates the same type of safeguard. Thus, the statute seeks to replace effective self-regulation with a duplicative program of *State* oversight. The ESRB standards are the very definition of a "less restrictive means," which serves to disqualify governmental meddling in this particular area. Further, consoles contain parental controls which can block the playing of mature-rated games, and gaming systems are built to refuse to allow unrated games to load.

At base, whether parents believe their children have sufficient maturity to play a given video game is up to the parents, not the government. Parents deserve, *if they so desire*, assistance in protecting their children from unwanted influences. Yet there is no requirement that the government must be the only entity that can provide such aid, or is even the best at doing so. And what one family may see as "assistance," others may see as unwelcome paternalism or a displacement of parental authority.

Quick fixes such as the California statute cause more practical and constitutional problems, in expanding unneeded regulatory activity and hindering law enforcement, than they solve. The potential negative impacts on State government and State citizens are important enough that the undersigned feel compelled to voice their concerns, notwithstanding the obvious political risk of being erroneously tagged as supporting the selling of these games to minors.

ARGUMENT

I. ONLY CONTENT-BASED REGULATION OF SPEECH IS AT ISSUE HERE.

The current case deals with a narrow and well-defined issue: content-based regulation of speech. The opinion cited by California in its questions presented to this Court summarizes the framework of the inquiry:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. . . .
>
> For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641-42 (1994) (citations omitted).

Only content-based restrictions trigger these considerations. In all other areas, "[t]his Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression," and well it should. *Winters v. New York*, 333 U.S. 507, 517 (1948).[1] The First Amendment is unique, and applying carefully bounded First Amendment jurisprudence will not affect the States' well-recognized rights to govern in general.

Three points made by California and its supporting states relating to these broad principles are well-taken – but do not support the Act's constitutionality. *First*, supporting parents in an attempt to raise their children, as well as protecting the welfare of the children themselves, are State responsibilities and legitimate goals. *Second*, minors are sometimes deemed to be incapable of making a reasoned decision as to whether to accept speech or not. *Third*, there are indeed circumstances where even the most exacting level of scrutiny can be met.

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[1] In *Winters*, the Court struck down a statute barring the distribution of obscene materials. In doing so, the Court stated: "We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency." *Id.* at 510. *Amici* agree that the States' powers to reduce crime remain just as vibrant and crucial today. Only the "principles of unrestricted distribution of publications" establish "the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution." *Id.* In that context, the *Winters* Court concluded: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." *Id.*

None of these observations, taken separately or together, justifies the Act or cures its inherent problems. To the contrary, these very considerations establish the shortcomings of the Act.

A. Parental Rights Are Paramount.

First, States have the right and responsibility to not only help parents, but to safeguard the welfare of children. Yet especially in the First Amendment context, "support" is not supposed to mean "supplant." The right of parents to raise their children as they see fit has enjoyed special – and constitutional – prominence. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Mothers and fathers enjoy the parental privilege to make decisions about their children's upbringing.

Telling a child, "You can't play that game because it's bad for you," represents parental authority. Telling a child, "You can't play that game because there is a law against offensive simulations of violence without sufficiently redeeming artistic value," represents governmental authority. There is no need to abridge First Amendment rights in order for the government to play the role that parents should and do play at home in connection with access to video games.

As the Court commented in striking down a law on First Amendment grounds: "a court should not presume parents, given full information, will fail to act." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000). In *Playboy*, Congress had enacted a statute to protect children from pornographic images on cable television. The Court indicated that Congress had to prove that a means less restrictive than blocking signals – specifically, educating parents and allowing them greater options to block the channels themselves – would not be as effective. *Playboy*, 529 U.S. at 816, 823-25. Congress could not bear this burden, and so the regulation was struck down in favor of the private option of the industry increasing education efforts so parents could apply standards in the home.

California and its *amici* attempt to rely on cases concerning public schools, cases holding that the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); Petitioners' Brief ("Pet. Br.") at 20. These cases add little to the current analysis. As *amicus* Louisiana points out in its brief supporting the Act, the Court has indicated that "schools may regulate some speech 'even though the government could not censor similar speech *outside the school*.'" Brief for *Amici Curiae* Louisiana, *et al.* ("Louisiana Br.") at 17 (emphasis added) (quoting *Morse v. Frederick*, 551 U.S. 393, 405-06 (2007), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). These cases recognize that there are special rules governing schools the government operates or oversees. By their terms, they do not suggest that governments may in general take over the job of parenting at the cost of First Amendment freedoms.

Nor does *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), alter the balance between parents and government in determining what content a minor should receive. In *Pacifica*, the Court recognized how often that children – even those too young to read – were exposed to broadcasting. 438 U.S. at 748-49.[2] A teenager who goes to a store to buy a game is making an individual choice, rather than being subjected to unintentional exposure, and it strains belief to suggest that children too young to read would escape the effective industry system described in Section II.A, below.[3]

In short, parents are the appropriate guardians of the content of the video games that their children play at home. They are uniquely well-suited to do so effectively and appropriately, and without any concerns about the abridgement of First Amendment rights.

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[2] Even broadcasting may not need the same protection in light of V-chip technology. The Second Circuit recently noted that there are options to block programs containing indecent speech that did not exist at the time of *Pacifica* in 1978. *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 2010 WL 2736937, at *8 (2d Cir. July 13, 2010); *see also Playboy*, 529 U.S. at 815 (noting that targeted blocking is less restrictive than government banning speech, and that the option to block minimizes *Pacifica*'s concern that "traditional First Amendment scrutiny would deprive the Government of all authority" to address problems of unwanted exposure).

[3] Eagle Forum would go a step further in arguing that children with video games become a "captive audience," relying on *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). Brief of *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Br.") at 21-23. Yet in *Sable*, the Court stated that "[t]here is no 'captive audience' problem," because the callers to the challenged dial-in adult services, will typically not be unwilling listeners, in contrast to the inability of the recipient to avoid the broadcasting in *Pacifica*. 492 U.S. at 127-28.

B. The States' Well-Established Right To Regulate Minors Does Not Support The Act's Abridgement Of First Amendment Rights.

Second, regulation may sometimes treat minors differently than adults. As this Court has recognized, the First Amendment rights of minors are not co-extensive with adults' rights and a State may determine that a child is not possessed of the full capacity for choosing speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 & n.11 (1975) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring) and *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring)).

However, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik*, 422 U.S. at 213-14. "In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors." *Id.* at 214 (footnote omitted). "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (rejecting state regulation on publication of alcohol prices even under a more lenient advertising standard).

The Act is the most troubling type of abridgement of free speech rights; namely, the State telling children and parents what value judgments to make. California admits that it is regulating speech because it does not like its content, asserting that "such games are *simply not worthy of constitutional protection* when sold to minors without parental participation." Pet. Br. at 6 (emphasis added).

The assumptions in this statement do not stand up to analysis. California's attempt to define what "such games" are has already failed: California concedes that approximately half of the statute, in which an alternative definition of "violent video game" is used, is likely an unconstitutional abridgment of speech. Pet. Br. at 39 n.5. While California went beyond simply classifying games as "violent," and attempted to provide examples of what content should be banned for minors, vagueness will always be present – and definitions will always be elusive – when the government is trying to dictate what speech cannot be heard by a segment of the population.

Moreover, "[i]n assessing whether a minor has the requisite capacity for individual choice *the age of the minor is a significant factor.*" *Erznoznik*, 422 U.S. at 214 n.11 (emphasis added) (citing *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 741 (1970) (Brennan, J., concurring)). The standards of the ESRB employ a number of age levels, while California's statute treats all minors as being at the same stage of mental development. Thus, the ESRB system is not only a less restrictive alternative but also a better constitutional fit.

As a rhetorical matter, *amici* express unrealistic concerns about very young children buying mature games. Louisiana states that "makers of *Postal*[2] likely never intended its hyperbolic violence to be taken seriously," but that ten-year-olds would not grasp the satire. Louisiana Br. at 2. Eagle Forum similarly notes that government has "a substantial interest in facilitating parental authority over an '8-year-old child.'" Eagle Br. at 15. This is only rhetorical posturing. No one presents any evidence that "such games" are targeting, or are being sold to, children ages 8 to 10. In addition, the FTC's most recent statistics (laid out in Section II.A, *infra*) show that in 2008, only 20% of children ages 13 to 16 were able to buy Mature-rated games, and that parents participated in well over 80% of the purchasing decisions.

C. The First Amendment Is Not Absolute.

Third, the application of strict scrutiny is not synonymous with the notion that every regulation must be struck down. Child pornography has been rightfully classified as "fully outside the protection of the First Amendment." *Stevens*, 130 S. Ct. at 1586 (discussing *New York v. Ferber*, 458 U.S. 747 (1982)). The Court explained that *Ferber* was a "special case" because the market for child pornography was "intrinsically related" to the crime of child abuse. *Id.* (citing *Ferber*, 458 U.S. at 759, 761). The First Amendment does not and should not provide a shield of full immunity for conduct that may be called "speech" yet represents unlawful behavior.

Yet even *Stevens*, which involved video-recording conduct violating animal cruelty laws, held that the criminalization of the videos could not stand. *Stevens* cautioned that "*Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." 130 S. Ct. at 1586. With the lack of an underlying actual criminal element, and with the lack of similar restrictions on depictions of violence in other media, the justification for creating an exceptional category targeting offensive content in video games is non-existent. The Act's sole focus on video games sold in stores which are also not "artistic" enough is an arbitrary category that is dictated by political considerations. It excludes violent but "value-laden" video games.[4] It excludes books, comic books, music, no matter how violent, and even excludes video games sold over the Internet. Though it fixes nothing, it raises the specter of censorship for any media that finds itself at the center of a politically charged societal debate. This Court has consistently recognized that the Constitution blocks entry to this slippery slope.

Indeed, data on actual crime suggests that there is no need to limit First Amendment rights with respect to simulations of violence in video games in order to control actual criminal conduct. If there were a causal connection between simulated violence in video games and real-world crime, one would anticipate a surge in the violent crime rate as video games became ubiquitous. Yet the opposite has happened.

In the video game era, adult and juvenile crime rates have steadily declined nationwide. According to a recent Department of Justice study, juvenile arrest rates for violent crime were lower in 2007 than 1980, and the arrest rate in 2004 was nearly 50% down from its 1994 peak. Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Statistical Briefing Book, Juvenile Arrest Rate Trends*

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[4] While the Act's inclusion of a savings clause for video games with redeeming values is intended to satisfy First Amendment scrutiny, it exposes a damaging evidentiary question: none of California's purported evidence shows that games with artistic merit are any less "dangerous" than video games with no such value. Thus, the part of the Act California is trying to save highlights the lack of a reason to save it.

(2009), http://www.ojjdp.ncjrs.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201. Similarly, there has been a dramatic decline in students ages 12 to 18 reporting violent crimes both in and away from schools. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Indicators of School Crime and Safety: 2009* 82 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/iscs09.pdf (rate of violent crime per 1,000 students at school dropping from 59 in 1993 to 26 as of 2007, and, away from school, dropping from 70 in 1993 to 20 in 2007). The overall violent crime victimization rate shows a similar decrease. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *National Crime Victimization Survey Violent Crime Trends, 1973-2008*, http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm (last visited Sept. 9, 2010) (showing a historic low of 19.3 victimizations per 1000 people age 12 and above in 2008, dropping from 51.2 in 1994, and 52.3 in 1981). Finally, violent crime has dropped in 2007, 2008, and 2009. Fed. Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States, 2009, Preliminary Annual Uniform Crime Report, January through December, Table 3* (2010), http://www.fbi.gov/ucr/prelimsem2009/table_3.html.

One piece of pseudo-"evidence" adduced as "proof" that violent, non-artistic video games can create criminals must be refuted in no uncertain terms – as it does a profound disservice to the United States armed forces and is without foundation. Two *amicus* briefs point to the United States military's use of video games in the "first-person shooter" genre as purported proof that they must necessarily make soldiers more violent, with one opining that "[t]hese video games are useful to the military precisely *because* they incite participants to kill." Eagle Br. at 10 (emphasis in original); Brief of *Amicus Curiae* of

California State Senator Leland Y. Yee, Ph.D., *et al.* ("Yee Br.") at 26-27. In fact, the use of video games as training tools serves to prove that the United States military has seen value and few ill effects from them. The military does not need video games to teach soldiers how to shoot: there are real bullets and real guns for that. Video games depicting combat – regardless of their artistic or aesthetic values – teach strategy and leadership skills that can be transferred from a virtual environment to a real one, without exposing soldiers to unacceptable risks in training. It is certainly not in the armed forces' interests to create a generation of violent, uncontrollable killers who ignore regulations, and that is just as certainly not what they are doing. These *amici*'s assumption that anything used by the United States military must promote violence is a baseless and ill-reasoned one.

II. THERE IS NO REASON TO BURDEN LAW ENFORCEMENT WITH VIDEO GAME CENSORSHIP RESPONSIBILITY.

The lack of a justification for placing a subset of video games with particular content outside of the First Amendment is further apparent when one looks at the practical realities of enforcement, and the less restrictive means available to achieve California's stated goal.

States have a broad right to make laws that they deem appropriate and need not justify the wisdom or effectiveness of any particular law. But in the First Amendment arena, the less-restrictive-means inquiry leads to an examination of how the law would actually operate, as well as how other alternatives would work. Here, California's legislation will do little more than duplicate the efforts of the successful

ESRB self-regulatory scheme while draining state resources for no good reason.

A. The Less Restrictive Means Of The ESRB System Makes The New Enforcement Regime Unnecessary.

> When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute. . . . The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished.

Ashcroft v. ACLU, 542 U.S. 656, 665-66 (2004) (citing *Reno v. ACLU*, 521 U.S. 844, 874 (1997)).

This Court has been clear that the less-restrictive-means analysis requires a close look at what the industry and consumers have done and plan to do. The analysis, at the very least, prefers effective self-regulation over untested governmental regulation. *See Reno*, 521 U.S. at 874, 877 (rapidly improving private computer technology allowed parents to dictate what their children could access online, which constituted a less restrictive means than criminalizing certain indecent messages); *see also Playboy*, 529 U.S. at 815 (private technology allowing parents and viewers to block certain channels was a less restrictive means than dictating the hours during which sexually explicit content could be shown). And that is the scenario presented by the evidence here.

Current FTC studies show that the ESRB self-regulatory scheme is having remarkable success in keeping Mature games out of the hands of young children. The FTC's most recent report tracks the marked improvement in the ESRB's enforcement program. FTC, *Undercover Shoppers Find It Increasingly Difficult To Buy M-Rated Games*, May 8, 2008, http://www.ftc.gov/opa/2008/05/secretshop.shtm. In 2008, only 20% of children age 13 to 16 were able to purchase Mature games, down from 42% in 2006, 69% in 2003, 78% in 2001, and 85% in 2000. *Id.* The FTC has thus stated that the video game industry has the strongest self-regulatory code in the entertainment space. FTC, *Marketing Violent Entertainment to Children (Sixth Follow-up)*, at iii. In their briefs, California (p. 51) and Dr. Yee (p. 4) rely on old data from earlier FTC studies regarding the ESRB system, while ignoring the updated measurements showing the remarkable improvements in retailer compliance.

The success of the ESRB's self-regulatory scheme is amply demonstrated by comparing its enforcement rate against that of the government's regulation of the sale of alcohol to minors. A 2005 Mothers Against Drunk Driving study, similar to the FTC mystery-shopper checks, revealed that 18% of retailers sold alcohol to people under the age of 21. Remarks of Glynn Birch, MADD National President, *21 Turns 21: Night of Compliance*, July 18, 2005, http://www.madd.org/docs/NOC_remarks-Glynn-Birch.pdf. Despite the fact that the sale of alcohol to minors has been illegal for many years, and that the devastating effects of alcohol consumption by minors such as drunk driving deaths and injuries are established facts, the success rate of self-regulation in preventing potentially inappropriate game sales is nearly identical. With the ESRB system demonstrating marked year-over-year gains, it may now outpace the government's prevention of underage alcohol consumption. Further, the similar levels of successful enforcement suggest that the act of making video game sales as illegal as alcohol sales will not guarantee stricter compliance.

The FTC has also found that parents are involved in more than 80% of video-game purchases for minors in any event, so that intimations of mass numbers of children furtively buying games without tapping their parents' financial resources are inaccurate. FTC, *Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries* 28-29 (2007), http://www.ftc.gov/reports/violence/070412MarketingViolentEChildren.pdf.

The system actually used for verifying a buyer's age makes sense, and reminds retailers of the age restrictions. At the time of the last study, out of eight major retailers, "seven have implemented point-of-sale register systems that prompt the cashier to request photo identification when an M-rated game is scanned for purchase." FTC, *Marketing Violent Entertainment (Sixth Follow-up)*, at 27-28; *see also* Respecttheratings.com, Ratings and Descriptors, GameStop/EB Games Rating Policy, http://www.respecttheratings.com/ratings.html (last visited Sept. 9, 2010) ("When a Mature game is scanned, an ESRB advisory appears on the register screen requiring employees to ask any under-age customer for a valid photo ID, unless accompanied by a parent or guardian.")[6]

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[6] For all practical purposes, the only change that would occur under California law is that for the games deemed inappro-

Further, the ESRB system does not simply use a "mature"/"non-mature" classification as the Act is forced to do. The ESRB system is more nuanced, as it references various age-levels – "T" for teenager-appropriate play, "10+" for ages 10 and up, and so on – that give parents more of a guide as to the propriety of the game to their particular children. It would be hard to argue against the concept that different standards are warranted for different age groups and among children at varying stages of cognitive and moral development. *Erznoznik*, 422 U.S. at 214 n.11. This is what the industry already does, but the Act does not: under the Act, a game would have to be labeled "18+" if it were "offensively violent" for any minor (and lacked sufficient artistic value), even for a pre-schooler.

California argues that ESRB's rating system is voluntary, and not all games are rated. Pet. Br. at 58. Yet California fails to mention that major retailers do not sell unrated games, as they have properly made that determination for business reasons instead of by governmental mandate. California does not seriously contest that virtually all games sold in the United States are rated, or that major retailers do not even sell "Adults Only" games. *See, e.g.*, Target.com, Target Stores Mature-Rated Games Policy, http://www.target.com/Mature-Rated-Games-Policy-Product/b?ie=UTF8&node=14306571 (last visited Sept. 9, 2010) (Target only carries games with ESRB ratings, and does not carry "adults only" merchandise); Walmartstores.com, "Mature" Merchandise: Music, Video Games and Movies, http://walmartstores.com/pressroom/news/8234.aspx (last visited

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priate under California law, retailers will be required to turn everyone away ages 17 and under, instead of ages 16 and under.

Sept. 9, 2010) ("All of [the games] that we carry are rated by the [ESRB] and we carry no adult-rated video or computer software games."); *see also*, *e.g.*, ESRB, Frequently Asked Questions, http://www.esrb.org/ratings/faq.jsp#3 (last visited Sept. 9, 2010). California also fails to mention that standard gaming consoles contain parental controls that enable parents to block teen- or mature-rated games from being played on them, much like the blocking technology employed in *Playboy*,[6] or that console companies require that all games sold on their platforms be ESRB-rated. *E.g.*, *id.*

Having the government mandate, upon pain of a criminal prosecution, that a retailer continue to do what it is already doing seems especially gratuitous in the First Amendment arena. Effective self-regulation is something State governments should celebrate. Indeed, the money that would be spent creating this regime of video game regulation seems better targeted to supporting law enforcement in its efforts to deter and prosecute real violent behavior.

B. The Act Creates A New Regulatory Regime, With Law Enforcement As Constitutional Arbiters.

California attempts to bring the illusion of objectivity and precision to what is necessarily an amorphous subject. The Act requires state-appointed video game authorities to make a number of necessarily subjective value judgments. The video games must be sufficiently reviewed and determined to meet the test of simulated violence disapproved by the Act, being both "appeal[ing] to a deviant or morbid interest in minors" and "patently offensive" as to minors, according to prevailing community standards. Cal. Civ. Code § 1746(d)(1)(A)(i)-(ii). Further, law enforcement would be charged with determining the "literary, artistic, political or scientific value for minors" of the game as a whole. Cal. Civ. Code § 1746(d)(1)(A)(iii).

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[6] *See* PTA & ESRB, *A Parent's Guide to Video Games, Parental Controls and Online Safety* 5-9 (2008), http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf; Scott Steinberg, *Video Games: How to Setup Parental Controls*, Digital Trends, Jan. 27, 2009, http://www.digitaltrends.com/how-to/video-games-how-to-setup-parental-controls/.

Vague bounds on speech serve to chill permissible speech: the problem lies in the fact that vagueness means "[p]eople 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'" *Citizens United v. FEC*, 558 U.S. 50, 130 S. Ct. 876, 889 (2010) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The immediate concern of the *amici* is how law enforcement can be expected to devote resources to not only engage in cultural critiques of video games, but then, apparently, conduct undercover "sting" operations in order to snare violators. Law enforcement personnel simply have better things to do than play video games and philosophize about their artistic merit. The tasks assigned to them by this Act do not even lend themselves to an "I know it when I see it" standard, as the depictions with which California is concerned are, according to its *amici*, often hidden in so-called "Easter eggs" within the games or higher levels of game play that would take hours and game-playing skill to reach.

Further, once law enforcement expends the necessary money and manpower to go through this process (and there is a virtual guarantee that different conclusions will be reached by different authorities), the criminal courts will be presented with a new kind of claim. Prosecutors and courts would find themselves poring over games to secure or debate a criminal conviction in an area where "reasonable doubt" appears to be the very nature of the beast. While *amici* see this process as a time-consuming and expensive hassle to solve a problem that seems to have already been solved by the ESRB, this Court has articulated the constitutional dimension: "The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Citizens United*, 130 S. Ct. at 891.

In addition to the unenviable task of determining which games meet the highly subjective standards of violence (without artistic merit) disapproved by the Act and the burden of prosecuting costly criminal suits, state officials will run the risk of civil liability resulting from the classification of certain games as "patently offensive" and lacking any "literary, artistic, political or scientific value for minors." Those aggrieved by a negative classification will doubtless run to court and force States to incur significant additional costs by claiming not only constitutional violations but business damages through overweening governmental interference as well. The law enforcement cost outstrips the questionable benefit of having the government itself dictate and enforce another minimum age requirement in retail stores.

Much ink has been and will be spilled in this case debating what the government must show in order to regulate the content of speech. In this narrow context, however, the less-restrictive alternative is apparent and the facts regarding its effectiveness should be undisputed, so that the Act fails whatever standard is used.

III. THE ACT INTERFERES WITH THE STATES' ABILITY TO ENFORCE EXISTING CRIMINAL LAWS AND RESPONSIBILITIES.

Amici States want to see criminals held accountable for their actions. This Act, however, will hinder their enforcement of existing criminal laws. California's prosecution of the sale of video games to minors, coupled with its imprimatur on the theory that video games (without sufficient artistic merit) cause violent and aggressive behavior, will produce the unintended consequence of legitimizing a "video game made me do it" defense to criminal prosecution. Defense attorneys will have the option of blaming a video game played when the defendant was a minor as an exculpatory defense or a mitigating factor in sentencing, encouraging violent offenders to argue that they acted under the debilitating influence of such games.

Video games are only the latest in a long line of media scapegoats that defendants have used to attempt to escape personal responsibility. Criminal defendants have been blaming their illegal conduct on music, movies, books and other media for decades if not centuries. Although these types of defenses have been largely rejected as inappropriate, California's attempted endorsement of the assumption that video games cause violent behavior unintentionally gives State approval, and a new lease on life, to a long-discredited excuse.

A. California's Law May Unintentionally Turn A Baseless "Twinkie Defense" Into An Increasingly Functional Criminal Defense.

The Seventh Circuit observed that "[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001). More recent scholarship has not filled this void. Yet defense attorneys, zealously representing their clients, will undoubtedly seize upon the Act to craft a video-game defense – taking what should be no more than a Twinkie defense, and giving it State-sponsored legitimacy. Criminal defendants have attempted to avoid responsibility for their actions by blaming everything from sugar to demonic possession.[7] In the realm of entertainment, defendants have attempted to blame a wide variety of sources including *The Catcher in the Rye*, violent television, movies, the internet, rap music, heavy metal, and the Beatles.[8]

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[7] *See* ABC News, *'Twinkie Defense' Psychiatrist Stabbed*, Oct. 9, 2000, http://abcnews.go.com/US/story?id=90484&page=1 (The "Twinkie Defense" is derived from a psychiatrist's testimony that a diet of junk food and soda contributed to Dan White's murder of San Francisco Mayor George Moscone and Supervisor Harvey Milk.); Allen Hicks, *Murder Suspect Charged, Man Accused In Death Said Demon Controlled Him*, Marshfield News-Herald, Oct. 4, 2003, at A1.

[8] *See, e.g.*, Paul L. Montgomery, *Lennon Murder Suspect Preparing Insanity Defense*, N.Y. Times, Feb. 9, 1981, at B12 (discussing obsession of John Lennon's killer with *The Catcher in the Rye*); *Zamora v. State*, 422 So. 2d 325, 328 (Fla. Dist. Ct. App. 1982) (noting that defense counsel argued insanity based on exposure to violent television); Chuck Philips, *Rap Defense Doesn't Stop Death Penalty*, L.A. Times, July 15, 1993, at F1; John W. Whitehead, *Charles Manson's Race War: The Beatles*

Most every day, the entertainment world and all of its varied genres are accused of being the true cause of an individual's decision to break the law.[9] Video games are merely the latest and most trendy excuses. However, if the Act succeeds in creating a category of entertainment on which criminals can blame their crimes, other media will not be far behind.

The data of which *amici* are aware provide no legitimate reason to treat video games differently from other forms of media. A 2002 study of 37 school attacks found that only 12 percent of the attackers exhibited interest in violent video games, whereas 27 percent showed interest in violent movies, and 24

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and Helter Skelter, Huffington Post, Aug. 3, 2009, http://www.huffingtonpost.com/john-w-whitehead/charles-mansons-race-war_b_249914.html (noting that Manson blamed the Beatles' *White Album* for the killings).

[9] *See, e.g.*, Katrina K. Wheeler, *13-Year-Old Boy Bites 11 Students at Middle School: Father Blames 'Twilight' Film*, Examiner.com, Mar. 27, 2009, http://www.examiner.com/pop-media-in-national/13-year-old-boy-bites-11-students-at-middle-school-father-blames-twilight-film (father blaming a movie, based on a series of novels, for his son's act of biting classmates); Eric Choy & Susie L. Morris, *Is 'Matrix' to Blame for Teen Violence*, ABC News, July 10, 2003, http://abcnews.go.com/Health/story?id=116720&page=1 (questioning whether *The Matrix* was responsible for teen plot to kill peers); Sean Michaels, *Slipknot Blamed for Inspiring School Shooting*, Guardian.co.uk, Aug. 21, 2008, http://www.guardian.co.uk/music/2008/aug/21/slipknot.school.killing (blaming the band Slipknot for a school attack involving a "sword-wielding schoolboy," killing one student and wounding three other people); Dan Noyes, *Accused Man's Mom Blames Fox News for Behavior*, ABC KGO-TV, Apr. 7, 2010, http://abclocal.go.com/kgo/story?section=news/iteam&id=7374140 (mother of 48-year-old man that was arrested for threatening Nancy Pelosi over health care legislation blamed Fox News for inciting her son, leading to the criminal threats).

percent showed interest in violent books. U.S. Secret Serv. & U.S. Dep't of Educ., *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States* 22 (May 2002), http://www.secretservice.gov/ntac/ssi_final_report.pdf. Although some of the attacks pre-dated the supposed emergence of violent video games, that fact simply shows horrific school shootings existed before the video game era, and unfortunately will likely exist long after video games cease to be the whipping boy for some societal ills.[10]

Moreover, there is an ever-increasing level of cross marketing between movies, the internet, video games, books and music. Video games, books, and movies are regularly based on other forms of entertainment. There is little sense in restricting the sale of *Postal* the game, while allowing the same minor to purchase *Postal* the movie, but even less sense in moving into other areas of entertainment so as to create a rap-music defense, violent-book defense, or violent-movie defense in criminal cases.

There are numerous and growing examples of criminal defendants testing the video-game defense waters. In a recent California case, a convicted criminal argued on appeal that he should have been allowed to plead not guilty by reason of insanity, because he commited the acts while under the belief that he was following the goals of the video game *Grand Theft Auto*. *People v. Henning*, 100 Cal. Rptr. 3d 419, 423 (Cal. Ct. App. 2009). In Alabama, a defense attorney argued that the defendant did not intentionally kill the victim; the attorney claimed that the defendant "had immersed himself in video games and lived in 'a different world than you and I.'" Holly Hollman, *Video Game Killing? Defense Claims Suspect in Halloween Murder Lived in Fantasy World*, Decatur Daily, Feb. 27, 2008, http://www.decaturdaily.com/stories/5921.html. In Michigan, attorneys for an 18-year-old on trial for beheading his victim claimed that he was under the influence of the game *Hitman*. GamePolitics.com, *Video Game Made Me Do It: Defendant In Beheading Trial Blames Hitman*, Apr. 11, 2008, http://www.gamepolitics.com/2008/04/11/video-games-made-me-do-it-defendant-beheading-trial-blames-hitman. In Ohio, a man was found guilty of murdering his mother and attempting to murder his father; his defense was that his actions were caused by the popular game *Halo*. Kevin Freeman, *Teen Who Killed Mother Over Video Game Gets 23 Years To Life*, Fox 8 News, June 16, 2009, http://www.fox8.com/news/wjw-news-daniel-petric-sentenced,0,644171.story.

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[10] Members of this Court have adroitly recognized the urge to play politics with the First Amendment based on the scandal *du jour*, and how that urge is rebuffed: "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring); *Playboy*, 529 U.S. at 830-31 (Thomas, J., concurring) (quoting *Denver*, 518 U.S. at 774).

Despite the fact that these defenses have typically been rejected, there are signs that the video game defense is gaining traction and complicating prosecutions. *See, e.g.*, GamePolitics.com, *Judge Comes Down Hard on Video Games in Halo 3 Murder Trial*, Jan. 13, 2009, http://www.gamepolitics.com/2009/01/13/judge-comes-down-hard-video-games-halo-3-murder-trial. In Tennessee, two teenagers blamed *Grand Theft Auto* for causing them to shoot at cars – resulting in the death of a motorist. *See* David

Kushner, *Grand Death Auto: Two Kids, 13 and 15, Killed an Innocent Highway Motorist. Was a Violent Computer Game Responsible – or Their Sad Lives?*, Salon, Feb. 22, 2005, http://www.salon.com/technology/feature/2005/02/22/gta_killers/index.html. The judge determined that the boys acted stupidly but without intent to kill, allowing them to plead guilty to reckless homicide and reckless endangerment. *See id.* (noting that for the first time, the video game defense seemed to work).[11] While *amici* do not wish to abolish the insanity defense, given the near ubiquitous playing of video games, they do not wish to see it baselessly expanded to play a role in virtually every criminal prosecution.[12]

Effective law enforcement means being able to place responsibility for intentional criminal acts on the actors, instead of casting about for someone or something else to blame – and California's Act works against this crucial interest. In some high-profile school shooting cases, families of the victims tried to shift responsibilty from the killers to the manufacters of video games and other forms of entertainment. For example, parents of victims in a Kentucky school shooting sued video game, movie production, and internet content providers. *James v. Meow Media, Inc.*, 300 F.3d 683, 687 (6th Cir. 2002). The Sixth

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[11] *See also* Terry Bosky, *The Video Game Defense*, Palm Beach Post, Blogs, Aug. 27, 2008, http://www.palmbeachpost.com/blogs/content/shared-blogs/palmbeach/powerup/entries/2008/08/27/ (discussing prevalence of the video game defense, why good lawyers should raise the defense, and the situations in which the defense is most effective).

[12] This defense will be available to youth and adults alike, as adults will simply claim that they have been obsessed with these games since youth and became delusional as a result.

Circuit quickly recognized the implications for law enforcement:

> The system of criminal liability has concentrated responsibility for an intentional criminal act in the primary actor, his accomplices, and his co-conspirators. By imposing liability on those who did not endeavor to accomplish the intentional criminal undertaking, tort liability would diminish the responsibility placed on the criminal defendant. *The normative message of tort law in these situations would be that the defendant is not entirely responsible for his intentional criminal act.*

Id. at 694 (emphasis added). *See also Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1268 (D. Colo. 2002) (dismissing tort claims against video game and movie producers stemming from the Columbine shootings). California's law, based on the premise that video games make children violent, would also be an acknowledgement that criminal defendants lack responsibility for their actions. Further, it would lend legitimacy to a rash of civil lawsuits in state and federal courts, such as the recent case in which video-game maker NCSoft is being sued for making *Lineage2* "too addictive." *See* Mike Thompson, *Lineage II Junkie Sues NCsoft For His Addiction*, The Escapist, Aug. 20, 2010, http://www.escapistmagazine.com/news/view/102914-Lineage-II-Junkie-Sues-NCsoft-for-His-Addiction (plaintiff claiming that the game was so addictive that it caused him to log over 20,000 hours of play, making him unable to function in his daily life).

The danger inherent in the Act's unfounded premise has been exacerbated by those stating – despite the lack of any conclusive evidence – that playing violent video games is almost as strong of an indicator toward youth violence as gang membership, and is a stronger indicator of youth violence than having abusive parents, a record of prior violence, or engaging in substance abuse. Eagle Br. at 3. Yet unlike the imaginary world of video games and other entertainment, gangs use actual guns, deal in actual drugs, and commit countless homicides and other crimes involving real victims as part of their membership.[13] Those crimes, while on the decline according to government data, represent law enforcement's central mission. California's Act does not.

If this Court accepts California's argument that games encourage and cause violent behavior in impressionable youth, this will function as a nationwide signal that appropriate criminal prosecutions just got more difficult to procure.

B. This Court Can And Should Consider The Detrimental Impact On Law Enforcement.

This Court has weighed law enforcement concerns in its First Amendment jurisprudence, and has every reason to do so here. In *Ashcroft v. Free Speech Coalition*, the Court struck down a law aimed at expanding the prohibition on child pornography as a violation of the First Amendment. 535 U.S. 234, 258

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[13] "Criminal gangs commit as much as 80 percent of the crime in many communities, according to law enforcement officials throughout the nation." Nat'l Drug Intelligence Ctr., U.S. Dep't of Justice, *National Gang Threat Assessment: 2009* iii (2009), http://www.justice.gov/ndic/pubs32/32146/32146p.pdf. Typical gang-related crimes include alien smuggling, armed robbery, assault, auto theft, drug trafficking, extortion, fraud, home invasions, identify theft, murder, and weapons trafficking. *Id.*

(2002). One Justice noted that the Government's most persuasive argument was that the Child Pornography Protection Act would protect against persons escaping conviction by raising a defense that images were computer-generated, not of actual children, thereby raising a reasonable doubt as to guilt. *Id.* at 259 (Thomas, J., concurring). In *Stevens* and *Free Speech Coalition*, the Court refused to allow legislation that violated the First Amendment despite the potentially beneficial impact on law enforcement. Here, California has created the converse situation – law enforcement and First Amendment interests are aligned in rejecting the inappropriate expansion of a barrier to appropriate prosecutions. Thus, by affirming the decisions below, two flaws are resolved.

CONCLUSION

The decision of the Ninth Circuit is correct, stands on solid legal grounds, and should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 08-1448

In The Supreme Court of the United States

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN, JR., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

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INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 25 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

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[1] Counsel of record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae* and its counsel have contributed monetarily to its preparation or submission.

The case now before the Court concerns the Institute for two reasons. First, the Institute is concerned about the increasing dependency of individuals upon the state to inform moral decisions and to provide for an expanding scope of individual needs, including traditional parenting responsibilities. The Institute believes that rather than empowering parents, the net effect of Cal. Civ. Code §§ 1746-1746.5 ("the Act") will be to undermine the parent-child relationship. Second, the Institute is concerned about the erosion of First Amendment freedom that has been proposed by the State of California. Any such proposal represents an extremely serious undertaking that ought to be viewed with suspicion as a matter of libertarian principles.

SUMMARY OF THE ARGUMENT

While the State of California ("the State") asserts in its brief that the Act is justified by its interest in promoting parental authority to restrict child access to violent video games, the record does not indicate that this was, in fact, the legislature's motivation in passing the law. While on its face, the State's proffered interest provides some sympathy for the State's case, critical analysis exposes the speciousness of this stated justification. Rather than enhancing parental authority, it is far more likely that the Act will hinder good parenting by fostering in parents a false sense of security. When it comes to parenting, the Institute submits that government agencies and regulations are simply no substitute for the watchful eyes of moms and dads.

In addition to the serious public policy concerns the Act poses, the law is constitutionally infirm. Unless the Court chooses to substantially extend its decision in *Ginsberg v. New York*, 390 U.S. 629 (1968), thereby eroding First Amendment protection for all forms of media containing violent content, the Act is subject to strict scrutiny because it is content-based. The Act cannot survive strict scrutiny for two reasons. First, the research cited by the State cannot support its asserted compelling interest in "preventing violent, aggressive, and antisocial behavior." *Video Software Dealers Assn. v. Schwarzenegger*, 556 F.3d 950, 961 (9th Cir. 2009). Second, the Act is not the least restrictive means by which the State might achieve its stated objectives.

ARGUMENT

I. The Court Should Reject The State's Newly-Asserted Justification That The Act Supports Parental Authority.

A. The State Did Not Cite An Interest In Enhancing Parental Authority As Its Original Justification For The Act.

Petitioner's Brief repeatedly cites the State's interest in promoting parental authority as a primary justification for the Act. However, a review of the Ninth Circuit's opinion reveals that this was not one of the State's asserted interests supporting the Act. *Id.*, 556 F.3d at 954. In the lower court, the interests proffered by the State to support the Act were "(1) preventing violent, aggressive, and antisocial behavior; and (2) preventing psychological or neurological harm to minors who play violent video games." *Id.*

Inasmuch as the State's interest in promoting parental authority was not asserted below, *Amicus* submits that the Court should not now consider it as a justification for the Act. *See Bragdon v. Abbott*, 524 U.S. 624, 658 n. 1 (1998) (noting that the Court has rarely addressed arguments not asserted below); *H.L. v. Matheson*, 450 U.S. 398, 442 n. 34 (1981) (refusing to consider interests not asserted below).

B. Upholding The Act Will Ultimately Undermine The Parent-Child Relationship By Allowing The State To Usurp Parental Authority.

Our nation is well on its way to becoming a "nanny state." As ever-expanding federal and state governments regulate more and more aspects of our daily life, each generation of Americans in turn becomes conditioned to expect and depend upon a higher level of government regulation. *Amicus* submits that this is a dangerous trend, particularly where the fundamental parent-child relationship is involved.

As things now stand, governments have an incredible amount of influence over the nation's children through the public education system. Modern public school curricula encompasses far more than reading, writing and arithmetic; subjects such as family life, sex education, and even character development are now included in public school curricula. Unfortunately, many parents not only tend to endorse the public system's assumption of authority to teach these topics, but are led to rely upon public schools to guide children on these matters that were traditionally the ambit of parents. To the extent that the state's foray into the inculcation of morals in the nation's youth represents the replacement of direct parental involvement in their own children's upbringing, *Amicus* submits this weakens the American family.

This case is not about whether or not violent video games are suitable for children. As the State's brief points out, the rating system employed by the video game industry constitutes a clear acknowledgment that some games are absolutely inappropriate for minors. (Pet. Br. 47). What this case *is* about is whether the State should be permitted to intervene to preclude minors from obtaining violent video games based on its own judgment regarding the possible effects of the games on minors. Inasmuch as the State purports to rely on research data pointing to a correlation between violent games and violent children as its rationale for restricting minors from obtaining such games, the State is acting not as a parent's helper, but rather is assuming an aspect of parental decision-making for itself.

In fact, parents have all the authority they need to preclude their children not only from buying these games, but from playing them at all. It is the parent who directs the child's freedom of movement and daily activities. While it is a tragic reality that many parents are not sufficiently invested in their roles as such to protect their own children from harmful influences, the State has not cited this consideration as its justification for the Act. If this is, in fact, its real motivation, then the State is disingenuous in now claiming that it merely seeks to "promot[e] parental authority to restrict [minors from obtaining violent games]." (Pet. Br. 6). The state does not promote the authority of parents by assuming the authority for itself. On the other hand, while the desire of legislators to fill a protective void for children of disengaged parents is understandable, it surely raises a host of serious concerns regarding the propriety of governmental parenting.

In addition to these concerns, the greater danger presented by the Act is the State's general usurpation of parental prerogatives. As our nation's parents are increasingly led to rely upon judgment-based decisions that the state makes for their children, parents are likely to become oblivious to their children's desperate need for good, old-fashioned, personal parenting. The Act will tend to lull even well-meaning parents into a false sense of security—into believing that parental supervision is unnecessary because there is no way minors can obtain the offensive games. In fact, the reality is that poorly-supervised minors will have ample opportunity to play the games with or without the Act. These children need only find a single friend or classmate whose parent or older sibling is willing to purchase the game on behalf of the minors. With or without the Act, the exposure of children to violent content will turn on the degree of parental involvement. But if the Act is upheld, many parents will have one more excuse to disengage. *Amicus* submits that what America's children need is not a state that parents, but parents who do.

Rather than usurp the traditional role of parents, using the force of law to determine when young people become mature enough to purchase blood-and-guts games for themselves, it would be far more constructive for the state to educate parents about the shocking nature of *many* games, the dangers posed by them, and the attendant necessity for parental awareness of and control over which games children are playing. In this way, the state might truly empower parents with information and, in the best case scenario, foster meaningful family conversations through which virtually bloodthirsty young people might ultimately be converted into compassionate, responsible adults.

As this Court has eloquently stated before, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *Amicus* asks the Court to reaffirm the responsibility and authority of parents—not the state—to protect their children from exposure to inappropriate media. If the Court instead upholds the Act, it will likely produce the unintended consequence of fostering complacency and a false sense of security among the parents whom the legislature purportedly seeks to empower.

II. If The Court Accepts The State's Argument For The Extension Of *Ginsberg*, It Will Create A Chilling Effect on All Forms Of Media.

Although the Act restricts access to violent video games in particular, the State's arguments for the legal basis for doing so have implications beyond the instant context. The Act thus threatens freedom of expression through books, movies, television shows, and music. While *Amicus* assumes that concerns over exposure to violence would be heightened where the exposure involves minors' virtual participation in the violence, the State has not proposed limiting principles that would prevent the State from expanding violence regulation to other media. The authority claimed by the State could be employed to restrict minors' access to a wide range of artistic expression. Therefore, even if the Court holds that the Act is constitutional, its decision should be crafted to avoid threatening other artistic media.

Indeed, the State has, in the course of defending the Act, implicitly claimed the authority to regulate other media. On appeal to the Ninth Circuit, the State claimed that although there was not substantial evidence supporting regulating video games more strictly than other forms of media, "the Constitution allows the Legislature to address the harmful effects media violence has on children *one phase at a time*." Reply Brief of Appellant-Petitioner at 10, *Video Software Dealers Ass'n v. Schwarzenegger*, No. 07-16620 (9th Cir. Feb. 26, 2008) (emphasis added). Elsewhere the State asserted that its legislature may "address the serious problems associated with children's exposure to extremely violent material *one medium at a time* as their harmful effects are established." Reply Brief of Appellant-Petitioner at 11, *Video Software Dealers Ass'n v. Schwarzenegger*, No. 07-16620 (9th Cir. Feb. 26, 2008) (emphasis added).

Adoption of the State's proposed standard for evaluating restrictions on distribution of violent content will facilitate the regulation of other forms of media that legislators may target. In fact, the California Senate Judiciary Committee noted that "some supporters of the bill readily agree that the bill's proposed regulations on violent video games should be expanded to movies, songs, and books." S. 2005 Leg.-1179, Reg. Sess., at pt. 5 (Ca. Sept. 8, 2005).

If the Act is upheld, then musicians, movie producers, and book publishers must adjust their artistic expression in order to avoid potential restrictions on retail sales. If the Court holds that the Act is constitutional without explaining clear boundaries on the legislature's authority, then artists in all media will face uncertainty about the scope of their First Amendment rights. That uncertainty is likely to hinder artistic expression. The Court should continue to foster artistic innovation by refusing to compromise constitutional protection of free speech. If the Court ultimately chooses to uphold the Act, *Amicus* urges the Court to explicitly limit the holding to video games, thereby protecting other media from a less-rigorous constitutional scrutiny.

III. The Act Cannot Pass Constitutional Muster Under A Strict Scrutiny Analysis Because The Cited Research Does Not Support The State's Asserted Compelling Interest In Preventing Harm To Minors.

A. The Current Research Is Insufficient To Establish A Causal Link Between Violent Video Game Use And Aggressive Behavior.

Longitudinal experimental studies conducted over a number of years are necessary to truly understand whether a causal relationship exists between violent action and violent video game use. *See* Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. of Adolescence 113, 121 (2004). As Craig Anderson, the State's expert, wrote, "when one considers violent video game research by itself, a glaring empirical gap emerges: the lack of longitudinal studies." *Id.* In the absence of longitudinal research, the State has attempted to link violent video game use to aggressive behavior through short-term and correlational studies.

Short-term and correlational studies not only fail to fill the "empirical gap" left by the absence of longitudinal research, such studies clearly reveal the need for long-term research to determine whether a relation exists between aggression and violent video games. For example, the State cites one short-term study in which researchers found that individuals who had just played violent video games associated more with aggression than those who had played non-violent video games. Eric Uhlmann & Jane

Swanson, *Exposure to Violent Video Games Increases Automatic Aggressiveness*, 27 J. of Adolescence 41, 45 (2004). The problem here is that participants were tested almost immediately after playing the violent video games. This provides no indication of how long the association with aggression lasts, how strong the association is days and weeks after playing the game, or whether the initial association will ever translate into aggressive behavior. Short-term studies cannot answer such questions, and, thus, without longitudinal research the State cannot demonstrate a causal link between violent video games and aggressive behavior.

The State also relies heavily on studies that fail to meet general standards of reliability or employ flawed methodologies. For instance, one cited study of the reactionary patterns of participants diagnosed with conduct disorders was never peer reviewed, and the researchers themselves noted the need for a "more controlled study." *See* Ind. Univ. Sch. Of Med., *Aggressive Youths, Violent Video Games Trigger Unusual Brain Activity* (December 2, 2002). The State also cited several flawed correlational studies. In one study, researchers utilized the uncorroborated self-reports of fourth- and fifth-graders to determine the children's frequency of violent video game use and their feelings of desensitization to violence. Jeanne B. Funk, et al., *Violence Exposure in Real-Life, Video Games, Television, Movies, and the Internet: Is There Desensitization?*, 27 J. of Adolescence 23, 27 (2004). Another study's correlation depended upon the *level* of violence in each video game the participants played as rated by the participants. Douglas A. Gentile, et al., *The*

Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance, 27 J. of Adolescence 5, 11 (2004). Such subjective measures cannot be expected to yield valid data. Furthermore, any correlational study will typically indicate only an association and not a causation. A correlational study cannot prove that a violent video game caused a child to act violently. It may simply indicate that an already violent child chose to play a violent video game, or that after playing the game the child gave in to the urgings of a third party to act violently.

Despite the shortcomings of the State's short-term and correlational research, the State's expert claims that his meta-analyses reveal a causal relationship between video game violence and aggression. However, other researchers have explained that the lack of consistent research standards across experiments makes it very difficult to obtain reliable conclusions from a meta-analysis. *See* John L. Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 Hum. Comm. Res. 409, 414 (2001) (explaining time to play games has ranged from five to seventy-five minutes during an experiment, and measures of aggression are rarely consistent). Thus, like the short-term and correlational research, the State's expert's meta-analysis is insufficient to show that playing violent video games causes a violent response.

It is worth noting that relying on the meta-analysis in this case produces additional concerns. The same meta-analysis relied upon by the State claimed that the correlation of television and aggression was over twice that of video games and aggression. *Id.* If this meta-analysis is used to sustain the Act here, it will likely have broad implications for other forms of protected expression. This risk to First Amendment freedom clearly is not justified by unreliable studies.

In the final analysis, the State has failed to produce any psychological or sociological evidence sufficient to establish a causal link between using violent video games and aggressive behavior. Longitudinal studies, which simply do not exist, are necessary to establish this link. Many of the short-term and correlational studies cited by the State are flawed or unreliable. Similarly, the State's expert's meta-analysis utilizes a scientifically unsound methodology. The State argues that it should not be required to prove a causal link in order to justify the Act. However, its unreliable research must not be allowed to sustain the heavy burden of proof borne by a government seeking to uphold restrictions on First Amendment rights.

B. The State Has Presented No Evidence That Violent Video Games Harm Minors.

The State has relied heavily on short-term and correlational studies that attempt to relate violent video games to an increase in aggression. However, none of these studies indicate any actual harm to either the adolescents playing the video games or to third parties. *See supra,* Part III (A). Without this link nearly all of the aggression studies are irrelevant.

The State may claim that the changes in brain patterns noted in the Indiana School of Medicine study cited above demonstrate a physical change toward aggression that is proof of harm to minors. However, because the participants in that study were previously diagnosed with a conduct disorder, it is unclear whether any increased aggression resulted from an environmental trigger or was the result of differences in brain patterns. Ind. Univ. Sch. of Med., *supra*. Even in the aforementioned study, which correlates some desensitization to violence with violent video game use, Funk, et al., *supra*, at 23, there is no indication that desensitization lead or would lead to violent behavior. Thus, the State ultimately fails to present any psychological evidence that establishes violent video games cause actual harm to individuals, adolescents or adults.

C. The State's Reliance On Pornography Research Is Misplaced Because Research On The Effects Of Pornography Is More Reliable Than Is The Research On Violent Video Games.

The State has tried to justify a reliance on the psychological research it presents in this case based upon this Court's (and even the California Legislature's) past reliance on the social sciences to permit the restriction of First Amendment rights and create legal distinctions between minor's and adults. One of the most apparent and closely related instances of this is the restriction of pornography under the obscenity standard. But while current psychological research supports this regulation of pornography, it does not support regulating violent video games. The research concerning pornography utilizes a more sound methodology and more persuasively shows that actual harm results from viewing obscene sexual material.

One risk pornography presents is an increased endorsement of the rape myth, a belief that women enjoy forced sex. Researchers have conducted several experimental studies indicating that pornographic materials cause viewers to endorse the rape myth. *See, e.g.*, Neil M. Malamuth & James V. P. Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 J. of Res. in Personality 436, 441 (1981) (finding men who viewed sexually violent films more likely to endorse the rape myth and accept interpersonal violence against women). Though not necessarily longitudinal studies, these studies used reliable methods (such as a control group, *see id.* at 438) and were controlled experiments demonstrating that the effects of viewing pornography extended beyond the laboratory setting. The Malamuth and Check study, for example, showed that even several days after viewing violent pornography men were still more likely to endorse the rape myth. *Id.* Other studies have demonstrated that persons holding unfavorable biases against a certain population segments can subconsciously create negative behavioral changes in interactions with the members of that segment which are readily observable. *See* Bernard E. Whitley, Jr. & Mary E. Kite, *The Psychology of Prejudice and Discrimination* (2006). Studies also show that many women and some men feel heightened alienation upon viewing the degrading portrayal of women in pornographic films. *See*

Michael Flood & Clive Hamilton, The Australia Institute, *Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects*, at 49 (2003).

Unlike the studies utilized by the State in this case, these studies of pornography viewing demonstrate real-world harm. Endorsing the rape myth several days after viewing pornography can result in aggressive behavior towards women. *See* Malamuth and Check, *supra*, at 441. The other cited studies show clear damage to interpersonal relationships, *see* Whitley, Jr. & Kite, *supra*, and self-image., *see* Flood & Hamilton, *supra*, at 49. Additionally, experimental subjects who endorse the rape myth (as a result of viewing pornography in the experiment) report that they would give more lenient sentences to convicted rapists than would control subjects, and they exhibit less sympathy with and compassion for rape victims. Dolf Zillman, *Effects of Prolonged Consumption of Pornography*, in Pornography: Research Advances and Policy Considerations 127, 136 (Dolf Zillmann & Jennings Bryant eds., 1989).

Another potential harm of pornography viewing is that it could lead to unsafe sexual practices. While research is ongoing, one experiment demonstrated that teens who were shown videos with explicit sexual practices believed that those practices were more acceptable than did the control subjects. *See* Flood & Hamilton, *supra*, at 38. Additionally, scientific polling has shown that teenagers who have watched more pornography believe their peers to be more sexually active than they actually are. *See*

Victor C. Strasburger & Barbara J. Wilson, *Children, Adolescents, and the Media* 159 (2nd ed. 2002). Viewers were also more likely to engage in sexual intercourse, and to have a positive attitude toward recreational sex. *See* Flood & Hamilton, *supra*, at 38.

While these studies are correlational and not long-term experimental studies, the research is highly persuasive and suggestive of potential harm. Its methodological techniques have traditionally been more precisely executed, leaving fewer concerns about the experiments' validity. The effects of pornography research have extended beyond the laboratory. Most importantly, the research has shown that pornography is firmly linked with tangible harms such as aggressive sexual attitudes. While the research on pornography tends to persuasively indicate that minors and others are likely to be harmed by viewing pornography, the same cannot be said of the research on violent video games.

IV. The Act Cannot Pass Constitutional Muster Under A Strict Scrutiny Analysis Because It Is Not The Least Restrictive Means Of Achieving The State's Interests.

The Ninth Circuit correctly held that because the variable *Ginsberg* standard applies only to obscenity, the Act is subject to strict scrutiny. *Amicus* submits that the Act cannot survive strict scrutiny because it is not the least restrictive means of achieving the State's interests. In fashioning its violent video game regulations, California ignored less restrictive alternatives such as promoting and enhancing the safeguards that already exist to protect children from video games that parents might find objectionable.

The legislative history surrounding the passage of the Act reveals that the California legislature did not adequately consider the effectiveness of existing measures to protect children from inappropriate content—or how it might enhance the effectiveness of those measures—before enacting this law that requires a relaxation of First Amendment principles. Specifically, California might have opted to promote the Entertainment Software Rating Board's ("ESRB") rating system or even proposed suggestions for increased participation and industry enforcement of the system.

While the State certainly has an interest in helping parents protect children from being exposed to violent video games, it has not adequately explained why the ESRB system—or some enhanced variation thereof—is insufficient to achieve this goal. This Court has held that a state must justify the rejection of less restrictive alternatives in order for a content-based regulation of speech to survive strict scrutiny. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The Court should view the State's decision to ignore less restrictive means with particular suspicion where, as here, the State is asking the Court to adjust constitutional standards in order to uphold the Act.

It is imperative that the State rely on a narrowly-tailored system that protects children instead of a broadly applicable law that creates a chilling effect on a wide variety of speech and expression. In this case, the least restrictive means of achieving the State's goal of protecting children is to leave the power to regulate violent video games in the hands of the industry's own ESRB and to empower parents to understand the system. *Amicus* submits that in a freedom-loving nation such as *ours*, only as a last resort should government seek to weaken First Amendment principles through regulations--even those based on noble intentions. A far superior alternative exists: government can work with industry trade groups and agencies to increase the effectiveness of the industry's own voluntary regulatory systems. State legislatures might even invite public participation in such an effort, thus bringing the full force of marketplace demand to bear on game manufacturers and retailers. In addition to providing more deference to First Amendment values, four practical advantages of the existing system counsel in favor of leaving violent video game regulation to the ESRB and parents.

First, the ESRB uses concrete terms that are more easily understood, applied, and limited than the vague terms that the Act employs. The ESRB system informs video game purchases by two methods. Entm't Software Rating Bd., Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Jul. 19, 2010). The ESRB provides both a rating symbol to suggest the ages of players for which the game is appropriate and content descriptors to indicate what elements in the game prompted the rating. *Id.* The rating is expanded on ESRB's website to provide parents with more information explaining the game's rating and what it means. Entm't Software Ass'n, Computer and Video Game Ratings and the Law, http://www.theesa.com/policy/effective_ratings_system_argument.asp (last visited Jul. 19, 2010).

Second, the ESRB is committed to educating parents about the ratings system and ensuring that they are equipped to use it effectively when making video game purchasing decisions for their children. The ESRB joined major video game and computer software retailers to form a group known as the ESRB Retail Council ("ERC"). Entm't Software Rating Bd., ESRB Retail Council, http://www.esrb.org/retailers/retail_council.jsp (last visited Jul. 20, 2010). The ERC instituted a code that directs each member to fully support the ESRB ratings system and educate store patrons about how the system works. *Id.* As part of the ERC directive, each retailer is to display signs in conspicuous locations that explain the ESRB rating system and the store's policy to refuse sales of Mature-rated video games to children under seventeen. Entm't Software Rating Bd., ESRB Retail Council "Ratings Education and Enforcement Code," at 2 (Jun. 21, 2006), *available at* http://www.esrb.org/retailers/downloads/erc_code.pdf In furtherance of these requirements, the ESRB provides retailers with signage in multiple languages to guarantee that parents are exposed to the ratings system when entering a store to make a video game purchase. Entm't Software Rating Bd., Retailers, http://www.esrb.org/retailers/index.jsp (last visited Jul. 20, 2010). The in-store signage is designed to supplement the rating sticker that is affixed to every video game box. The State has already taken one step toward enhancing the effectiveness of in-store education by passing a statute requiring every retailer to prominently display information about the rating system. *See* Cal. Bus. & Prof. Code § 20650(b).

The ESRB's dedication to educating parents about the rating system extends to initiatives designed to reach parents at home. The ESRB has created and aired public service announcements on national, regional, and statewide levels. Entm't Software Rating Bd., Public Service Announcements, http://www.esrb.org/about/psa.jsp (last visited Jul. 20, 2010). These public service announcements have reached millions of parents via television, radio, print, outdoor locations, and the Internet. *Id.* In addition, the ESRB has partnered with many third-party organizations to provide education through channels most likely to reach parents. Groups such as the Parent Teachers Association and *Parenting* magazine have helped ensure that the ESRB is able to educate parents about the rating system. Entm't Software Rating Bd., Education & Outreach, http://www.esrb.org/about/education.jsp (last visited Jul. 20, 2010).

This outreach shows clear signs of success as parents are increasingly aware of and able to apply the rating system. The Federal Trade Commission ("FTC") conducted independent studies focused on determining the effectiveness of the ESRB rating system. The FTC compared a study it had conducted in 2000 to a study it conducted in 2006 and found that the ESRB rating system had gained tremendous support and application during the six-year span. Fed. Trade Comm'n, A Report to Congress, Marketing Violent Entertainment to Children: A Fifth Follow-up Review of Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries (Apr. 2007), *available at* http://www.ftc.gov/bcp/conline/edcams/ratings/reports.htm. Awareness of the ESRB rating system rose from 61% in 2000 to 87% in 2006. *Id.* at 27. 85% of parents restricted the types of games their children could play in 2006 as opposed to only 63% of parents in 2000. *Id.* After examining all the data, the FTC noted that "[o]verall the results of the parent and child surveys reflect positively on the ESRB system." *Id.*

Third, the new generation of video game consoles allows parents to utilize a password system to control what types of video games their children can play without direct parental supervision. Entm't Software Rating Bd., & Parent Teacher Ass'n, A Parent's Guide to Video Games, Parental Controls and Online Safety, 5 *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf (last visited Jul. 20, 2010). Games are embedded with the ESRB's rating so the system will recognize how the game is rated and respond accordingly if the parent has set up the parental controls. Note, *Faulting San Andreas: The Call to Arms for Sensible Regulation of Video Games*, 29 Hastings Comm. & Ent. L.J. 121, 146 (2006). For instance, if a parent does not want a child to play a game rated Teen or above, the parent can set up this preference and the video game system will not allow the child to play any game rated Teen or above. *See generally* A Parent's Guide to Video Games, *supra* (explaining how to set up the parental controls on each next generation video game console).

Fourth, retailers are increasingly consistent in applying their minimum age requirements for purchasing violent video games thanks to pressure from the public and the ESRB. The FTC conducted mystery shopper audits designed to test the efficacy of retailers' policies to refuse sales of Mature-rated video games to children under the age of seventeen. Fed. Trade Comm'n, Undercover Shoppers Find It Increasingly Difficult for Children to Buy M-Rated Games (May 2008), *available at* http://www.ftc.gov/opa/2008/05/secretshop.shtm. This study found that the rate at which retailers enforce their age requirement policies increased dramatically between the years 2000, when they only enforced their policies 15% of the time, and 2008, when they enforced their policies 80% of the time. *Id.* Although retailer enforcement is not universal, it is dramatically better when applied to video games than when applied to other media, such as tickets to R-rated movies or the sale of R-rated DVDs. *Id.* The dramatic increase in enforcement is a direct result of increased public pressure to protect children and increased focus by the ESRB to train retail employees.

The State asserts that the Act should be upheld as constitutional because the ESRB and parents cannot control the video games children play (Pet.

Br. 58). This assertion presumes that the ESRB rating system is ineffective and that parents do not act upon the rating information they are given. But the statistics show otherwise. Entm't Software Rating Bd., Consumer Research, http://www.esrb.org/about/awareness.jsp (last visited Jul. 20, 2010). The FTC found that 89% of parents are involved in the purchase or rental of video games for their children. *Id.* 98% of parents feel the ESRB rating system is either very helpful or somewhat helpful, and 98% of parents are either very confident or somewhat confident that the ESRB rating information accurately describes the content of the video game. *Id.* Furthermore, "[a] court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 824.

Rather than rely on an argument for the erosion of First Amendment standards, the State should use the least restrictive means to achieve its interest by working with parents and the ESRB to fortify the current regulatory system. The State should take advantage of the ESRB's proven willingness to work with states to educate citizens about the existing rating system.

CONCLUSION

The record calls into question whether the State's motivation for passing the Act was truly to enhance parental authority or rather to usurp that authority and replace the State's own judgment for that of parents. Either way, *Amicus* believes that the actual, long-term effect of the Act will be to undermine parents' roles in the lives of their children. By purporting to ensure that minors will not play violent games unless their parents specifically consent (an impossible undertaking), the State effectively gives the nod to parents to go to sleep at the wheel. Surely, a nation of disengaged parents poses an even greater threat to our young people than exposure to violent games.

Finally, the Act cannot pass constitutional muster under strict scrutiny, which remains the appropriate level of review for its content-based restrictions. The cited research does not support the State's claim that the regulation is justified by a compelling interest in preventing harm to the minors who play the games, and the Act is not the least restrictive means of achieving any of the State's asserted objectives.

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AMICUS
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BRIEF

No. 08-1448

IN THE
Supreme Court of the United States

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF SOCIAL SCIENTISTS, MEDICAL SCIENTISTS, AND MEDIA EFFECTS SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 82 scholars with expertise in psychology, psychiatry, neuroscience, criminology, media studies, communication, and other fields. *Amici* have extensive experience with the research regarding the effects on individuals of media violence, including violence in video games. *Amici* believe that California's ban on the sale and rental of violent video games to minors is based on profoundly flawed research and disregards recent empirical evidence contradicting the harm to minors that California asserts arises from the playing of violent video games (or any other harm). *Amici* submit this brief to respond to the evidentiary claims made in California's brief and in the amicus brief of Senator Leland Yee et al. ("Senator Yee").

The appended List of Scholars identifies each of the individual amici.

INTRODUCTION AND SUMMARY OF ARGUMENT

As respondents explain, California's ban on the sale and rental of certain video games to minors is subject to strict scrutiny because it directly regulates video games based on the content of a game, *i.e.*, whether the game is deemed "violent." California asserts that its law is necessary to "prevent[] psychological or neurological harm to minors who play violent video games." Pet App. 23a. Under strict scrutiny, California must both provide "substantial evidence" that the video games it regulates cause psychological or neurological harm to minors who play them, and demonstrate that the restriction will "alleviate these harms in a direct and material way." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 664, 666 (1994). *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002).

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[1] The parties have consented to the filing of this brief in letters that are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, this brief was not written in whole or in part by counsel for any party and no person or entity other than counsel for *amici* has made a monetary contribution to the preparation and submission of the brief.

California has done neither. Indeed, California does not offer any reliable evidence, let alone substantial evidence, that playing violent video games causes psychological or neurological harm to minors. California confesses it cannot prove causation, but points to studies that it says show a "correlation" between the two. Pet. Br. 52. But the evidence does not even do that.[2]

California and Senator Yee also cite studies that purport to show a link between the playing of violent video games and violent, aggressive, and antisocial behavior by minors. But in the court of appeals, California expressly disclaimed any interest in regulating video games sales and rentals to minors to prevent such conduct, Pet. App. 23a-24a, and therefore these studies are waived because the argument was waived. The studies are of no help to California in any event because they document neither a causal connection nor a correlation between the playing of violent video games and violent, aggressive, or antisocial behavior.

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[2] Amici do not address California's argument that, to satisfy strict scrutiny, it need only show a correlation between violent games and the harms it seeks to prevent. Pet. Br. 48-49. Nor do amici address California's threshold argument that strict scrutiny is inapplicable on the grounds that, when sold to minors, violent video games are not protected by the First Amendment at all. *Id.* at 13.

Indeed, whether attempting to link violent video games with psychological and neurological harm or with violent, aggressive, and antisocial behavior, all of the studies that California and Senator Yee cite suffer from inherent and fundamental methodological flaws.

- The survey of aggressive behavior. The courts below carefully considered this survey and correctly discredited it because the questions it posed are simply not valid indicators for actual violent or aggressive behavior and because it fails to account or control for other variables that have been proven to affect the behavior of minors.

- The laboratory experimental study of aggression. This study, too, was rightly discounted by the courts below because it relies on proxies for aggression that do not correlate with aggressive behavior in the real world.

- The "meta-analysis" of video game violence research. A meta-analysis combines the results of many other studies on a particular subject. But the accuracy and utility of any meta-analysis depends on the quality of the underlying studies themselves. Put another way, a meta-analysis of scientifically unreliable studies cannot cure the studies' flaws. Here, the meta-analysis on which Senator Yee relies was compromised because it was based on studies that used invalid measures of aggression.

- "Longitudinal" studies of aggression. A longitudinal study analyzes participants on many occasions over an extended period. The studies that Senator Yee cites are not longitudinal because they observed participants on only a few occasions and over just a short period of time. Additionally, those studies both failed to account for other variables that may explain aggressive behavior and used invalid measures of aggression.

- Neuroscience studies. These studies supposedly show a connection between playing violent video games and altered brain activity. The courts below properly concluded that they do not. Further, the neuroscience studies are rooted in fundamentally flawed statistical methodologies and do not address the cause of brain activation and deactivation in children.

Methodological flaws are only the beginning of the studies' problems. Both California and Senator Yee repeatedly exaggerate the statistical significance of the studies' findings, failing to inform the Court of express disclaimers and cautionary statements in the studies about the nature of their findings.

Finally, California and Senator Yee ignore a weighty body of scholarship, undertaken with established and reliable scientific methodologies, debunking the claim that the video games California seeks to regulate have harmful effects on minors.

ARGUMENT

I. CALIFORNIA'S ASSERTED INTEREST IN PREVENTING PSYCHOLOGICAL AND NEUROLOGICAL HARM TO MINORS IS NOT SUPPORTED BY ANY RELIABLE, LET ALONE, SUBSTANTIAL EVIDENCE.

A. California's Studies Do Not Show A Causal Link, Or Even A Correlation, Between Playing Violent Video Games And Psychological Or Neurological Harm To Minors.

California's ban on the sale and rental of violent video games to minors rests on the same flawed studies that court after court has rejected. Pet. Br. 52-56; Pet. App. 27a-32a, 63a-64a; *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1059-1067 (N.D. Ill. 2005), *aff'd* 469 F.3d 641 (7th Cir. 2006); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958-59 (8th Cir. 2003); *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 578-79 (7th Cir. 2001) ("AAMA"); *Entertainment Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 832 (M.D. La. 2006); *Entertainment Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1069-70 & n.2 (D. Minn. 2006); *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 652-54 (E.D. Mich. 2006). The courts were right to reject these studies because they do not even establish the "correlation" between violent video games and psychological harm to minors that California says exists, let alone the causation of harm that, as respondent explains, the First Amendment requires. Nor do the studies show a connection between playing violent video games and violent or aggressive behavior of minors, which explains why California disclaimed that interest below.

First, California points to a 2004 study by Douglas Gentile of approximately 600 eighth and ninth-grade students. Pet. Br. 52-53 (citing JA 600). These students completed surveys that asked questions about the types of video games they preferred and how "violent" they were. (The survey did not provide any definition of "violent.") The survey also recorded how often the students played the games; the students' hostility level; how often they had argued with teachers during the past year; their average grades; and whether they had been in a physical fight in the past year. JA 613-15. From the survey answers, Gentile concluded that "[a]dolescents who expose themselves to greater amounts of video game violence" were more hostile and reported getting into more arguments with teachers and physical fights and performing poorly in school. JA 601.

Although California relies heavily on the Gentile survey, Pet. Br. 52-53, it has absolutely no relevance here. The survey examines only the purported connection between video game violence and "aggressive behavior" or "physical aggression" towards third parties. Pet. Br. 53. It does not study, and says nothing about, the psychological or neurological harm allegedly caused to those who play violent video games, which is the only interest that California defended below and thus is the only interest that is properly before this Court. Pet. App. 24a.

Even if the Gentile survey were relevant, it simply does not say what California says it does. California states that the survey "suggest[s] a causal connection between playing violent video games and aggressive behavior." Pet. Br. 53. It does no such thing. The survey makes absolutely no finding that exposure to violent video games leads to physical aggression. To the contrary, it explicitly cautions against making that inference: "It is important to note . . . that this study is limited by *its correlational nature. Inferences about causal direction should be viewed with caution.*" JA 638 (emphasis added); see also JA 632-33 ("Are young adolescents more hostile and aggressive because they expose themselves to media violence, or do previously hostile adolescents prefer violent media? Due to the correlational nature of this study, we cannot answer this question directly.").

Beyond that, the Gentile survey is rife with methodological flaws that undermine even the suggested correlation. For example, the measures of "aggressive behavior" that Gentile employed are highly suspect. Having an argument with a teacher – without any further exploration into the nature of the event – does not even suggest violent or aggressive behavior. And simply asking students whether they had been in a fight – again, without any further analysis of the event – is not a valid indicator for violent or aggressive behavior.[3]

Additionally, there are many factors that may influence youth violence or aggressive behavior, including: family violence, antisocial personality traits, and association with delinquent peers. *See* Herrenkohl et al., *Risk Factors for Violence and Relational Aggression in Adolescence*, 22 Journal of Interpersonal Violence 386 (2007); *see also* Savage,

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[3] The validity of the methodology for measuring aggression refers to whether the methodology has been proven reliable at predicting actual aggression in the real world. Kutner & Olson, GRAND THEFT CHILDHOOD 69, 71-74 (Simon & Schuster 2008). Well-validated measures include those that directly measure specific physically or verbally aggressive behaviors toward another person (hitting, kicking, insults, etc.); crime data; or clinical scales that have been empirically shown to relate to real-world physical aggression or violence (such as the Child Behavior Checklist, p. 31, below). Ferguson & Kilburn, *The Public Health Risks of Media Violence: A Meta-Analytic Review*, Journal of Pediatrics 759, 760 (2009). Poorly validated measures are those that are not standardized or have not proven to have any reliability in predicting actual aggression. *Id.; see* Grimes et al., MEDIA VIOLENCE AND AGGRESSION: SCIENCE AND IDEOLOGY 76-78 (Sage 2008) (describing how definition and measurement of "aggression" in many media effects studies have been "exercises in abstraction" without any "coherent protocol of measurement that is predictive of behavior").

The Role of Exposure to Media Violence in the Etiology of Violent Behavior: A Criminologist Weighs In, 51 American Behavioral Scientist 1123, 1127 (2008) ("A focus on media violence literature, where we might find some correlations in a subset of studies, would lead to an exaggerated view of the importance of media violence in the etiology of violent behavior if we ignore the empirical evidence on other individual factors and situational factors."). Because Gentile's survey failed to control for, or even consider, those other variables, its conclusion that there is a correlation between video games and hostility to third parties lacks scientific grounding.[4] In fact, controlling for gender alone removes most of the variance from which Gentile finds a correlation. Ferguson, *Blazing Angels or Resident Evil? Can Violent Video Games Be a Force for Good?*, 14 Review of General Psychology 74-75 (2010). In other words, the correlation Gentile claims to find is equally explainable by the effect of gender: boys tend to play more violent video games and tend to be more aggressive. *Id.*

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[4] Overlooking "third" variables is a common flaw of studies claiming to find a correlation between violent video game play and aggression. *E.g.*, Ferguson et al., *Violent Video Games and Aggression*, Criminal Justice and Behavior 312 (2008) (explaining "sparse research on violent video games often overlooks 'third' variables," such as family environment and innate aggression); *see also* Freedman, MEDIA VIOLENCE AND ITS EFFECT ON AGGRESSION: ASSESSING THE SCIENTIFIC EVIDENCE 130-133 (Univ. of Toronto Press 2002) (recognizing "many factors" could produce the "weak" correlations between media violence and aggression researchers claim to have found).

Second, California points to a 2004 study of 130 college students by Craig Anderson. Pet. Br. 53 (citing JA 479, 493-94). That study measured the blood pressure of students before, during, and after playing selected video games and had students take a "word completion" test after playing selected video games. JA 497. Based on the resulting measurements, Anderson concluded that the students' blood pressure increased while playing certain video games he labeled "violent" and that game play "increase[d] . . . the accessibility of aggressive thoughts." JA 507.

The Anderson study is no help to California, because it does not show that a rise in students' blood pressure has any relationship to whether violent video games cause psychological or neurological harm. Nor does California show how "aggressive thoughts" leads to psychological harm.[5]

Laboratory experiments, like Anderson's, that measure aggression immediately following the playing of a video game are common in the field of media effects research. *See generally* Kutner & Olson, *supra*, at 73-74. And like Anderson's, these experiments rely on proxies for *real* aggressive or violent behavior, such as the participants' willingness to administer blasts of white noise against an unseen (and non-existent opponent). Freedman, *supra*, at

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[5] Both California and Senator Yee claim there is a connection between violent video game play and "aggressive thinking." Pet. Br. 52; Yee Br. 11, 18, 26. But preventing "aggressive thinking" is not a constitutionally legitimate state interest. *Free Speech Coalition*, 535 U.S. at 253.

60-63. The problem is that the proxies bear no relationship to whether someone is going to act aggressively or violently in the real world. Kutner & Olson, *supra*, at 73-74.[6] Similarly, giving participants words with blank spaces and evaluating whether they make "aggressive" or "non-aggressive" words with the letters they fill in (*i.e.*, "explo_e" could be completed as "explore" or "explode"), as Anderson did in his experiment, JA 496, has no known validity for measuring aggressive behavior (or even aggressive thinking).[7]

Third, California points to a 2004 study of fourth and fifth-grade students by Jeanne Funk, and claims it "found that playing violent video games was correlated with lower empathy as well as stronger pro-violence attitudes." Pet. Br. 53 (citing JA 705-06). But the Funk study specifically disclaimed any proof of causality. JA 730. As Funk admitted, the children in her study whose scores indicated lower empathy or stronger pro-violence attitudes may simply have been drawn to violent video games. *Id.* Moreover, the small sample size – just 150 children – and the failure to control for or consider any other variables undermine even the study's tentative conclusion of a correlation between violent video games and pro-violence attitudes.

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[6] *See also* Ritter & Eslea, *Hot Sauce, Toy Guns and Graffiti: A Critical Account of Current Laboratory Aggression Paradigms*, 31 Aggressive Behavior, 416-18 (2005) (summarizing problems with laboratory aggression paradigms).

[7] California also cites (Pet. Br. 56), without any discussion, other articles by Anderson that the district court and the court of appeals considered and rejected. Additionally, California cites (*id.* at 54) an article summarizing a meta-analysis that Anderson conducted in 2004. But that study contained "readily admitted flaws." Pet. App. 29a.

B. The Additional Studies Cited By Senator Yee Do Not Support California's Ban On The Sale And Rental Of Violent Video Game Sales To Minors.

Senator Yee's brief boldly declares that "science confirms that violent video games are harmful to minors." Yee Br. 10. But the studies he discusses do not show that.

Senator Yee leans heavily on a one-page statement by some researchers, who did not join his amicus brief. Yee Br. 11. That statement focuses on whether violent video games increase the likelihood of "aggressive behavior," which is the interest that California disclaimed below. Pet. App. 24a. With respect to the interest that California defended below – whether violent video games cause psychological or neurological harm to minors – the statement offers only one line at its tail end expressing concern about aggressive "thinking," aggressive "feelings," desensitization, and a decrease in "pro-social" behavior. But if the First Amendment means anything, it means government cannot ban speech to stop thoughts or feelings, and certainly not to promote "pro-social" behavior.

Aside from his reliance on the one-page statement of scholars, Senator Yee refers to "recent research," "new data," and "hundreds of studies" regarding the effects of violent video games. Yee Br.

5, 6. But there rarely are citations in Senator Yee's brief to support these broad assertions.[8]

Read carefully, the "recent research" and "new data" that Senator Yee offers boils down to: (1) a meta-analysis conducted by Craig Anderson, (2) a book co-authored by Anderson and Douglas Gentile, (3) certain purported "longitudinal studies," (4) broad policy statements of the American Academy of Pediatrics and the American Psychological Association, and (5) a few neuroscience studies. None of these sources provides substantial evidence that violent video games cause psychological or neurological harm to minors or lead to violent, aggressive, or antisocial behavior in minors.[9]

1. Anderson Meta-analysis. This recent study is labeled a "meta-analysis" of video game violence research. Anderson et al., *Violent Video Game*

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[8] At times, Senator Yee does reference specific books, but fails to provide any substantiating internal page cites. *E.g.*, Yee Br. 17 & n.20.

[9] Senator Yee also cites an "upcoming publication" by Anderson and Gentile that supposedly "contemplate[s] the effects of playing video games" by "discuss[ing]" theoretical perspectives. Yee Br. 17, n.22. This source is not yet publicly-available, and Senator Yee has not shared it with the Court or the parties. Additionally, Senator Yee refers to some studies that supposedly show a "negative correlation" between school performance and time spent playing video games, Yee Br. 12, n.7, 19-20, and the addictive potential of video games, *id.* at 18-19. These studies concern *all* video games, not the subset of video games that California seeks to regulate. And the poor school performance and video game addiction that the studies supposedly document are not interests that California advances for its regulation.

Effects on Aggression, Empathy and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review, 136 Psychological Bulletin 151 (2010). "Meta-analysis" is a research technique that merges the results of many studies on a particular topic using statistical analysis.

The accuracy and usefulness of this tool necessarily depends, however, on the choice and quality of the studies that are merged for analysis, and the "end-product will never be better than the individual studies that make up the meta-analysis."[10] Anderson's study is an example of how a meta-analysis can simply compound the methodological flaws in the underlying studies.

For example, Anderson's meta-analysis combines studies that used methods for measuring aggression that have not been proven to be valid. Ferguson & Kilburn, *Much Ado About Nothing: The Misestimation And Overinterpretation of Violent Video Game Effects in Eastern and Western Nations: Comment on Anderson et al.*, 136 Psychological Bulletin 174, 175-76 (2010). By incorporating those studies into his analysis, Anderson replicated their methodological flaws in his meta-analysis, severely eroding the reliability of its findings.

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[10] Gliner et al., *Meta-Analysis: Formulation and Interpretation*, 42 Journal of the American Academy of Child and Adolescent Psychiatry 1376-79 (2003). *See* Olson, *Media Violence Research and Youth Violence Data: Why Do They Conflict*, 28 Academic Psychiatry 144, 147-48 (2004) (discussing meta-analyses and concluding that studies are frequently combined in a manner that renders the results ineffective for use by policymakers).

Additionally, the process by which Anderson selected the studies for inclusion in the meta-analysis casts serious doubt on the results. Anderson reasonably included some unpublished studies in his meta-analysis given the risk of publication bias in the field of violent video game effects research.[11] But the process by which Anderson selected unpublished studies – he included his own unpublished work and the work of others whose conclusions mirror his, and excluded a wealth of unpublished studies from a contrary perspective – injected more, not less, bias into the analysis. Ferguson & Kilburn, *supra*, at 175.

Notably, Senator Yee fails to mention that the methodology of Anderson's meta-analysis was resoundingly criticized in the very same issue of the journal in which the meta-analysis was first published. Ferguson & Kilburn, *supra*.[12]

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[11] The problem of publication bias in meta-analytic research – also termed the "file drawer problem" – is the recognition that the research published in scholarly journals does not represent all of the existing research on video game effects. Kutner & Olson, *supra*, at 81-82. It is generally recognized that articles with positive results (i.e., studies purporting to find a relationship between video game violence and harm) are selected for publication more often than articles which report negative results. *Id.*; Ferguson, *Evidence for Publication Bias in Video Game Violence Effects Literature: A Meta-Analytic Review*, 12 Aggression and Violent Behavior 470, 473 (2007). There are, however, accepted statistical methods for estimating and accounting for publication bias in meta-analytic research.

[12] Along with some of his co-authors, Anderson responded to the criticism of his meta-analysis. *See* Bushman et al., *Much Ado About Something: Violent Video Game Effects and a School*

Leaving the methodological flaws aside, Anderson's meta-analysis does not support Senator Yee's sweeping claims that it contains "definitive findings" and "unequivocal evidence" that "prove[s]" playing violent video games increases aggressive thoughts and behavior. Yee Br. 26, 28. That is because the estimated "effect size" between playing violent video games, on the one hand, and aggressive behavior, on the other, that Anderson identified is minimal. Anderson et al., *supra*, at 170. An "effect size" estimate represents the proportion of shared variance between two variables. It is, roughly speaking, the degree to which one variable can predict the other improving upon chance alone. For example, an effect size of 1% means that knowing variable x (playing violent video games) for an individual would be 1% better than chance alone in predicting whether that individual was likely to engage in aggressive or violent behavior. In contrast, an effect size of 100% means that the variable is a fully accurate predictor.

In his meta-analysis, Anderson concedes that the estimated effect size between playing violent video games and aggressive behavior is "small," specifically, 0.152 or 2.31%. Anderson et al., *supra*, at 170. Thus, the effect size that Anderson himself calculates – far

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of Red Herring: Reply to Ferguson and Kilburn, 136 Psychological Bulletin 182 (2010). The response, however, repeats many of the same claims made in the Anderson meta-analysis and relies on the same erroneous assertions – such as the claim that video game violence effects are as strong as effects found in medical research – that have been debunked in the scholarship. *See* footnote 13, below.

from being a significant "causal risk factor," Yee Br. 26 – means that playing violent video games is only 2.31% better than chance alone at predicting whether that individual will engage in aggressive behavior.[13] And even that insignificant effect size is likely inflated because Anderson's study did not control for well-accepted risk factors for aggressive behavior, such as the influence of peers and family. Ferguson & Kilburn, *supra*, at 177.

Finally, other meta-analytic research that incorporated studies with valid and reliable methodologies, properly accounted for publication bias, and controlled for "third" variables have found little evidence that violent video games cause psychological harm (or any other harm) to minors.

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[13] Even a lay examination of Anderson's small effect size calls into question Senator Yee's assertion that the relationship between media violence and aggression is "nearly as strong" as the relationship between cigarette smoking and lung cancer, Yee Br. 17. *See, e.g.*, American Cancer Society, Smoking and Cancer Mortality Table, available at http://ww2.cancer.org/docroot/PED/content/PED_10_2X_Smoking_and_Cancer_Mortality_Table.asp (listing smoking as the cause of 87% of lung cancer deaths among men and 70% among women). Indeed, scholars long ago assessed the asserted link between media effects and smoking research, concluded it was grossly overinflated, and conclusively debunked it. *E.g.*, Block & Crain, Comment, *Omissions and Errors in "Media Violence and the American Public,"* 62 American Psychologist 252 (2007) (criticizing 2001 Anderson article making this assertion as based on "incorrectly calculated" data); Ferguson, *Is Psychological Research Really as Good as Medical Research?*, 13 Review of General Psychology 130 (2009) (recognizing flawed calculations and cautioning against making such comparisons between psychological and medical research).

For example, in a 2009 study published in the Journal of Pediatrics, Dr. Christopher Ferguson and Dr. John Kilburn conducted a meta-analytic review of studies that considered the impact of violent media on aggressive behavior. They relied on studies that used well-validated measures for assessing aggressive behavior, properly corrected for publication bias, and controlled for well-accepted risk factors for aggressive behavior. Ferguson & Kilburn, *Public Health Risks, supra*, at 759-60. The results suggest that the overall effect for exposure to media violence (both television and video game violence) was less than 1%. *Id.* at 761. Thus, the authors concluded that the results of their study "do not support the conclusion that media violence leads to aggressive behavior." *Id.* at 759.[14]

In another recent meta-analytic study, Dr. John Sherry concluded that while there are researchers in the field who "are committed to the notion of powerful effects," they have been unable to prove such effects; that studies exist that seem to support a relationship between violent video games and aggression but other studies show no such relationship; and that research in this area has employed varying methodologies, thus "obscuring clear conclusions." Sherry, *Violent Video Games and Aggression: Why Can't We Find Effects?*, Mass Media Effects Research: Advances Through Meta-Analysis 231, 232 (2007); see also Sherry, *The Effects of Violent Video Games on Aggression: A Meta-Analysis*, 27 Human Communication Research 409-31 (2001). Although Dr. Sherry "expected to find fairly clear, compelling, and powerful effects," based on assumptions he had formed regarding video game violence, he did not find them. Sherry, *Violent Video Games, supra*, at 231, 245. Instead, he found only a small relationship between playing violent video games and short-term arousal or aggression and further found that this effect lessened the longer one spent playing video games. *Id.* at 243-45.

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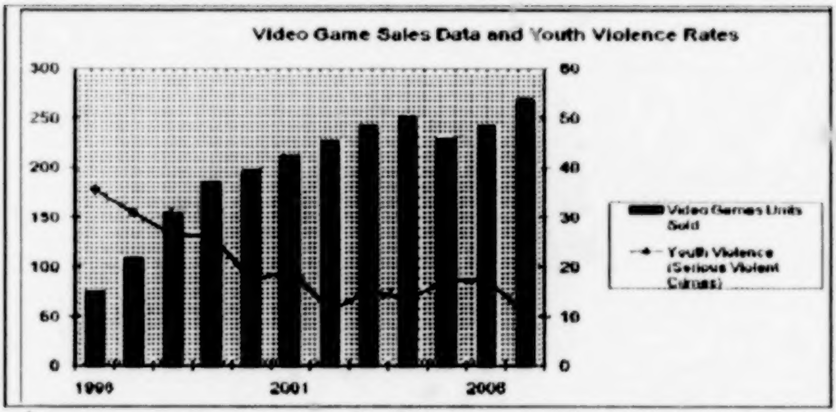
[14] Dr. Ferguson has published two other recent meta-analytic studies that similarly found no relationship between playing violent video games and aggressive behavior. *See* Ferguson, *The Good, The Bad and The Ugly: A Meta-Analytic Review of Positive and Negative Effects of Violent Video Games*, 78 Psychiatric Quarterly 309 (2007) (surveying articles published between 1995 and April 2007 and finding "no support for the hypothesis that violent video game playing is associated with higher aggression"); Ferguson, *Evidence For Publication Bias, supra*, at 480 (concluding that existing literature "has not provided compelling support to indicate either a correlational or causal relationship between violent video game play and actual aggressive behavior").

Such small and inconclusive results prompted Dr. Sherry to ask: "[W]hy do some researchers continue to argue that video games are dangerous despite evidence to the contrary?" *Id.* at 244. Dr. Sherry further noted that if violent video games posed such a threat, then the increased popularity of the games, would lead to an increase in violent crime. *Id.* But that has not happened. Quite the opposite, during the same period that video game sales, including sales of violent video games, have risen, youth violence has dramatically declined.



(Source: Ferguson & Olson et al., *Violent Video Games, Catharsis Seeking, Bullying, and Delinquency: A Multivariate Analysis of Effects*, Crime & Delinquency 5 (2010))

2. Anderson and Gentile Book. Senator Yee touts a "recent book" (Yee Br. 16-17), co-authored by Anderson and Gentile, that asserts there are "reasons to expect" larger effects from exposure to violent video games because of their interactive nature. Anderson, Gentile, & Buckley, VIOLENT VIDEO GAME EFFECTS ON CHILDREN AND ADOLESCENTS: THEORY, RESEARCH, AND PUBLIC POLICY 135 (Oxford Univ. Press 2006). But that assertion rests on the same old research of Anderson and Gentile that has been rejected as fundamentally flawed by every court that has considered it. Pet. App. 29a, 64a; *see, e.g.*, *Blagojevich*, 404 F. Supp. 2d at 1063 ("Dr. Anderson also has not provided evidence to show that video games . . . are any more harmful than violent

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television, movies, internet sites or other speech-related exposure.").[15]

3. Longitudinal Studies. A longitudinal study examines a subject on several occasions over an extended period of time. *See* Kutner & Olson, *supra*, at 68-69. Both Anderson and Gentile (the main proponents of the idea that violent video games have harmful effects on minors) acknowledged in the record below that "there is a 'glaring empirical gap' in video game violence research due to 'the lack of longitudinal studies'" (Anderson) and that therefore "longitudinal research is needed" (Gentile). Pet. App. 28a, 30a.

Senator Yee claims that this gap has now been closed: according to Senator Yee, longitudinal studies of violent video games have been done and have proven harmful effects. Yee Br. 26. But Senator Yee provides no citations to support this proposition.

Amici are aware of one recent study of students in the United States and Japan that Anderson has described as "longitudinal" data that "confirm[s]" that playing violent video games is an "important causal risk factor for youth aggression." Anderson et al., *Longitudinal Effects of Violent Video Games in Aggression in Japan and the United States*, 122 Pediatrics 1067 (2008). But there is nothing "longitudinal" about this study. Rather than studying participants multiple times over extended periods, it surveyed participants only twice and with only a few months lag in between. Additionally, the flaws that taint Anderson's other research (*e.g.*, failing to control for "third" variables and using measures of aggression that have not been proven reliable) recur in this study. Finally, Anderson's sweeping assertion of a causal connection is belied by the study's insignificant effect sizes (between .152 and .075, or 0.5% and 2.3%).[16]

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[15] Anderson admitted in his testimony in *Blagojevich* that his previous studies did not find greater effects for video game violence than other forms of media. JA 1263.

4. Policy Statements. Senator Yee cites policy statements of two organizations, the American Academy of Pediatrics and the American Psychological Association, that violence in the media generally is a risk to minors. Yee Br. 10-12. But these pronouncements indict violence in *all* media, not just video games, and thus, if acted upon, would open the door to sweeping governmental restrictions on speech in films and on the Internet that even California does not propone.

Further, broad organizational pronouncements, like those in the policy statements that Senator Yee cites, are not based on a serious analysis of the relevant scientific evidence. See, e.g., Freedman, *supra*, at 9 ("Although they have all made unequivocal statements about the effects of media violence, it is almost certain that not one of these organizations conducted a thorough review of the research. They have surely not published or made available any such review."). The lack of any detailed analysis underpinning the statements is illustrated by (a) the American Academy of Pediatrics' assertion that "*[m]ore than 3500 research studies* have examined the association between media violence and violent behavior; all but 18 have shown a positive relationship," American Academy of Pediatrics, *Media Violence*, 108 Pediatrics 1222 (2001), emphasis added (cited at Yee Br. 11), and (b) an assertion in a 2000 joint statement of medical and psychological groups that "*well over 1000 studies* . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children," JA 378, emphasis added (quoted at Pet. Br. 44). The rub is that there have not been over 3500 – or even over 1000 – scientific studies done on this topic. And the studies that have been conducted do not reach the uniform or "overwhelming" conclusion that the organizations claim they do. Freedman, *supra*, at 9; *see also* Kutner & Olson, *supra*, at 78. Finally, it is telling that the citations in the policy statements on which Senator Yee relies are to the flawed studies that were incorporated into Anderson's meta-analysis.

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[16] Anderson's article in Pediatrics on the purported longitudinal study of students in the United States and Japan also states that he had conducted a previous longitudinal study. *Aggression in Japan and the United States*, *supra*, at 1068 (citing Anderson, Gentile, & Buckley, *supra*). But that study is not longitudinal either because it measured students at only two points during a single school year. It also reported an insignificant effect size (.13, or 1.7%), which would likely have shrunk even further if "third" variables had been controlled. Anderson, Gentile, & Buckley, *supra*, at 104 (Table 6.3).

5. Neuroscience Research. California's ban on the sale and rental of violent video games to minors is based on an assumption that "[e]xposing minors to depictions of violence in video games . . . makes those

minors more likely . . . to experience a reduction of activity in the frontal lobes of the brain." Pet. App. 8a. In both the trial court and the court of appeals, California relied on research by William Kronenberger that purported to identify a connection between violent video games and altered brain activity using functional magnetic resonance imaging ("fMRI") technology. Pet. App. 31a. But every single court to review Kronenberger's fMRI research, including the courts below, have found no such connection. *Id.*; *See, e.g., Blagojevich*, 404 F. Supp. 2d at 1063-65; *Granholm*, 426 F. Supp. 2d at 653. California has now abandoned all reliance on Kronenberger's fMRI research or any other fMRI study.

Senator Yee, however, invokes Kronenberger's fMRI research, as well as a handful of other neuroscience articles, claiming that they show "a critical link" between virtual violence and altered brain functioning. Yee Br. 24. They do no such thing.

To begin with, Senator Yee fails to acknowledge the intense debate in the scientific community, widely reported in both the academic and popular press, regarding whether fMRI technology is being misused and its results being exaggerated. *See, e.g.*, Lehrer, *Picturing Our Thoughts*, The Boston Globe, Aug. 17, 2008; Vul et al., *Puzzlingly High Correlations in fMRI Studies of Emotion, Personality, and Social Cognition*, 4 Perspectives on Psychological Science 274 (2009); *see also* Hotz, *The Brain, Your Honor, Will Take the Witness Stand*, The Wall Street Journal, Jan. 15, 2009 (reporting scholars' criticism that fMRI brain scans cannot be used as legal evidence because they are "easily manipulated" and "can't be trusted yet"); Begley, *Of Voodoo and the Brain*, Newsweek, Jan. 31, 2009 (reporting scholars' claim that many published fMRI studies show "voodoo correlations," methods and analysis so poor that they must be redone); Begley, *Brain Imaging and (More) Voodoo, But Politer*, Newsweek, April 27, 2009 (asking "isn't it time the fMRI community came to grips with the growing criticism of its methods"); Hamilton, *False Signals Cause Misleading Brain Scans*, National Public Radio, July 7, 2009 (reporting "furious debate" as to whether flaws in statistical analysis have made fMRI results "appear stronger than they really are" and that "even the strongest defenders of fMRI acknowledge that there are problems"); Sanders, *Trawling the Brain*, ScienceNews, Dec. 19, 2009 (describing growing concern in scientific community as to fMRI's reliability and warning that "the singing of fMRI's praises ought to be accompanied by a chorus of caveats"); Logothetis, *What We Can Do and What We Cannot Do with fMRI*, Nature, June 2008 ("[F]undamental questions concerning the interpretation of fMRI data abound, as the conclusions drawn often ignore the actual limitations of the methodology.").

As many scholars have cautioned, fMRI studies of brain activation have inherent methodological issues that make them difficult to understand and interpret. In a typical fMRI experiment, a subject is placed in a tube-shaped machine (just like the one used for an ordinary MRI test), told to lie perfectly still and then to perform some experimental task, such as looking at an image and making a decision. Magnets detect the ratio of the change between oxygenated and deoxygenated blood in a specific region of the brain. A complicated statistical analysis is then used to turn that signal into an "activation" in the brain. The underlying assumption is that active neurons require more oxygen to work and, therefore, more oxygen means greater neuronal activity.

A central problem, however, is that while fMRI studies may indicate areas of the brain that decrease in activation during a task, deactivations that may occur simultaneously are not well understood and, thus, are only tentatively discussed in published fMRI studies. *See, e.g.*, Kalbfleish, *Getting to the Heart of the Brain: Using Cognitive Neuroscience to Explore the Nature of Human Ability and Performance*, 30 Roeper Review 165 (2007). Additionally, it is not yet understood how brain activation is influenced by neural development in children. *Id.*

Further, because fMRI studies depend on statistical analysis, errors in the method or procedure of that analysis may undermine the reliability of the results. *See* Vul et al., *supra.* A recent study surveyed 55 fMRI studies on brain activation and emotion, personality, and social cognition and found that, in about half of these studies, the methods and analysis were so flawed that the results were "entirely spurious correlations." *Id.* at 274.

On top of the inherent limitations of fMRI research generally, the particular fMRI studies that Senator Yee cites – three studies conducted in part by Kronenberger and one study conducted by Rene Weber – have their own specific flaws and their results are so inconclusive that they do not remotely support the asserted link between playing video games and altered brain functioning.

The Kronenberger articles — each of which expressly states that it was funded by a grant from the anti-media violence Center for Successful Parenting[17] — set forth findings that are so qualified as to render them meaningless.

In the most recent Kronenberger study, *see* Yee Br. 21 (citing Hummer et al., *Short-Term Violent Video Game Play by Adolescents Alters Prefontal Activity During Cognitive Inhibition*, 13 Media Psychology 136 (2010)), forty-five adolescents were divided into two groups, with one group playing a car racing video game and the other group playing a shooting game. After thirty minutes of play, each participant was subjected to an fMRI scan, during which they were required to press a button for each letter that was displayed, except for the letter x, for which there was no response. Looking at the resulting data, Kronenberger and his co-authors made the broad conclusion that there were lower activity levels for the shooting game in regions of the brain "*thought to be involved* in cognitive inhibition." *Id.* at 147 (emphasis added).

As a threshold matter, this study cannot possibly support California's claim that violent video game cause harm to minors because a decrease in activity in an area of the brain is not necessarily a negative effect and, instead, may indicate nothing more than expertise in a practiced task. *See, e.g.*, Poldrack et al., *The Neural Correlates of Motor Skill Automaticity*, 25 Journal of Neuroscience 5356 (2005). The mere fact that the brain changes as it responds to stimuli does not prove that the stimuli are harmful.

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[17] The Center for Successful Parenting is a group that describes itself as "an advocate of eliminating children's exposure to violence and sex in media venues." Center for Successful Parenting, http://www.sosparents.org.

Additionally, the study's own express qualifications undercut its findings. The authors admitted that the two video games chosen differed in ways other than the presence or absence of violent content and thus created "potential confounds" for the results. Hummer et al., *supra*, at 149.

The two other studies conducted in part by Kronenberger did not consider exposure to video games specifically, just "media violence" generally, and thus do not support California's claim that violent *video games* cause harm to minors. See Kronenberger et al., *Media Violence Exposure and Executive Functioning in Aggressive and Control Adolescents*, 61 Journal of Clinical Psychology 725, 726 (2005) (cited at Yee Br. 21); Mathews et al., *Media Violence Exposure and Frontal Lobe Activation Measured by Functional Magnetic Resonance Imagine in Aggressive and Nonaggressive Adolescents*, 29 Journal of Computer Assisted Tomography 287 (2005) (cited at Yee Br. 22). More importantly, each study is expressly announced to be inconclusive. For example, in their study of media violence and "executive functioning," Kronenberger and his colleagues explicitly warn that the results are only "preliminary" and "should be viewed with caution." Kronenberger et al., *supra*, at 726; *see also* Mathews et al., *supra*, at 291-92 (explaining study's "limitation" is that it "did not evaluate other brain regions involved in emotional control"; authors recommended "further study" to evaluate "the entire system involved in aggressive behavior").

Senator Yee fares no better in his reliance on the Weber fMRI study. Yee Br. 24 (citing Weber et al., *Does Playing Violent Video Games Induce Aggression? Empirical Evidence of a Functional Magnetic Resonance Imaging Study*, 8 Media Psychology 39 (2006)). The Weber study involved thirteen adult men who were observed playing a supposedly violent video game for an hour. The study examined brain activity patterns that were similar to those seen in a previous study of individuals "imagin[ing] scenarios involving aggressive behavior." *Id.* at 42-43, 53. What those patterns mean, however, is not explained by the science. Nor do the patterns demonstrate any real-world connection between the "imagin[ings]" and violence or harmful neurological effect. And Senator Yee fails to explain how this limited study of a small pool of adult men substantiates the sweeping assertions about minors' neurological functioning on which California's law depends.[18]

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[18] In his discussion of the claimed effects of video games on the brain, Senator Yee also cites two studies that do not involve fMRI technology but instead measure brain waves with electrodes. Yee Br. at 23-24. Those studies are of no utility to California either.

C. California And Senator Yee Ignore The Large Body Of Empirical Evidence That Shows No Causal Connection, Or Even A Correlation, Between Violent Video Games And Harm To Minors.

California and Senator Yee ignore a wealth of recent empirical evidence disabusing the notion that violent video games are harmful to minors. Here is just a snapshot of that body of scholarship:

- A study of 603 Hispanic youths (ages ten to fourteen), recently published in The Journal of Pediatrics, examined various risk

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The first, a study of adult men by Anderson and his colleagues, does not even purport to analyze violence in video games – it just analyzes video games generally. *See* Bailey et al., *A Negative Association Between Video Game Experience and Proactive Cognitive Control*, 47 Psychophysiology 1 (2009). It compared brain wave patterns of "high gamers" (over 40 hours per week spent playing video games) with "low gamers" (less than two hours per week). Expressly qualifying their findings, the authors stated it was "impossible" to know whether differences they observed between the two groups were caused by video games or "some other factor." *Id.* at 8.

The second study measured brain waves of 39 male college students during an experiment in which "noise blasts" were administered and violent and non-violent images were shown. Bartholow et al, *Chronic Violent Video Game Exposure and Desensitization to Violence: Behavioral and Event-Related Brain Potential Data*, 42 Journal of Experimental Social Psychology 532 (2006). The authors claim their results "are the first to link media violence exposure and aggressive behavior to brain processes ***hypothetically*** associated with desensitization" to violence. *Id.* at 532 (emphasis added). But even Senator Yee concedes that the results of the study are only "theoretically" related to aggression. Yee Br. 23.

factors for youth violence, including video game violence, delinquent peer association, family conflict, depression, and others. Ferguson et al., *A Multivariate Analysis of Youth Violence and Aggression: The Influence of Family, Peers, Depression, and Media Violence,* 155 Journal of Pediatrics 904 (2009). The children listed television shows and video games and rated how often they viewed or played the media – a reliable and valid method of evaluating violent media exposure. *Id.* at 905. The children were then evaluated using the Child Behavior Checklist, a well-researched and well-validated tool for measuring behavioral problems in children and adolescents. *Id.* A statistical analysis of the results revealed that exposure to video games had a negligible effect size and was not predictive of youth violence and aggression. *Id.* at 906.

- A study of 1,254 seventh and eighth-grade students examined the influence of exposure to violent video games on delinquency and bullying behavior. Ferguson & Olson et al., *supra.* The Entertainment Software Ratings Board ratings were employed as a standardized measure of participants' exposure to violence in video games. *Id.* at 8. The study applied a multivariate statistical method that considered other factors that might be predictive of aggressive behavior (such as level of parental involvement, support from others, and stress). *Id.* at 7-8. This study did not use abstract measures of aggression, but instead focused on specific negative behaviors such as delinquency and bullying. *Id.* at 8, 9. A statistical analysis revealed insignificant effect sizes between exposure to violent video games and delinquency or bullying. *Id.* at 11, 12. The authors accordingly concluded that exposure to such games was not predictive of delinquency or bullying. *Id.*

- A study of 213 participants examined the influence of violent video game play on aggressive behavior. Williams & Skoric, *Internet Fantasy Violence*, 72 Communication Monographs 217 (2005). The 213 participants were divided into a 75-person treatment group that played a single game, Asheron's Call 2, a type of "massively multi-player online role-playing game" that is "highly violent" and has "a sustained pattern of violence," for at least five hours over a one-month period, and a 138-person control group that did not play the game. *Id.* at 221, 224. Participants then completed self-reported questionnaires that included a range of demographic, behavioral, and personality variables. *Id.* at 225. Aggression-related beliefs were measured according to the Normative Beliefs in Aggression general scale, a well-validated scale for measuring beliefs about the acceptability of aggression, and aggressive social interactions were measured using specific behavioral questions. Both measurement techniques had been successfully used in previous studies of violent television and video game effects. *Id.* The results of this study found no effects associated with aggression caused by playing violent video games. *Id.* at 228.

These studies are just the tip of the iceberg.[19] They rate barely a mention in Senator Yee's brief, which disparages them as "alleged 'scientific studies'" that involved "small sample size, poor test conditions and chance." Yee Br. 27. That is wrong. The studies employed large sample sizes, long-standing and validated measures of aggression, and superior statistical controls. Ironically, the studies also include the work of researchers whom California and Senator Yee cite favorably. For example, as noted above, California relies on the research of Jeanne Funk. Pet Br. 53 (citing JA 705-06). But, in a separate study that California does not mention, Funk "fail[ed] to find" even a correlation between violent video games and aggressive emotions and behavior. *See* Funk et al., *Aggression and Psychopathology in Adolescents With a Preference for Violent Electronic Games,* 28 Aggressive Behavior 134 (2002). Notably, this second Funk study employed the Child Behavior Checklist, which is a better validated measure of aggression than measures utilized in the studies on which California and Senator Yee rely.

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[19] See Ferguson & Rueda, *The Hitman Study: Violent Video Game Exposure Effects On Aggressive Behavior, Hostile Feelings And Depression*, 15 European Psychologist 99 (2010) (study of 103 young adults for causal effects of video game playing on aggressive behavior, hostile feelings, and depression; results found no evidence that short-term exposure to violent video games either increased or decreased aggressive behavior); Ferguson et al., *Personality, Parental, And Media Influences On Aggressive Personality And Violent Crime In Young Adults*, 17 Journal of Aggression, Maltreatment & Trauma 395 (2008) (study of 355 undergraduate students for potential contributors to violent crime; results indicated exposure to violent video games or television did not predict aggression); Baldaro et al., *Aggressive And Non-Violent Videogames: Short-Term Psychological And Cardiovascular Effects On Habitual Players*, 20 Stress and Health 203 (2004) (study of 22 "habitual, expert players" for short-term effects of violent video game play on several physiological and psychological indexes; results found no short-term increase in hostility or aggression); Colwell & Kato, *Investigation Of The Relationship Between Social Isolation, Self-Esteem, Aggression And Computer Game Play In Japanese Adolescents*, 6 Asian Journal of Social Psychology 149 (2003) (study of 305 twelve and thirteen-year-old Japanese students; results "suggest[ed] that the positive relation between playing computer games and aggression may simply be correlational and not causal; aggressive children like playing computer games, many of which are aggressive").

Importantly, additional studies have shown, in contradistinction to California's position, that playing video games, including violent games, can reduce aggression in adolescents and can have a positive impact on emotional health.

At minimum, the scholarship that California and Senator Yee ignore belies the notion that the "substantial evidence of causation" standard imposes an "insurmountable hurdle" on science or legislatures. Pet. Br. 52. These studies show

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See, e.g., Colwell & Kato, *supra,* at 149-58 (concluding that "the evidence actually supports a catharsis mechanism, that playing aggressive computer games may lead to lowered aggression"); Olson et al., *The Role Of Violent Video Game Content In Adolescent Development: Boys' Perspectives,* 23 Journal of Adolescent Research 55 (2008) (finding that boys use violent games to regulate emotions and channel anger).

unequivocally that the causation research can be done, and, indeed, has been done. The problem confronting California and Senator Yee thus is not the constitutional standard; it is simply their inability to meet that standard in this case because validated scientific studies prove the opposite, leaving no empirical foundation for the assertion that playing violent video games causes harm to minors.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS
CURIAE
BRIEF

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No. 08-1448

In the

SUPREME COURT OF THE UNITED STATES

ARNOLD SCHWARZENEGGER, Governor of the State of California, and EDMUND G. BROWN Jr., Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

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September 17, 2010

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STATEMENTS OF INTEREST OF *AMICI*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. The Center is familiar with the issues presented in this appeal having filed as *amicus curiae* in two other cases involving restrictions on violent video games: *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003) and *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001).

The Media Institute is an independent, nonprofit research organization located in Arlington, Va. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry, and journalistic excellence. The Institute has participated as *amicus*

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[1] Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties' written consent to the filing of *amicus curiae* briefs is on file with the court.

curiae in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

SUMMARY OF ARGUMENT

Whatever lingering confusion may have existed concerning the origins of categories of speech unprotected by the First Amendment, it was eliminated by this Court's decision last Term in *United States v. Stevens*, 130 S. Ct. 1577 (2010). Yet despite seeking to add to the list of unprotected categories of speech, Petitioners reference *Stevens* only twice in their brief on the merits. Pet. Br. 12, 14. This paucity is understandable; any more extensive analysis of *Stevens* would foreclose Petitioners' argument that California Civil Code §§ 1746-1746.5 (the California Act) passes constitutional muster. Indeed, the two passages cited by Petitioners are merely general statements about the unprotected categories' roots in American history and tradition. When viewed in context of the decision as a whole, the two *Stevens* passages cited by Petitioners oppose–rather than support–a determination that the California Act is consistent with this Court's First Amendment jurisprudence.

By its plain meaning, the California Act is a content-based restriction on speech that does not fall under any of the established categories of unprotected speech. As such, it is presumptively invalid and subject to strict scrutiny. *See City of Los Angeles v. Alameda Books*, 535 U.S. 425, 434 (2002);

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 817-18 (2000); *R. A. V. v. St. Paul*, 505 U.S. 377, 382, 395 (1992); *Video Software Ass'n, et. al. v. Schwarzenegger, et al.*, 556 F.3d 950, 958 (2009). In an effort to avoid this degree of review, Petitioners urge this Court to adopt an open-ended approach to First Amendment analysis: Rather than requiring the government prove that unwelcome speech falls within an established exception to free speech, courts should consider creating a new category of unprotected expression anytime government claims it has a rational basis for wanting to suppress speech. This Court rejected such an approach in *Stevens* and it should do so in this case.

Petitioners attempt to temper the novel nature of their argument by casting it in terms of traditional First Amendment analysis. Specifically, Petitioners argue that restricting the access of minors to violent video games is no different than restricting their access to obscene materials, approved by this Court in *Ginsberg v. New York*, 390 U.S. 629 (1968). Beyond the similarity of limiting the access of minors to expressive materials, examination of this Court's reasoning in *Ginsberg* reveals little support for the restrictions set forth in the California Act.

Although Petitioners raise a number of issues defending the California Act, each of those issues is addressed in the opinion of the Court of Appeals and the Brief of Respondents. Rather than repeating those analyses, *amici* The Thomas Jefferson Center for the Protection of Free Expression and The Media

Institute believe they could best assist this Court by briefly elaborating solely on the inappositeness of Petitioners' reliance on this Court's decisions in *United States v. Stevens* and *Ginsberg v. New York*.

ARGUMENT

I. PETITIONERS ADVOCATE AN APPROACH TO ASSESSING CONTENT-BASED RESTRICTIONS ON SPEECH THAT WAS SPECIFICALLY REJECTED IN *UNITED STATES v. STEVENS*.

In asking this Court to uphold the California Act, Petitioners seek no less than the legal recognition of a new content based category of expression outside the range of First Amendment protection. Perhaps recognizing that just last Term this Court rejected the creation of new categories of unprotected expression simply because government deems the speech "valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor" (*see Stevens*, 130 S. Ct. at 1586), Petitioners assert an historical basis for the unprotected status of video games directed toward minors containing "offensively violent material." Pet. Br. 13. This historical link, argue Petitioners, places the speech targeted by the California Act among the "*well-defined and narrowly limited* classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Stevens*, 130 S. Ct. at 1584 (citing *Chaplinsky v. New*

Hampshire, 315 U.S. 568, 571-72 (1942)) (emphasis added).

In making this argument, however, Petitioners confuse analogy to historical tradition with history itself. The primary evidence Petitioners claim demonstrates that access by minors to "offensively violent material" is among the "categories of speech that have been historically unprotected" (*Stevens*, 130 S. Ct. at 1586), is an analogy to this Court's analysis in *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding restrictions on access by minors to obscene materials). Yet access by minors to expressive materials is not a category of speech. While it is true that *Ginsberg* recognizes that obscene materials in the hands of minors may not be obscene in the hands of adults, the fact remains that the speech at issue was obscenity–a *category* of speech deemed unprotected by American history and tradition. *Ginsberg*, 390 U.S. at 635 (citing *Roth v. United States*, 354 U.S. 476, 485 (1957). Petitioners provide no valid evidence that access by minors to "offensively violent materials" is a category of speech that has been historically unprotected.

Indeed, Petitioners' claim is seriously weakened by the fact that so much of their argument is based on the alleged minimal value that violent materials offer when in the hands of minors. For example: "Whatever First Amendment value these games may possess for adults, such games are simply not worthy of constitutional protection when sold to minors without parental participation." Pet. Br. 6.

"Violent video games, like sexual images, can be harmful to minors and have little or no redeeming social value for them." Pet. Br. 13. Similarly, Petitioners center much of their argument balancing the value of offensively violent material with the alleged harmful effects it has on children. "As is true of ... other forms of unprotected speech, offensively violent speech aimed at minors can be harmful, and our Nation's traditional interest in protecting minors outweighs any benefit derived from such speech." Pet. Br. 34. This value-laden "balancing of interests" approach to First Amendment analysis was specifically rejected in *Stevens*. "[T]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document 'prescribing limits, and declaring that those limits may be passed at pleasure.'" *Stevens*, 130 S. Ct. at 1585 (quoting *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803)); *see also Winters v. New York*, 333 U.S. 507, 510 (1948).

The core of Petitioners' argument is found in the statement that "[t]here is no sound basis in logic or policy for treating offensively, violent harmful material with no redeeming value for children any different than sexually explicit material." Even if there were some merit to the substance of this statement (a point effectively disputed in the Brief of Respondents, 31-33), it is does not justify a shift in

First Amendment jurisprudence. As *Stevens* makes clear, First Amendment analysis is not about courts setting new policy by analogy to existing unprotected categories of speech; it is about determining whether a particular category of speech itself has been historically unprotected. If history can provide no such evidence, then the restriction on that category of speech is presumptively invalid and subject to strict scrutiny. *See e.g. Alameda Books*, 535 U.S. at 434.

II. THE COURT OF APPEALS APPROPRIATELY LIMITED THE *GINSBERG* STANDARD TO SEXUAL IMAGERY.

In their brief, Petitioners make the extraordinary statement that "this Court *unequivocally* held in *Ginsberg v. New York* ... [that] states may properly restrict minors' access to material that is fully protected as to adults." Pet. Br. 12 (emphasis added). In fact, *Ginsberg* makes no such sweeping pronouncement concerning the relative First Amendment rights of children and adults. Rather, the decision is explicitly limited to minors' access to obscene materials:

> We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State. It is enough for the purposes of this case that we

> inquire whether it was constitutionally impermissible for New York ... to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see.

Ginsberg, 390 U.S. at 636-37. Consequently, the Circuits that have considered the issue have uniformly refused to apply *Ginsberg* in cases involving the regulation of violent materials. *See Schwarzenegger*, 556 F.3d 950; *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

These courts soundly have held to the distinction between violence and obscenity reflecting the disparate rationales for regulating each category of speech. Governmental attempts to regulate violent materials seek to prevent the harmful psychological effects and violent behavior alleged to result from their use. *See James v. Meow Media, Inc.* 300 F.3d 683, 698 (6th Circuit 2002); *Kendrick*, 244 F.3d at 575. Obscenity is regulated because of its offensiveness and not because of some psychological harm it allegedly inflicts on the viewer. *Kendrick*, 244 F.3d at 574-75. Thus, "no proof that obscenity is harmful is required ... to defend an obscenity statute against being invalidated on constitutional grounds." *Id.* at 575. Because violent material is not regulated based on its offensiveness, but rather to prevent its alleged harmful effects, it should be held to a different and higher standard of review. Indeed, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), this Court has already determined the appropriate standard for assessing regulations of speech that could induce people to violence, one of the harms allegedly caused by offensively violent material. *See* Pet. Br. 36.

Moreover, as the Ninth Circuit recognized in the case below, this Court has made clear that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Schwarzenegger*, 556 F.3d at 958 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975)). Although the scope of speech to which children have access may not be coextensive with that of adults, the same First Amendment principles govern:

> Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.

Erznoznik, 422 U.S. at 213-14.

In *Ginsberg,* the Court provided two justifications for regulating minors' access to sexual material: (i) "the legislature [can] properly conclude that parents and others ... who have primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility," and (ii) the State has an "independent interest in the well-being of its youth." *Ginsberg,* 390 U.S. at 639-40. Contrary to Petitioners' assertion (*see* Pet. Br. 18), the *Ginsberg* holding does not authorize the use of a standard lesser than strict scrutiny anytime government alleges these justifications are present. *Ginsberg* involved the defining of an already established unprotected category of expression as it applied to minors. In determining that the definition of obscenity could vary based on the age of the person viewing it, the Court was still working with a category of speech that was never intended to be protected by the First Amendment. *See Ginsberg,* 390 U.S. at 638). Hence, regulations of such speech need not require the degree of scrutiny that is necessary for assessing regulations of protected speech. The California Act is aimed at regulating the content of speech never previously recognized as unprotected. As such, it should be evaluated with strict scrutiny. To hold otherwise would allow government to regulate speech by mere allegation, without proving that the regulation serves the purposes of aiding parents in raising children and promotes the well-being of children.

A comparison of the practical applications of limiting minors' access to obscenity and violent video games reveals further evidence of the ill-advisability of treating the variable standard of *Ginsberg* as interchangeable with a category of speech not contemplated in the decision. *Ginsberg* dealt with "girlie" magazines and other obscene materials that were easily seen by minors. *Ginsberg*, 390 U.S. at 631. Such magazines may feature sexual content on the cover, allowing children to see the material simply by entering a store. Once a minor has purchased the material, it can be easily secreted within the home or viewed outside the home in the course of the minor's ordinary daily activities. As such, an age-based restriction on purchasing obscene materials offers practical assistance to parents in prohibiting their children from viewing such items. It is the rare circumstance that the same case could be made for the purchase of violent video games. Children cannot view the contents of a video game without a video game console or computer, the cost of which is in the hundreds of dollars. *See* http://www.consumersearch.com/video-game-consoles/compare (visited September 16, 2010). The video games themselves are also relatively expensive: *Red Dead Redemption* for example, retails for $55.99 on Amazon.com. *See* http://www.amazon.com/Red-Dead-Redemption-Playstation-3/dp/B001SGZL2W (visited September 16, 2010). Most children do not have access to this amount of money without obtaining it from their parents or guardians. Those who do are typically much older and therefore, under the theory espoused by Petitioners, are less likely to suffer from the alleged harms caused by exposure to such material because they are closer to the age of majority.

Even when a minor has a game console and a copy of a video game, his ability to use them outside his parents' knowledge or control is largely eliminated by constraints of time and space. Parents can confiscate games or consoles or use the parental controls built into game consoles to limit minors' access to video games. Ultimately, parents have much greater ability to shield children from violent video games than from obscene sexual material.

This Court has emphasized the traditional value placed on parents' freedom to guide the upbringing of their children rather than assigning this role to the state. *Meyer v. Nebraska*, 262 U.S. 390, 400-403 (1923); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In *Reno v. American Civil Liberties Union*, the Court found the existence or even possibility of parental control a significant answer to concerns regarding minors' access to obscene material on the Internet, noting that "currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which the *parents* believe is inappropriate will soon be widely available." 521 U.S. 844, 877 (1997) (citation omitted) (emphases in original). Thus, a restriction on minors' First Amendment rights that is justified as assistance to parents falls far short of meeting its burden when parents already have at their disposal ample means for supervising the content of video games their children play. While government may assist parents in their responsibilities, such assistance should not be "an unbridled license to regulate what minors read and view." *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 959-60 (8th Cir. 2003).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to affirm the judgment of the Ninth Circuit Court of Appeals.

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AMICUS
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BRIEF

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In The
Supreme Court of the United States

◆

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of the State of California, and EDMUND G. BROWN, JR., in his official capacity as Attorney General of the State of California,

Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION and ENTERTAINMENT SOFTWARE ASSOCIATION,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF OF *AMICUS CURIAE* VINDICIA, INC., IN SUPPORT OF RESPONDENTS

◆

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition.

The questions presented are:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?

2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 666 (1994), is the State required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the State can prohibit the sale of the games to minors?

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INTEREST OF *AMICUS CURIAE*[1]

Belmont, California based Vindicia, Inc., founded in 2003, develops and offers on demand strategic billing solutions for online merchants. Many of Vindicia's merchant clients sell and distribute entertainment products and content, including video games.

The California law at issue in this case substantially impacts Vindicia, its customers, and the consumers they serve online using computers and portable device platforms, by creating uncertainty regarding the legal status of video game expression. Further, the Act's age verification mandate jeopardizes significant modes of online commerce.

For the first time in the game industry's history, growth in online gaming is outpacing console and PC-based revenues, reflecting a convergence of (1) significant growth in the popularity of the gaming medium as a form of entertainment and communication;

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or their counsel made a monetary contribution to its preparation or submission.

(2) significant technological advances rendering online gaming a viable platform; and (3) the forging of innovative business models, like free-to-play (or "freemium").

Vindicia seeks to inform the Court of significant issues presented by the application of this law in the internet domain. The challenged law imposes a substantial impact on the vibrant and innovative game industry, and on the burgeoning community of gamers for which Vindicia provides a forum for entertainment, societal discourse and exchange of ideas.

◆

SUMMARY OF ARGUMENT

Video games, rivaling movies and music as the leading form of entertainment in the United States, are a form of expression protected under the First Amendment. That some video game content, like some motion picture or other artistic expression, may not be suitable for children is not surprising, as contrary to conventional wisdom, video games are primarily enjoyed by adults. However, California's statutory restrictions on the sale of video games to minors are unconstitutional because they overly burden the legitimate speech of adult video game players.

Among the many flaws present in the California statute, the Act's age verification requirement by sellers prior to making a sale of so-called "violent video games" presents interpretive challenges. This age verification clause, and its catch-all affirmative defense for sellers who "reasonably" rely upon evidence that a purchaser is not a minor, is unconstitutionally vague. In a predominantly Internet-based market, age verification can only be accomplished by requesting players to declare their age or provide personally-identifying information. But requiring proof of age through verification of personally-identifiable information substantially interferes with and limits legitimate adult expression. In particular, such schemes jeopardize the increasingly popular "freemium" business model of providing game content, in which games are initially free to play, but charge a premium to those consumers who wish to engage the game at a deeper level.

The legislation also fails constitutional scrutiny because there are less restrictive means to limit minors' access to violent content. In addition to a robust voluntary rating system implemented by the industry, parental oversight and involvement in children's decisions offers the best and least-restrictive alternative to restricting minor access to age-inappropriate content. Parental monitoring and involvement in children's decisions about appropriate games to play are the most effective means to ensure children are accessing age-appropriate content. Technological innovation cannot substitute for responsible, effective parenting.

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ARGUMENT

I. Video Game Content Is A Form Of Speech Protected By The First Amendment.

This Court has consistently held that entertainment, like political and ideological speech, is entitled to First Amendment protection. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Schacht* v. *United States*, 398 U.S. 58 (1970); *Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Se. Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *see also California* v. *LaRue*, 409 U.S. 109, 118 (1972); *Young* v. *Am. Mini Theatres, Inc.*, 427 U.S. 50, 61-62 (1976).

This broad category of speech encompasses, but is not limited to, "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works," *Schad*, 452 U.S. at 65, as well as music, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989). Of course, motion pictures, music, and dramatic works frequently contain significant political and social expression that seeks to persuade, protest, debate, and educate in addition to merely entertain.

Accordingly, nothing would justify the exclusion of video game content from the First Amendment's protection. Video games contain and convey artistic, musical and literary content, providing a sensory and communicative experience for their audience akin to the forms of entertainment specifically recognized by this Court as protected speech. Video games afford both designers and players a means of expression. Game designers convey a visual and aural message not unlike other artists, authors and musicians. Game players not only absorb this expression, they respond to the expressive content in turn as they engage in the game. Accordingly, the expressive rights of video game creators and players are entitled to full protection under the First Amendment.

Ratified in 1791, the First Amendment predates many current modes of expression, but does not specifically enumerate any modes of "speech." Accordingly, the question of whether a particular entertainment medium merits First Amendment protection occasionally arises before this Court. *See, e.g.*, *Joseph Burstyn*, 343 U.S. at 501-02 (movies); *Se. Promotions, Ltd.*, 420 U.S. at 557-58 (live theater).

Concerns regarding government regulation intended to protect minors from allegedly negative influences of entertainment likewise come before this Court on occasion. As early as 1952, in *Joseph Burstyn,* this Court determined that motion pictures were entitled to First Amendment protection despite the argument that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." 343 U.S. at 502. The Court stated:

> Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

Id. Just as this Court prohibited a total ban on movies for minors based on a general assertion of harm, the purported harm to minors who play violent video games cannot be a basis to categorically deny First Amendment protection to video games as a medium of expression.

II. The Act's Restrictions On Video Game Sales Unduly Burden Adult Speech.

The challenged law significantly curtails adult speech and limits adults' access to legitimate content. Although this Court has recognized a governmental interest in protecting children from harmful materials, it has consistently found that this governmental interest does not justify an unnecessarily broad suppression of speech addressed to adults. *Reno* v. *ACLU*, 521 U.S. 844, 875 (1997); *see also United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004). The mere fact that speech is regulated for the important purpose of protecting children does not foreclose inquiry into a regulation's validity. *Reno*, 521 U.S. at 875. Accordingly, the Act is invalid because it fails to strike an adequate balance to protect legitimate adult speech.

A. Video Games Are Primarily And Pervasively Enjoyed By Adults, Largely Online.

Video games are largely an adult pastime. Although some popular perceptions rooted in the early days of video games conceive that video games are predominantly played by children and teens, the children who played video games thirty or more years ago have grown up with the industry, which has expanded its appeal to all age levels.

According to the Pew Internet & American Life Project, over half of all American adults play video games, and one in five adults plays video games on a daily basis. AMANDA LENHART ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, PEW RESEARCH CENTER, INTERNET PROJECT DATA MEMO: ADULTS AND VIDEO GAMES 1 (Dec. 7, 2008), *available at* http://www.pewinternet.org/~/media/Files/Reports/2008/PIP_Adult_gaming_memo.pdf.pdf [hereinafter PEW ADULT GAMES MEMO]. Eighty-one percent of all adults between 18 and 29 play video games, with sixty percent of players being between 30 and 49 years of age. *Id.* at 2. Three-quarters (75%) of video game players are over 18, with nearly half of all players in the United

States being between the ages of 18 and 49. ENTM'T SOFTWARE ASSOC., 2009 SALES, DEMOGRAPHIC AND USAGE DATA: ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 2, *available at* http://www.theesa.com/facts/pdfs/ESA_EF_2009.pdf.

Given the prevalence of video gaming among adults, the size of the video game industry is, as expected, quite significant. With over twenty-one billion dollars in annual sales of video game systems, software, and accessories, video games are as popular an entertainment medium as movies and music in the United States. Barbara Ortutay, *Video Game Sales Top $21 Billion in 2008*, ASSOCIATED PRESS, Jan. 15, 2009, http://www.msnbc.msn.com/id/28682836; *see also* Press Release, THE NPD GROUP, INC., 2009 U.S. VIDEO GAME INDUSTRY AND PC GAME SOFTWARE SALES REACH $20.2 BILLION (Jan. 14, 2010), *available at* http://www.npd.com/press/releases/press_100114.html.

While historically, the only way to purchase video games was to buy individual software, or "boxed" video games, for computers or home game consoles, the Internet has made the video game purchase experience quite varied. Games are increasingly distributed and sold through the Internet and allow players to access purchased games either by one-time computer download or directly online through proprietary websites. Video games are also increasingly purchased and downloaded via mobile phone applications.

The technological advances facilitating online game play has caused the Internet video game market to explode. Of the $10.7 billion in revenues generated from sales of video gaming PC software, reportedly 70% of those sales (roughly $7 billion) were made through online gaming and digital game downloads. PC Gaming Alliance, The PCGA Presents: The PC Gaming Industry in 2008 (2009), *available at* http://www.pcgamingalliance.org/RESOURCES/Articles/tabid/397/Default.aspx. In fact, online gaming is one of the top reasons Americans access the Internet. A recent Nielsen Company report reveals that gaming is a leading online pastime for Americans, representing 10% of the overall time spent on the Internet, up 10% from last year alone. Nielsen Company, What Americans Do Online: Social Media and Games Dominate Activity, Aug. 2, 2010, *available at* http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/ (last visited Sept. 15, 2010).

Second only to social networks, Internet gaming surpasses even the amount of time people spend emailing. *Id.* Conservative estimates put the number of daily online game players in the hundreds of millions. *See, e.g.*, AppData, http://www.appdata.com (last visited Sept. 15, 2010). Nearly a quarter (23%) of American adults play video games online, representing nearly half (43%) of the overall adult gaming population. Pew Adult Games Memo, *supra*, at 4.

Several options are available for players to game online. Proprietary gaming websites offer paid subscriptions for online gaming, pay-as-you-go plans (known as "microtransactions"), and free online playable content (known as "free-to-play" or "freemium"). The freemium model in particular has become a popular gaming platform and business model, giving players free access to basic gameplay, while charging a fee to extend gameplay; to access premium or additional features; or to obtain virtual currency, tokens, or goods to enhance game play.

Online players may obtain website memberships to play either individually or with a group of players. *See, e.g.*, World of Warcraft, http://www.worldofwarcraft.com/index.xml (last visited Sept. 15, 2010); The New Instant Action – Real PC Gaming in Your Browser, http://www.instantaction.com/ (last visited Sept. 15, 2010); Hasbro, http://www.hasbro.com/hasbrokids/ (last visited Sept. 15, 2010). Social media networks like Facebook allow online gamers to play directly through the social networking site and to join in collaborative play with others in their network. *See, e.g.*, Facebook, http://www.facebook.com (select the Farmville or Mafia Wars gaming application) (last visited Sept. 15, 2010).

B. The Act's Application to Online Gaming Is Vague And Particularly Harmful.

The Act fails to take into account the vast array of distribution platforms in which video games are sold. The Act states simply, "A person may not sell or rent a video game that has been labeled as a violent video game to a minor." CAL. CIV. CODE § 1746.1(a). This legislation is crafted to apply to all video games.

However, the Act makes no mention of how this regulation would be applied to varying digital platforms and distribution, *e.g.*, video game home consoles, smartphone applications and Internet gaming sites. The Act does not account for the unique features of each platform, namely how sales of, access to, and use of video games on each of these platforms differs, nor does the Act evaluate how its application will disparately impact each medium.

Such a one-size-fits-all regulatory approach to vastly different media is fraught with problems, both practical and constitutional. The Act's failure to address the different ways in which people enjoy video games is impermissibly vague because the primary forum for gaming – the Internet – is not adequately contemplated by the Act.

This Court is well aware of the constitutional concerns posed by the regulation of Internet content. *See Reno*, 521 U.S. 844; *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002); *United States* v. *ALA*, 539 U.S. 194 (2003); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004). Where content-based regulation of Internet subject matter is at issue, this Court takes great care to evaluate available technologies and to determine whether less restrictive measures may be taken to ensure that an undue burden is not placed on protected speech.

For example, in *Reno* v. *ACLU*, the Court found that the Communications Decency Act, which prohibited the transfer of obscene sexual content to minors, was unconstitutional, in part because it impermissibly interfered with "adult-to-adult communication." 521 U.S. at 876. This was so because,

> [g]iven the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor – and therefore that it would be a crime to send the group an indecent message – would surely burden communication among adults.

Id. The Court found that the lack of existing technology to *effectively* verify the age of the message recipient and the expense for commercial and non-commercial Internet speakers to comply with the verification requirement would "inevitably curtail a significant amount of adult communication on the Internet," particularly where user-based, parent-controlled software would less restrictively provide protection for children from obscene speech. *Id.* at 876-77.

The same problems doom the California law. Once a video game is labeled "violent," it is clear that a seller should not sell the game without proof that the person is not a minor. CAL. CIV. CODE § 1746.1. Yet the legislation is silent as to the criteria required to comply with the age-verification provision and, critically, lacks a sufficient, specific enumeration of acceptable forms of evidence to establish the purchasers' age. The Act provides only one example of adequate age verification: a customer's production of a driver's license or other identification issued by a state or the U.S. Armed Forces. CAL. CIVIL CODE § 1746.1(b).

Requiring proof in the form of a driver's license or other government-issued identification, as the Act suggests, might be a relatively straightforward process for in-person game purchases. However, it is logistically impossible with online transactions, and the law is silent as to acceptable alternatives.

This uncertainty is especially problematic in online gaming platforms. In the Internet-based video game market, age verification is commonly accomplished by requesting that players either declare their age or provide personally-identifying information. Without the opportunity to physically see a purchaser and to verify his or her age in a reliable manner, online game sellers face significant and unique cost barriers to comply with the Act, which will seriously impair the largest sector of the gaming market: adults.

The top games on social network platforms, many of which operate under the "freemium" model, can have upwards of 2.5 million active users daily. *See* AppData, http://www.appdata.com (last visited Sept. 15, 2010) (providing daily updated statistical metrics for Facebook game application use). In this context, any form of mandated age verification for every participant would prove administratively problematic.[2]

Online age-verification requirements would be particularly destructive of the freemium business model. Under the freemium model, consumers are able to sample a wide array of interactive games, reserving the choice to pay only for those games in which they wish to become more deeply involved. And to sustain the economic viability of the games, developers are able to effectively market the game to a wider array of people who might be willing to pay for its premium content, but would never do so if required to pay up-front to sample the game. The freemium model thus enables consumers to sample more than they could otherwise afford, and enables developers to market games that, if they were to be available only on a traditional purchase-gateway model, could not attract a viable market.

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[2] Due to the difficulty of verifying age online, there is also a high likelihood that children, particularly older minors, will be able to circumvent the age-verification process. As children experience technology at younger and younger ages and become more technologically savvy, it is reasonable to expect that they will find ways to bypass these verification systems entirely, or, at a minimum, falsify a birth date to access content. And although requiring a credit card would prevent younger children from viewing violent material, teenagers may already have credit cards in their parents' name and/or may access their parents' cards for use on gaming sites. The State's interests are more effectively accomplished through other means. *See* discussion *infra*, Part III.

The key to freemium, however, is that the games must truly be freely accessible to sample. Most adults will not provide personally-identifying information, and especially not a credit card number, to casually sample something that is supposedly free. Freemium's viability depends on making a clear distinction between free and paid content, which is defeated if the game developer must request payment information at the game's entry-level free stage.

Moreover, in the freemium setting, it is unclear at what point the seller is considered to have made a "sale" for purposes of applying the Act. Thus, tracking compliance is difficult. And it is unclear how far the responsibility for compliance extends. Is a retail seller solely responsible for ensuring compliance, or does the Act extend to online game distributors and, possibly, companies such as Vindicia, that engage in billing for online sales? To avoid legal liability in the face of the statute's vagueness, many game companies would opt to overcomply, either by requiring upfront age verification, regardless of the video's content, or by not offering the content online at all. In either scenario, legitimate adult speech would be deterred. Consequently, the age verification provisions overly restrict speech in their failure to account for various business models and accessibility options involved in online video game play.

The law's impact on freemium distribution and consumption highlights another point of concern. Few industries have transformed themselves as completely and rapidly as has the video game industry. A danger of improperly regulating technological innovation is that it is difficult to envision all of the possible implications and outcomes of a particular development. In this instance, vague statutory language creates uncertainty about how to interpret and apply regulation to ever-evolving technological developments among video game publishers, retailers, and all supporting technology industries. The fear of liability deters innovators from exploring and implementing new technologies.

Impeding technological advances developed for the video gaming community potentially limits broader applications for society as a whole. But the First Amendment secures not only existing modes of expression, it allows new modes of protected expression to develop organically, free from the threat of criminal prosecution.

Additional complexity is added by the fact that the Act limits distribution of video games into and outside of the state. The uncertainty of how to address or resolve these issues will result in sellers overcompensating to ensure compliance by refusing to sell video games in states with content-based regulations. And given the Internet's nature, which is not geographically contained, the result could be one state dictating a lowest common denominator of online content, depriving other states and communities of access to expression they might welcome. Consequently, expression will be dramatically curtailed, chilling adults' right to access these games and preventing video game creators from exercising their right of expression. *Cf. United States* v. *Stevens*, 130 S. Ct. 1577, 1587-92 (2010).

III. Parental Controls Offer An Effective And Less Restrictive Alternative To Statutorily Imposed Age Verification Requirements For Online Video Gaming.

The Act's significant impact on online adult speech is also constitutionally unsound because the State's interest in protecting children from the harmful effects of video game violence may be addressed through less restrictive, more effective means. The burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. *Reno*, 521 U.S. at 874. With a robust voluntary rating system implemented by the industry and several educational and technological resources available to aid in parental control, parental involvement in children's video game play is the most effective manner to ensure children are accessing age-appropriate content.

Most American parents are involved in children's decisions about video games. A Pew Internet & American Life Project study found that 90% of parents sometimes or always know what games their children play. Amanda Lenhart et al., Pew Internet & American Life Project, Pew Research Center, Teens, Video Games and Civics 38 (Sept. 16, 2008), *available at* http://www.pewinternet.org/~/media//Files/Reports/2008/PIP_Teens_Games_and_Civics_Report_FINAL.pdf.pdf [hereinafter Pew Teen Video Game Report].

Further, there appears to be a strong correlation between a child's age and parental awareness of the child's video game activity. Parents of younger teens are more likely to always know what games their children are playing than parents of older teens: 63% of parents of teens between the ages of 12 and 14 always know what games their children are playing, as opposed to 48% of parents with teens between the ages of 15 and 17. *Id.* at 36.

Indeed, many parents actively participate in video game play with their children. Fifty-seven percent of parents play video games with their children, with 2% playing always, 29% sometimes, and 26% rarely. Pew Teen Video Game Report, *supra*, at 38. Again, there is a correlation between the child's age and parental involvement. Parents of younger teens are more likely to play video games with their children than are parents of older teens – 34% of parents of children aged 12 to 14 play video games with their children, compared with 27% of parents of teens aged 15-17. *Id.* at 38.

Of course, unlike the situation that may have prevailed thirty years ago, the world of video games is no impenetrable mystery to parents. Considering the prevalence of video gaming among adults, it is no surprise that a majority of parents play video games on an at least occasional basis. Indeed, parents are more likely than other adults to play video games: 66% of parents play video games, compared with 47% of adults who are not parents. PEW ADULT GAMES MEMO, *supra*, at 4. Accordingly, parents are familiar with the video games available in the market and have a good understanding of what may or may not be appropriate for their children.

Research also shows that one significant benefit of parental involvement with their children's video game play is that when violent content is encountered, parents are able to explain and contextualize any negative messages that children might receive. PEW TEEN VIDEO GAME REPORT, *supra*, at 38. When parents participate in media with their children, parents are able to impart their values and beliefs about the acts and messages within the media form. *Id.* at 37.

The video game industry's voluntary ratings system has proven to be an effective resource for parents. Fifty-five percent of parents check ratings before allowing their children to play a game. *Id.* Sixty-seven percent of parents under the age of 40 always check ratings. *Id.* Consequently, it would appear that the younger a child is, the more likely a parent is to check on the appropriateness of game content.

Available technological tools further assist parents in monitoring children's access to content. Video game console systems offer parental controls for online game interactions. *See* PARENT TEACHER ASSOC. & ENTM'T SOFTWARE RATING BD., A PARENT'S GUIDE TO VIDEO GAMES, PARENTAL CONTROLS AND ONLINE SAFETY, *available at* http://www.esrb.org/about/news/downloads/ESRB_PTA_Brochure-web_version.pdf (detailing the ESRB's video game rating system and providing step-by-step instructions for setting up parental controls on various gaming consoles); *see also* Nintendo, http://www.nintendo.com/corp/parents.jsp (last visited Sept. 15, 2010); Microsoft X-Box, http://www.xbox.com/en-US/support/familysettings (last visited Sept. 15, 2010); Sony Playstation, http://us.playstation.com/support/parents/index.htm (last visited Sept. 15, 2010). Online gaming websites also offer parental control features. *See, e.g.*, Walt Disney's Pirates of the Caribbean Game, http://piratesonline.go.com/#/account_services/parental_controls_faq.html (last visited Sept. 15, 2010) (parental controls for Disney Pirates of the Caribbean online game); World of Warcraft Sign-Up

Page, https://us.battle.net/account/creation/wow/signup/ (last visited Sept. 15, 2010) (World of Warcraft account set up age verification).

In addition, filtering software, available through internet service providers or others via download or in-store purchase, provide options for greater parental control of children's access to content on the Internet. In most instances, filtering software offers parents the option of tailoring restricted content, including the ability to block select websites. These tools are extremely helpful to parents navigating the world of video game material available to children. *See* BERKMAN CENTER FOR INTERNET & SOCIETY AT HARVARD UNIVERSITY, INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES 37-38 (Dec. 31, 2008), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf. [hereinafter ISTTF FINAL REPORT].

This Court often looks to the viability of less-restrictive, currently available technological alternatives to regulate harmful content. In its second consideration of the Child Online Protection Act, this Court upheld an injunction and remanded the case for trial because, *inter alia*, the factual record did not reflect the then-current technology available. *Ashcroft v. ACLU*, 542 U.S. 656, 671 (2004). The Court reasoned that additional fact-finding would allow for the identification of better filtering software that provided a less restrictive alternative to content-based restrictions. The past five years have seen dramatic transformations in both video gaming technology and digital security tools for the Internet. The universe of less restrictive alternatives is ever-expanding, while the need for content regulation of the Internet, if any, is inexorably diminishing.

◆

CONCLUSION

California's regulation of access to protected video game content is unconstitutional. The State's approach is unconstitutionally vague, and imposes heavy burdens upon video game creators and retailers that could be avoided through the use of less restrictive regulatory mechanisms. Failing to take into account the myriad distribution platforms and sales methods in the gaming industry, the Act disrupts significant popular methods of marketing and consuming video game content, chilling the speech of game producers and players, preventing expressive creativity and restricting adult access to protected game content.

The judgment below should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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No. 08-1448

IN THE

Supreme Court of the United States

ARNOLD SCHWARZENEGGER, In His Official Capacity
as Governor of the State of California, and
EDMUND G. BROWN JR., In His Official Capacity as
Attorney General of the State of California,
Petitioners,

v.

VIDEO SOFTWARE DEALERS ASSOCIATION AND
ENTERTAINMENT SOFTWARE ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* OF CALIFORNIA STATE SENATOR LELAND Y. YEE, Ph.D, THE CALIFORNIA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS, AND THE CALIFORNIA PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

California Civil Code sections 1746-1746.5 prohibit the sale of violent video games to minors under 18 where a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, is patently offensive to prevailing community standards as to what is suitable for minors, and causes the games as whole to lack serious literary, artistic, political, or scientific value for minors. The respondent industry groups challenged this prohibition on its face as violating the Free Speech Clause of the First Amendment. The court of appeals affirmed the district court's judgment permanently enjoining enforcement of the prohibition.

The questions presented are:

1. Does the First Amendment bar a state from restricting the sale and rental of violent video games to minors?
2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, under *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994), is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

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INTEREST OF *AMICUS CURIAE* [1]

Senator Leland Y. Yee is the author of the California statute which is at the core of this case. He serves in the California Senate as the Assistant President pro Tempore. Prior to involvement in elected office, Senator Yee earned a doctorate degree in Developmental Psychology at the University of Hawaii and then worked in various mental health and school settings.

Prior to serving in the California Legislature, Dr. Yee spent eight years on the San Francisco Unified School District Board of Education where he worked for the improvement of the education system for school children. During his tenure in the Legislature, Senator Yee has fought for children, mental health services, working families, open government, and civil rights. In addition to authoring legislation protecting minors from the harmful effects of ultra-violent video games, Senator Yee has passed other laws geared to safeguarding children.[2] Likewise, of equal interest is the fact that Senator Yee has worked to defend and guarantee the constitutional right of free speech.[3]

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for amicus curiae authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make an monetary contribution to the preparation or submission of this brief. The parties filed a blanket consent.

[2] Most notably, in 2004, he authored legislation protecting children from being exploited through prostitution and has been acknowledged for his work by receiving the Special Friend of Children Award by the National Association of School Psychologists.

The California Chapter of the American Academy of Pediatrics (AAP-CA) is an organized group of over 5,000 board-certified pediatrician members of all four California regional Chapters. Their mission is to promote the health and well-being of all California's children.

The California Psychological Association is a non-profit professional association for licensed psychologists and others affiliated with the delivery of psychological services. CPA was founded in 1948 to work for the licensure of psychologists, and currently sponsors legislative proposals to increase greater access to mental health care services for the consumer and extended protection of the rights of psychologists to practice to the full extent allowed by law.

The California Chapter of the American Academy of Pediatrics, the California Psychological Association and Senator Yee are concerned about the mental health of children.

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[3] For his legislative and community efforts, Senator Yee has also been honored with the Freedom of Information Award by the California Newspaper Publishers Association. In addition, as result of his work for public access, open government and free speech rights, Californians Aware named Yee "Senator Sunshine." His legislation includes laws protecting high school and college teachers and other employees from retaliation by administrators as a result of student speech. In fact, Senator Yee authored legislation making California the first state in the nation to specifically prohibit censorship of college student press, including school newspapers and broadcast journalism.

Simply put, not only do *amicus* have a direct and vital interest in the specific statute before the Court, but additionally have a longstanding interest in safeguarding the mental well-being of children.

SUMMARY OF ARGUMENT

By any measure, California has a compelling interest in protecting the physical and psychological care of minors. When juxtaposed against the backdrop of protecting the First Amendment, this Court has held that the Constitution does not confer the protection on communication aimed at children as it does for adults. When weighing the conflicting concerns of minors this Court correctly carved a flexible standard of review and not a strict scrutiny approach. We know, of course, that a state can prohibit the sale of sexually-explicit material to minors under a "variable obscenity" or "obscenity as to minors" standard. *Ginsberg v. New York*, 390 U.S. 629 (1968). Just as it was rational for the State to conclude that that type of material was harmful to minors, the restrictions to assist parents in protecting their children's well-being is, in a practical sense, no different than the concerns supporting California's enactment of California Civil Code Sections 1746 - 1746.5.

Indeed, restricting the sale and rental of extremely violent interactive videos to minors advances the very same societal interests understood in *Ginsberg*. Contrary to the Ninth Circuit's perception, *Ginsberg* was not meant to exclusively apply to sexually explicit materials, but can and should apply to equally harmful materials depicting violence. *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

Needless to say, the world is much different today than it was in 1968 when *Ginsberg* was decided. What *has* remained for the past 40 years, however, is the commonsense understanding that the First Amendment does not protect materials harmful to minors.

In 2006, a Federal Trade Commission study revealed that nearly 70 percent of 13 to 16 year olds are able to successfully purchase Mature or M-rated video games. These M-rated games, labeled by the industry as such in an attempt to voluntarily "police" the distribution of harmful videos, are designed specifically for adults. The content in these types of games enable the user to murder, burn, and maim law enforcement officers, racial minorities, and members of clergy as well as sexually assault women.

In his March 29, 2006 testimony submitted to the Subcommittee on the Constitution, Civil Rights, and Property Rights of the United States Senate Judiciary Committee, Senator Yee noted that the interactive nature of video games is vastly different than passively listening to music, watching a movie, or reading a book. With interactive video games, the child becomes a part of the action which serves as a potent agent to facilitate violence, and over time learns the destructive behavior. This immersion results in a more powerful experience and potentially dangerous learned behavior in children and youth. In fact, often times it is the same technology that our military and police use to simulate and train for real life battle conditions and violent law enforcement confrontations in the community.

Moreover, there is a practical side in favor of the State's effort to regulate the sale or rental of violent video games to children. Parents can read a book, watch a movie or listen to a CD to discern if it is appropriate for their child. These violent video games, on the other hand, can contain up to 800 hours of footage with the most atrocious content often reserved for the highest levels that can be accessed only by advanced players after hours upon hours of progressive mastery.

Just as the technology of video games improves at astonishing rates, so too does the body of research consistently demonstrate the harmful effects these violent interactive games have on minors. Hundreds of peer-reviewed studies, produced over a period of 30 years documenting the effects of screen violence (including violent video games), have now been published in the professional journals of the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychological Association, American Medical Association, American Academy of Family Physicians, and the American Psychiatric Association and others.

This *amicus* brief includes some of the most recent research addressing this serious concern including a meta-analysis of approximately 130 studies pertaining to the effects of playing violent video games which was published in March 2010.

These data continually and strongly suggest that participating in the playing of violent video games by children increases aggressive thought and behavior; increases antisocial behavior and delinquency; engenders poor school performance; and desensitizes the game player to violence.

Notably, extended play has been observed to depress activity in the frontal cortex of the brain which controls executive thought and function, produces intentionality and the ability to plan sequences of action, and is the seat of self-reflection, discipline and self-control.

Also, United States Surgeon General David Satcher warned in his Report on Youth Violence (2000) of a demonstrated link between screen violence and subsequent physical aggression in children and adolescents that is stronger than the link between secondhand smoke and cancer.

Finally, new data shows that the intensity of interactive video games may be habituating and that 2 to 3 hour sessions of intense interactions with video games raise adrenaline levels in children and produces extended physiological arousal. In the medical community concern has been raised at prolonged and regularly repeated states of adrenalized arousal and hyper-vigilance involved in children watching violent video games and the possible harmful effects on still developing bodies and brains.

These studies demonstrate that playing ultraviolent games can cause automatic aggressiveness, increase aggressive thoughts and behavior, antisocial behavior, desensitization, poor school performance and reduced activity in the frontal lobes of the brain.

As a society, we understand the clear unequivocal commonsense reasons to prohibit the sale of alcohol, tobacco, firearms, driver's licenses and pornography to minors. That same reasoning applies in the foundation and enactment of California Civil Code Sections 1746 – 1746.5. Given that the First Amendment does not protect the State's restriction on the sale or rental of harmful violent video games to minors, the Court should reverse the decision of the Ninth Circuit Court of Appeals and uphold the California law as a statutory safeguard necessary in this modern day world.

ARGUMENT

I. THIS COURT HAS ACKNOWLEDGED SOCIETY'S RATIONAL AND COMPELLING INTEREST IN DISTINGUISHING AND LIMITING THE RIGHTS ENJOYED BY MINORS.

This Court has long agreed that there is an overriding justification in protecting children from conduct pervasive in society. Without question, restricting a minor's access to gambling, smoking and alcohol serve the community's interest in both protecting a minor's development as well as safeguarding against the individual and widespread collateral consequences which flow from a minor's early addiction to these vices.

As a general proposition, many constitutional rights vary in the degree to which the exercise of the right by minors is protected from government abridgment. For example, minors do not have the right to exercise the franchise. Similarly, a minor's right to have an abortion may be subject to regulations that would be rejected as unduly burdensome if they were applied to adult women. Thus, there is a recognized foundation for distinguishing between minors and adults in analyzing the constitutionality of regulations.

This foundation comports with the common sense intuition that, because children lack maturity to make wise judgments, their autonomy deserves less respect from the state than does the autonomy of adults. While paternalistic state regulations are correctly viewed as demeaning when applied to adults, there are considered appropriate, if not necessary, for children.

In *Ginsberg*, of course, this Court concluded that the State had greater authority to limit the exercise of protected freedoms because children were involved and, in relying on its precedents, recognized that "the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent 'their growth into free and independent well-developed men and citizens.'"

As it relates to expressive materials, there is no language from this Court suggesting that the State's interest in protecting minors from such material *is limited* to speech with sexual content. In *Erznoznik v. City of Jacksonville*, a case concerning restrictions on films depicting nudity from being shown in drive-in movies, the Court was unwilling to protect minors from brief exposure to such images.

However, the alleged harm caused by the minimal exposure to nude images a child passing by a drive-in theater might witness cannot realistically be compared to harm resulting from repeated and long term exposure to violent video games. In fact, in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court supported an FCC determination that the radio broadcast of a George Carlin monologue containing "filthy words" could be restricted precisely because it was accessible to young children.

Children, this Court has acknowledged, are different in the eyes of the law because of brain development. *Ropers v. Simmons*, 543 U.S. 551 (2005). Under the "evolving standards of decency" test, the *Ropers* Court held that it was cruel and unusual punishment to execute a person who was under the age of 18 at the time of the murder. Writing for the majority, Justice Kennedy cited a body of sociological and scientific research that found that juveniles have a lack of maturity and sense of responsibility compared to adults. Adolescents were found to be overrepresented statistically in virtually every category of reckless behavior.

In *Ropers*, the Court noted that in recognition of the comparative immaturity and irresponsibility of juveniles, almost every state prohibited those under age 18 from voting, serving on juries, or marrying without parental consent. The studies also found that juveniles are also more vulnerable to negative influences and outside pressures, including peer pressure. They have less control, or experience with control, over their own environment. More recently, in *Graham v. Florida*, 130 S.Ct. 2011 (2010) this Court used the same rationale in finding that some life sentences without parole for minors were unconstitutional. This unequivocal commonsense approach by the Court to constitutional matters and children should be likewise applied in addressing the deepening dangers to minors from violent video games.

In sum, "[A] state or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Erznoznik,* at 212.

Here, California's marginal control on the sale or rental of violent video games to minors is within the permissible advancement of a significant, if not compelling, public interest in protecting the development and mental health of minors.

California's concern for its minors in the modern violent video game world is not fanciful or without basis. Science supports the legislative public policy determination.

II. SCIENCE CONFIRMS THAT VIOLENT VIDEO GAMES ARE HARMFUL TO MINORS ALLOWING THE STATE CLEAR JUSTIFICATION IN REGULATING CHILDREN'S ACCESS TO THESE MATERIALS.

1. Overview of Scientific research confirms harmful effects to minors from violent video games.

Testimony before Congress[4] has elicited a large body of testimony by national experts, medical and mental health professional associations and others, the gist of which is that there is a significant relationship between exposure to media violence and aggressive behavior, and that repeated exposure leads to general increases in aggressiveness over time. The following testimony is typical:

> "Though there are many complexities in this realm of behavioral research, there is one clear and simple message that parents, educators, and public policy makers such as yourselves need to hear: Playing violent video games can cause increases in aggression and violence."[5]

In October 2009, the American Academy of Pediatrics (AAP) issued its Policy Statement on Media Violence.[6] The AAP, after considering the evidence from the extensive research on the effects of media violence, concluded that exposure to media violence, including playing violent video games, "represents a *significant risk to the health of children and adolescents.*" (emphasis added). Indeed, both before and since California's enactment of the statutes in this case, there have been hundreds of studies in the area of the effects of playing violent video games on children.

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[4] *March 21, 2000 United States Commerce Committee hearing on the "The Impact of Interactive Violence on Children".*

[5] *Testimony of Craig A. Anderson, Ph.D. Director, Center for the Study of Violence, Department of Psychology, Iowa State University; see also http://www.CraigAnderson.org*

[6] American Academy of Pediatrics, (2009) *Pediatrics*, published online on October 19, 2009; *http:www.pediatrics.org*

In fact, as part of this *amicus* brief, leading researchers, scholars and scientists from around the United States, Germany and Japan, who have studied the harmful effects of violent video game playing on minors, are submitting their Statement on Video Game Violence for this Court's consideration. *See* Appendix. Nearly 100 other leading researchers and scholars from around the globe have endorsed this Statement. *See* Endorsement list in Appendix. These researchers have clearly found harmful effects to minors in playing violent video games.

Repeatedly thinking about violent characters, choosing to be aggressive, enacting that aggressive choice, and being rewarded for it can be conceived as a series of learning trials influencing a variety of types of aggressive knowledge structures. *"Violent Video Games: Specific Effects of Violent Content on Aggressive Thoughts and Behavior,"* Advances in Experimental Social Psychology, Vol. 36 (2004).

The American Academy of Pediatrics also, with numerous others, concludes that exposure to violence in media, including violent video games, can contribute to aggressive behavior, desensitization to violence, nightmares and fear of being harmed. *"Media Violence,"* American Academy of Pediatrics, Volume 108, Number 5, (November 2001). The

American Academy of Pediatrics found that American children between 2 and 18 years of age spend an average of 6 hours and 32 minutes each day using media, including video games.

Predicated on years of studies and research, in August 2005, the American Psychological Association formally recognized the serious negative impact of violent video games on this nation's children and passed its Resolution "On Violence in Video Games and Interactive Media."

These prestigious associations of experts concluded not only that there are long term negative effects on children in playing these violent video games, but that the industry, the public, parents, caregivers and educational organizations had a responsibility to intercede in this epidemic.

The statute authored by Senator Yee which California enacted into law was a direct response to that alarm for state assistance given our children's unfettered access to violent video games.[7] The First

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[7] As noted in *Boys Adrift: the Five Factors Driving the Growing Epidemic of Unmotivated Boys and Underachieving Young Men,* (2005) (p.237), Sax, L., there is a significant negative correlation between academic performance and amount of time playing video games which has been documented in several studies: *In Elementary School Students*: C. Anderson, D. Gentile, and K. Buckley, "Study 3: Longitudinal study with elementary school students," in the authors' book Violent Game Effects on Children and Adolescents, (2007)(pp. 95-119); *In Eight-and Ninth Grade Students*: D. Gentile, P. Lynch, J. Ruh Linder, and D. Walsh, "The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance,: *Journal of Adolescence*, volume 27, pp.5-22, (2004); and, *In High School Students*: C. Anderson, D. Gentile, and K. Buckley, " Study 2: Correlational study with high school students," in the authors' book Violent Game Effects on Children and Adolescents, (2007)(pp. 78-94).

Amendment does not preclude the state action carefully crafted in this case.

2. A Minor's Exposure To Violent Video Games - More Time Spent Playing Games With Increasing Graphic Violence

A minor's exposure to the avalance of violent video games is staggering. Video games first emerged in the 1970s, but it was during the 1990s that violent games truly came of age. In 1992, *Wolfenstein 3D*, the first major "first-person shooter" game was released. In a first-person shooter, one "sees" the video game world through the eyes of the player, rather than seeing it as if looking on from afar.[8] The player is the one fighting, killing, and being killed. Video game historian Steven Kent noted that "part of *Wolfenstein 3D* popularity sprang from its shock value. In *Wolfenstein 3D*, enemies fell and bled on the floor."[9]

With ever changing advancements in technology, the dramatic increases in speed and graphic capability have resulted in more realistic violence. As an example, in the video game *Soldier of Fortune*, the player/shooter can wound an enemy causing exposed bone and sinew.

As the video games became more graphically violent, the average time children played these games continued to climb. In the book, *Violent Video Game*

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[8] Anderson, C., Gentile, G., Buckley, K., Violent Video Game Effects On Children and Adolescents: Theory, Research, and Public Policy (2007), p. 5.

[9] Kent, S.L., The Ultimate History of Video Games (2001), page 458.

Effects on Children and Adolescents, the authors note that in the early 1990s, boys averaged 4 hours a week and girls 2 hours a week playing video games. In a few years these averages jumped to 7.1 and 4.5, respectively. In a recent survey of over 600 eighth and ninth-grade students, children averaged 9 hours per week with boys averaging 13 hours per week and girls averaging 5 hours per week.[10]

In 1993, United States Senators Joseph Lieberman and Herbert Kohl noticed the increasing violence in video games and held hearings to examine the issue. Although there was much less research on the effects of violent video games, the senators put pressure on the video game industry to create a rating system. The goal of the rating system was to provide information to parents about the content of games so that they could make informed decisions about which games their children could play.[11] However, these industry "voluntary" labels rating video games are inherently flawed and have failed due to "invalid assumptions about what is safe versus harmful."[12]

In 2003, more than 239 million computer and video games were sold in the United States; that is almost two games for every household in the United States.[13]

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[10] Gentile, Lynch, Linder, Walsh, *The Effects of Violent Video Game Habits On Adolescent Hostility, Aggressive Behaviors, and School Performance* Journal of Adolescense, 27, 5-22 (2004).

[11] Anderson, C., Gentile, G., Buckley, K., Violent Video Game Effects On Children and Adolescents: Theory, Research, and Public Policy (2007), p. 152.

[12] Anderson, C., Gentile, G., Buckley, K., Violent Video Game Effects On Children and Adolescents: Theory, Research, and Public Policy (2007), p. 156-157.

[13] Entertainment Software Association,(2004), Essential Facts About the Computer and Video Game Industry.

More than 90% of all U.S. children and adolescents play video games. The National Youth Violence Prevention Resource Center (2004) has stated that a 2001 review of the 70 top-selling video games found 49% contained serious violence.[14] In 41% of the games, violence was necessary for the protagonists to achieve their goals. There is no doubt, violent video games are among the most popular entertainment products for teens and adolescents, especially for boys.[15]

New generation violent video games contain substantial amounts of increasingly realistic portrayals of violence. Elaborate content analyses revealed that the favored narrative is a "human perpetrator engaging in repeated acts of justified violence involving weapons that results in some bloodshed to the victim."[16]

3. Scientific Studies Confirm that Violent Video Games Have Harmful Effects Minors

In a nutshell, teens and adolescents play video games frequently, and a significant portion of the games contain increasingly realistic portrayals of violence. Viewing violence increases aggression and greater exposure to media violence is strongly linked to increases in aggression.[17]

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[14] National Youth Violence Prevention Resource Center, (2004), *Media Violence and Statistics*.

[15] Vorder, P., Bryant, J.K., & Weber, R. (2006) Playing Video Games As Entertainment. In P. Vordere & J. Bryant (Eds., Playing Video Games—Motives, responses, and Consequences (pp. 1-7), Mahwah, NJ: Lawrence Erlbaum Associates, Inc.

[16] Weber, R., Ritterfeld, U., Mathiak, K., (2006) Does Playing Violent Video Games Induce Aggression Empirical Evidence of a Functional Magnetic Resonance Imaging Study, *Media Psychology*, 8, 39-60.

Playing a lot of violent games is unlikely to turn a normal youth with zero, one or even two other risk factors into a killer. But regardless of how many other risk factors are present in a youth's life, playing a lot of violent games is likely to increase the frequency and the seriousness of his or her physical aggression, both in the short term and over time as the youth grows up. These long term effects are a consequence of powerful observational learning and desensitization processes that neuroscientists and psychologists now understand to occur automatically in the human child.[18] Simply stated, "adolescents who expose themselves to greater amounts of video game violence were more hostile, reported getting into arguments with teachers more frequently, were more likely to be involved in physical fights, and performed more poorly in school.[19]

In a recent book, researchers once again concluded that the "active participation" in all aspects of violence: decision-making and carrying out the violent act, result in a greater effect from violent video games than a violent movie. Unlike a passive observer in movie watching, in first-person shooter and third-person shooter games, you're the one who decides whether to pull the trigger or not and whether to kill or not.[20] After conducting three very different kinds of studies (experimental, a cross-sectional correlational study, and a longitudinal study) the results confirmed that violent games contribute to violent behavior.

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[17] Bushman, B., Anderson, C., (2001), Media Violence and the American Public: Scientific Facts Versus Media Misinformation, *American Psychologist*, June/July 2001.

[18] Huesmann, L., (2007), The Impact of Electronic Media Violence: Scientific Theory and Research, Journal of Adolescent Health, 41, S6-S13.

[19] Gentile, D., Lynch, P., Linder, J., Walsh, D., (2004) The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors and School Performances, *Journal of Adolescence* 27, 5-22.

The relationship between media violence and real-life aggression is nearly as strong as the impact of cigarette smoking and lung cancer: not everyone who smokes will get lung cancer, and not everyone who views media violence will become aggressive themselves. However, the connection is significant.[21]

In an upcoming publication concerning children and violent video games, three complementary theoretical perspectives are discussed when contemplating the effects of playing video games.[22] The *General Aggression Model* and its offshoot the *General Learning Model* describe the basic learning processes and effects involved in both short-term and long-term effects of playing various types of games. The *Five Dimensions of Video Game Effects* perspective describes different aspects of video games and video game play that influence the specific effects likely to occur. The *Risk and Resilience* perspective describes the effects of video game play—prosocial, antisocial, and other—take place within a complex set of social and biological factors, each of which contribute to development of the individual's thoughts, feelings, and behaviors.

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[20] Anderson, C., Gentile, D., & Buckley, K., (2007), Violent Video Game Effects on Children and Adolescents, Theory, Research, and Public Policy.

[21] Strasburger, V., Jordan, A., and Donnerstein, E., (2010), Health Effects of Media on Children and Adolescents, *Pediatrics*.

[22] Anderson, C. A., Gentile, D. A., & Dill, K. E. (in press). Prosocial, Antisocial, and Other Effects of Recreational Video Games. Chapter to appear in D. G. Singer, & J. L. Singer (Eds), *Handbook of Children and the Media, 2nd Edition,* Thousand Oaks, CA: Sage.

The main findings can be succinctly summarized: playing violent video games causes an increase in the likelihood of physically aggressive behavior, aggressive thinking, aggressive affect, physiological arousal, and desensitization/low empathy. It also decreases helpful or prosocial behavior. With the exception of physiological arousal (for which there are no cross-sectional or longitudinal studies), all of the outcome variables showed the same effects in experimental, cross-sectional, and longitudinal studies. The main effects occurred for both males and females, for participants from low-violence collectivistic type Eastern countries (*e.g.*, Japan), and from high-violence individualistic type Western countries (*e.g.*, USA, Europe).

Research also indicates that the aggression carried out by video game characters is usually portrayed as justified, retributional, necessary to complete the game, rewarded and followed by unrealistic consequences (Dietz, 1998; Dill et al., 2005; Haninger, Ryan, & Thompson, 2004; Lachlan, Smith, & Tamborini, 2005; Robinson et al., 2008; S. Smith, L., Lachlan, & Tamborini, 2003; S. L. Smith et al., 2004). The overall level and realism of violent depictions, use of guns and likelihood of being killed by a gun has risen substantially over time; additionally, female victims and police officer victims rose significantly across time (Miller, 2009).

Many researchers have begun studying the concept of video game "addiction" and most researchers studying the pathological use of computer or video games have defined it similarly to how pathological gambling is defined – based on damage to family, social, school, occupational, and psychological functioning. The pace of studies has increased greatly in the past decade. In 2007, the American Medical Association released a report on the "addictive potential" of video games (AMA, 2007). The report concluded with a recommendation that the "AMA strongly encourage the consideration and inclusion of 'Internet/video game addiction' as a formal diagnostic disorder in the upcoming revision of the *Diagnostic and Statistical Manual of Mental Disorders*-IV" (p. 7).

The most comprehensive study to date in the US used a national sample of over 1,100 youth aged 8 to 18, in which 8.5% of video game players were classified as pathological (Gentile, 2009) demonstrates that it is not a trivial number of people who are suffering damage to their lives because of their game play.

School Performance

Several studies have documented a negative relation between amount of time playing video games and school performance among children, adolescents, and college students (Anderson & Dill, 2000; Anderson *et al.*, 2007; Chan & Rabinowitz, 2006; Chiu, Lee, & Huang, 2004; Cordes & Miller, 2000; Gentile, 2009; Gentile, Lynch, Linder, & Walsh, 2004; Harris & Williams, 1985; Roberts, Foehr, Rideout, & Brodie, 1999; Sharif & Sargent, 2006). The displacement hypothesis, that games displace time on other activities, is the most typical explanation for this relation. It could be argued, however, that the relation might be due to the children themselves, rather than to game time. It is highly likely that children who perform more poorly at school are likely to spend more time playing games, where they may feel a sense of mastery that eludes them at school. Nevertheless, each hour a child spends playing entertainment games (in contrast to educational games, which have been demonstrated to have educational benefits) is an hour not spent on homework, reading, exploring, creating, or other things that might have more educational benefit. Some evidence has been found to support the displacement hypothesis. In one nationally representative US sample of 1,491 youth between 10 and 19, gamers spent 30% less time reading and 34% less time doing homework (Cummings & Vandewater, 2007). Therefore, even if poor school performance tends to cause increases in time playing video games, large amounts of video game play are likely to further hurt their school performance.

In short, the recent explosion in research on video game effects has greatly improved our understanding of how this medium affects its consumers. Several conclusions can be drawn without any reasonable doubt. First, there are many different effects of playing video games on the player. Some of these are short term, whereas others are long term. Second, the specific effects depend on a host of factors, including the content, structure, and context of the game. Third, the same game can have multiple effects on the same person, some of which may be generally beneficial whereas others may be detrimental. Fourth, playing violent video games is a causal risk factor for a host of detrimental effects in both the short and the long term, including increasing the likelihood of physically aggressive behavior.

Negative Effects On The Brain

Studies have shown evidence that exposure to violent video games reduces the player's use of some brain areas involved in higher order thought and impulse control.[23]

In addition to behavioral-psychological theories explaining the relationship between media violence exposure and aggressive behavior, recently attention has turned to neuro-psychological theories. These theories attempt to identify areas of brain functioning that may be affected by media violence exposure and that may underlie aggressive behavior.[24]

As recently as June 2010, another study of violent video game effects on frontal lobe activity was published wherein it was concluded that playing a violent video game for only 30 minutes immediately produced lower activity levels (compared to a nonviolent video game) in prefrontal regions thought to be involved in cognitive inhibition.[25] This study shows that playing a violent video game for 30 minutes causes a decrease in brain activity in a region of the frontal lobe that is known to be important in the ability to inhibit impulsive behavior. The study also suggested that that violent games may also impair emotional functioning when it noted that "an impaired role of DLPFC (dorsolateral prefrontal cortex) in inhibition, therefore, may yield impaired emotional functioning following violent video game play."

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[23] Some researchers contend that video games may affect the brain in children in much the same way that medications like Ritalin and Adderall and Concerta do. Sax, L. (2007), Boys Adrift: The Five Factors Driving the Growing Epidemic of Unmotivated Boys and Underachieving Young Men, p.91. In *Everything Bad is Good For You*, (2005), it was noted that research on video games suggest that these games stimulate "a part of the brain called the nucleus accumbens" in much the same way that crack cocaine affects the same area." (pp. 34 and 39).

[24] Kronenberger, W., Mathews, V., Dunn, D., Wang, Y., Wood, E., Giauque, A., Larsen, J., Remsch, M., Lowe, M., Li, T., (2005) Media Violence Exposure and Executive Functioning in Aggressive and Contol Adolescents, Journal of Clinical Psychology, Vol. 61(6), pp. 725-737.

[25] Hummer, T., Wang, Y., Kronenberger, W., Mosier, K., Kalin, A., Dunn, D., Mathews., V., (2010) Short-term Violent Video

Other studies of the neurological underpinnings of aggressive behavior, for example, indicate that a neural circuit that includes parts of the frontal cortex, amygdale and temporal lobes is important in emotional regulation and violence. Research strongly suggests an underactivity of brain inhibitory mechanisms in the frontal cortex and striatum, coupled with hyperarousal of the amygdala and temporal lobe regions, is responsible for chronic, explosive and/or severe aggressive behavior.

Research clearly indicates that areas in the frontal lobe and amygdale may be activated by viewing violent television and playing violent video games.

With the use of functional magnetic resonance imaging (fMRI), research has shown a direct alteration in brain functioning from exposure to media violence.[26] Researchers found that teenagers who

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Game Play by Adolescents Alters Prefrontal Activity During Cognitive Inhibition, *Media Psychology*, 13:136-154.

[26] Mathews, V., Kronenberger, W., Dunn, D., Wang, Y., Lurito, J., Lowe, M., (2005) Media Violence Exposure and Frontal Lobe Activation Measured by Functional Magnetic Resonance Imaging in Aggressive and Nonaggressive Adolescents, Journal of Computer Assistedomography, Volume 29, Number 3, May/June 2005.

played a violent videogame exhibited increased activity in a part of the brain that governs emotional arousal and the same teenagers showed decreased activity in the parts of the brain involved in focus, inhibition and concentration.

Youth who play a lot of violent video games (but who have not been diagnosed with a behavioral disorder) show a similar pattern of brain activity when doing complex executive control tasks as youth who have been diagnosed with some type of aggression-related behavior disorder. This pattern is very different from control-group youth who do not play a lot of violent games (and who have not been diagnosed with a behavioral disorder).

Youth who play a lot of violent video games show a deficit in a specific type of executive control known as proactive control. Proactive control is seen as necessary to inhibit impulsive reactions. This difference shows up in the brain wave patterns as well as in behavioral reactions.[27]

Additionally, video game violence exposure and aggressive behavior to brain processes have been linked reflecting a desensitization in the aversive motivational system.[28] Repeated exposure to media violence reduces its psychological impact and eventually produced aggressive approach-related motivational states theoretically leading to a stable increase in aggression.

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[27] Bailey, K., West, R., Anderson, C., (2009), A Negative Association Between Video Game Experience and Proactive Cognitive Control, *Psychophysiology*, Society for Psychophysiological Research, pp. 1-9.

[28] Bartholow, B., Bushman, B. Sestir, M., (2006), Chronic Violent Video Game Exposure and Desensitization to Violence: Behavioral and Event-Related Brain Potential Data, *Journal of Experimental Social Psychology*, 42, 532-539.

Finally, in a functional magnetic resonance imaging study on players of the first-shooter game *Tactical Ops: Assault on Terror*, the violent portions of a video game activated the regions in the brain known to be active in fight-or-flight situations. In other words, the brain reacted to the fictional violence of a video game in much the same way as it reacts to real violence.[29]

In short, neuroscience research supports a critical link between perpetration of virtual violence with reduced activation of a neural mechanism known to be important for self-control and for evaluation of affect. These findings strongly suggest that focusing on the activity of prefrontal cortical structures important for executive control could provide important mediational links in the relationship between exposure to violent media and increased aggression.

4. Recent Studies and Researchers Continue to Find Harmful Effects To Minors From Playing Violent Video Games

In March 2010, leading researchers in the area of media violence from the United State and Japan worked together to conduct a meta-analytic procedure testing the effects of violent games on aggressive behavior, aggressive cognition, aggressive affect, physiological arousal, empathy/desensitization, and prosocial behavior.[30] In conducting their meta-analysis on the effects of video game violence, these researchers retrieved over 130 research reports which entailed scientific tests on over 130,000 participants. This study has been described as "probably about as exhaustive a sampling of the pre-2009 research literature as one could obtain and far more than that used in any other review of violent video game effects."[31]

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[29] Weber, R., Ritterfeld, U., Mathiak, K., (2006), Does Playing Violent Video Games Induce Aggression? Emperical Evidence of a Functional Magnetic Resonance Imaging Study, Media Psychology, 8, 39-60.

This extensive meta-analysis of the effects of violent video games confirms what many theories predicted and what prior research about other violent mass media found: that violent video games stimulate aggression in the players in the short run and increase the risk for aggression behaviors by the players later in life. The effects occur for males and females and for children growing up in Eastern and Western cultures. Also, the effects were stronger for more violent than less violent outcomes.

From their overarching analysis, these researchers concluded that the scientific debate should move beyond the simple question whether violent video game play is a causal risk factor for behavior because: "scientific literature has effectively and clearly shown the answer to be 'yes.'"

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[30] Anderson, C., Ihori, N., Bushman, B., Rothstein, H., Shibuya, A., Swing ,E. Sakamoto, A., Saleem, M., (2010) , Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review, *Psychological Bulletin*, March.

[31] Huesmann, L., (2010) Nailing the Coffin Shut on Doubts That Violent Video Games Stimulate Aggression Comment on Anderson, et al. ,*Psychological Bulletin*, Vol. 136, No-2,179-181.

Regardless of research method, (experimental, correlational, or longitudinal) and regardless of cultures tested (East and West) the same effects are proven: exposure to violent video games is a causal risk factor for aggressive thoughts and behavior, and decreased empathy and prosocial behavior in youths. In fact, Dr. Anderson, one of three 2010 American Psychological Association Distinguished Scientist Lecturers, has stated that this recent meta-analysis on violent video games may be his last because of its "definitive findings." [32]

5. The Shortcomings of Purported "Research" Contesting the Scientific Studies Showing the Harmful Effects to Minors Playing Violent Video Games

The Video Software Dealers Association and the Entertainment Software Association will likely contest the science showing the harmful effects of violent video games on minors. Apart from the self-serving motive for such opposition, one need only consider a professional organization that clearly does not doubt the serious aggression-teaching abilities of violent video games—the United States Department of Defense. Both the U.S. Army and U.S. Marines have their own video games used to train soldiers as tactical "first-person shooters" leading teams in "close-quarters urban combat."[33] Many of these military combat training videos, such as *Full Spectrum*

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[32] Nauert, R., Senior News Editor, (March 2, 2010) Violent Video Games Can Make Kids Aggressive, *Psych Central*.

[33] Anderson, C., Gentile, G., Buckley, K., Violent Video Game Effects On Children and Adolescents: Theory, Research, and Public Policy (2007), p. 153-154.

Warrior and *First To Fight* have been adapted and placed on the commercial market for minors to play.

Also, alleged "scientific" studies may be suggested by Respondents to argue that there are no harmful effects from violent video game playing. These "findings" can be explained by small sample size, poor test conditions and chance. The simple response to these studies is the recent and clear findings of the meta-analysis comprising 130 studies of the effects of violent video games showing the like between violent video games and aggression.[34]

CONCLUSION

The scientific debate about whether exposure to media violence causes increases in aggressive behavior is over. All major types of research methodologies have been used, including experiments, cross-sectional correlational studies, longitudinal studies, intervention studies and meta-analyses. For each category exposure to media violence was significantly associated with increased aggressions or violence.[35] Likewise, the harmful effects on minors from playing violent video games are documented and not seriously contested.

Much research over several decades documents how witnessing violence and aggression leads to a range of negative outcomes for children. Negative outcomes result both from witnessing real violence

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[34] Anderson, C., (2010), Violent Video Games and Other Media Violence; *Pediatrics For Parents, March/April*, V. 26, Numbers 1 & 2

[35] Anderson, Gentile, Buckley, Violent Video Game Effects On Children and Adolescents: Theory, Research, and Public Policy (2007), page 04.

(*e.g.*, Osofsky, 1995) as well as from viewing media violence (Anderson *et al.*, 2003; Gentile, 2003). The most recent comprehensive review of the media violence literature documents the ". . . unequivocal evidence that media violence increases the likelihood of aggressive and violent behavior in both immediate and long-term contexts" (Anderson *et al.*, 2003, p. 81).

In the end, we need only to circle back from this rising ocean of research and return to simple commonsense. Society has a direct, rational and compelling reason in marginally restricting a minor's access to violent video games. Indeed, under the statute any parent remains completely free to provide any video game for their children.

Although this Court has never directly dealt with this precise issue, the Court's clear and understandable precedent in protecting children establishes that the lower court should be reversed and given the scientific findings by the community of mental health professions, the California statute upheld.

Respectfully submitted,

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APPENDIX

APPENDIX

Statement on Video Game Violence

"Both the American Psychological Association (APA, 2005) and the American Academy of Pediatrics (AAP, 2009) have issued formal statements stating that scientific research on violent video games clearly shows that such games are causally related to later aggressive behavior in children and adolescents. Extensive research has been conducted over many years using all three major types of research designs (experimental, cross-sectional, and longitudinal). Numerous original empirical research studies have been conducted on children and adolescents. Overall, the research data conclude that exposure to violent video games causes an increase in the likelihood of aggressive behavior. The effects are both immediate and long term. Violent video games have measurable and statistically significant effects on both males and females. Theoretically important effects of violent video games have been confirmed by many empirical studies. The effects have been replicated by researchers in different settings and in numerous countries. The psychological processes underlying such effects are well understood and include: imitation, observational learning, priming of cognitive, emotional and behavioral scripts, physiological arousal, and emotional desensitization. These are general processes that underlie all types of social behavior, not just aggression and violence; they have been confirmed by countless studies outside of the media violence domain. In addition to causing an increase in the likelihood of aggressive behavior, violent video games have also been found to increase aggressive thinking, aggressive feelings, physiological desensitization to violence, and to decrease pro-social behavior."

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